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THE LAW OF SPECIFIC RELIEF

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ANAND & IYER'S

THE LAW OF SPECIFIC RELIEF

(ACT No. 47 OF 1963)

In 2 Volumes

7th Edition

Revised by

R. B. SETHI

Author of S. Row's Contract & Law Relating to Tenders

Assisted by

BOARD OF EDITORS

Vol. I

1977

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FOREWORD

The Law of Specific Relief is one of the most important branches of Civil Law. An exhaustive and careful commentary on this branch of Law, as it prevails in British India, has been prepared by Mr. Ram Lal Anand, Advocate, High Court, Lahore, and Mr. N. K. Iyer, M. A., B. L., of Madras. The authors have taken great care to include in this book the case-law on this subject, in an up-to-date and well-digested form, under suitable headings. Not only the latest rulings of all the High Courts of India have been noted and discussed in this volume, but the rulings of the Privy Council as well as the decisions of British Courts, having a bearing on various aspects of the Indian Specific Relief Act, which is based on British Law, have been duly noted and commented upon.

Mr. Ram Lal Anand is a busy legal practitioner in the High Court at Lahore and it is very much to his credit that he has found time in the midst of his otherwise heavy work, to conduct this research into the grounds of the Law of Specific Relief and to present to the student of this Law, as well as to the lawyer wishing to consult its provisions, an elaborate and reasoned commentary on the subject. Mr. Iyer has had suitable experience as an author of law books and as an Editor of an All-India Law Journal. I think this book, produced by the collaboration of two such capable writers, will be found very helpful by the Bench and the Bar, and will have the reception it so well deserves.

It is noteworthy that the footnotes in this book give comparative references of the rulings cited in it, where a ruling is to be found in more than one publication. The provision of this facility is very necessary in these days, when so many Law Reports, authorized and unauthorized are in the field. The value of the work as a book of reference has been enhanced by the well-arranged Index and a number of Appendices attached to it.

A. QAUDIR

PREFACE TO THE SERVENTH EDITION

Specific performance of an agreement to sell immoveable property is not invariably ordered as a matter of right. The relief is discretionary but the discretion being a judicial and it has to be exercised neither arbitrarily nor unreasonably but according to law. The Specific Relief Act has provided certain guidelines as to when specific performance could be ordered and when not. The primary concern of every court and legal practitioner is to have clear, concise, authoritative treatment of the subject readily at hand. The present edition of Iyer and Anand's Specific Relief Act is presented to fulfil that aim. The work has already run into six editions—striking proof of its popularity and utility to its readers. This edition now laid before the public is the seventh. It has been carefully revised and the entire case-law relating to the subject has been brought up to date. New matter has been added, obsolete matter removed and certain parts of the book have been rewritten. All cases of adequate importance will now be found incorporated under the various sections.

It is hoped that the seventh edition will sustain the reputation of its predecessors and continue to deserve the patronage of the Bench and the Bar.

Dated the 26*th May*, 1977.

AUTHOR

PREFACE TO THE SIXTH EDITION

The New Specific Relief Act enacted in 1963 as a new and independent Act based on recommendations of the Law Commission reflects an evolutionary process, determined by Judicial Precedents, principles of Indian, English and American Law and our current requirement; it is like our Constitution, the rich embodiment, the saturated essence of legal wisdom and legal experience. Specific Relief as a form of judicial redress belongs to the Law of Procedure and in a body of written law arranged according to the natural affinities of the subject-matter is intended to enable a suitor to obtain the very thing to which he is entitled. The Act takes in its stride specific performance, declaratory decrees (in status or right), injunctions, rescissions and rectifications.

The present edition follows the familiar pattern of the previous ones. In revising this great work the broad features of the earlier editions of the learned authors have not been altered so that its identity is not lost. The text of the Act and the case-law have been brought up to date. Several passages have been re-written or enlarged to make the work abreast of the law and obsolete ones have been removed. The exposition of the law endeavours to be clear and accurate. No pains have been spared to tackle every question likely to arise under the Act.

It is, therefore, hoped that the work will continue to commend itself to the Bench and the Bar and maintain its reputation as an outstanding work in its field.

The equitable principles enshrined in the Act and the equitable remedies provided by it for specific as well as preventive relief make the provisions of the Act very important and useful in practice.

New editions have been regularly called for and this fact testifies to its continued and growing popularity as a clear exposition of the law.

It is largely in use by the members of the legal profession and the statements of law contained therein have been quoted with approval in the judgments of the Superior Courts of the country.

The Law of Specific Relief by Aiyer and Anand ranks among the best Indian legal works and has been recognized as a standard treatise on the subject. This treatise now runs into its 6th Edition.

AUTHOR

PREFACE TO THE FIFTH EDITION

The Specific Relief Act, 1963, is one of the most important pieces of Legislation enacted recently. The Law on the subject before this Act was contained in the enactment of 1877 which was originally drafted upon the lines of the Draft New York Civil Code, 1862, and its main provisions embodied the doctrines evol ed by English Equity Courts, which had previous to the Act been applied in India as principles of equity, justice and good conscience. The Act on the whole worked well but there was a room for improvement both in expression and substance. As a result it was referred to the Law Commission whose recommendations are contained in the Ninth Report. The recommendations of the Law Commission on which the new Act is based are themselves based on experience gained from the working of the old Act as revealed from cases thereunder and foreign law and precedents. It is in implementation of this report that the present Law is enacted. It consists of 44 sections and the scheme and the arrangement of the Act as adopted on the basis of the report of the Law Commission is the same as adopted in the repealed Specific Relief Act with suitable re-grouping and modifications.

The subject deals with equitable remedies which have been classified into seven heads:

(1) Recovery of possession.
(2) Specific performance of contracts.
(3) Rectification of instrument.
(4) Rescission of contract.
(5) Cancellation of instruments.
(6) Declaratory decrees.
(7) Injunctions.

The Act is not exhaustive. It enumerates specific remedies which should be granted by the courts in prescribed cases.

Specific Relief is Law of Procedure and contains a body of adjective law arranged according to the natural affinities of the subject-matter which finds place in other aspects in the provision of the Code of Civil Procedure, Contract Act, Transfer of Property Act and others. While re-grouping several sections of the repealed Act in a more scientific manner, giving due regard to the affinity of the subject, compensatory reliefs found inconsistent with the main relief have been given the "go by" and other provisions not found useful have been dropped. As has been said by the Law Commision in the report, they had tried to improve both the language and the substance of the Act but the basic difficulty of formulating of equitable principles in codified law remained. However, it appears that an attempt has been made to remove in the present Act as far as possible defects which were felt in the working of the repealed Act; the illustrations often misled rather than facilitated the proper understanding of the Law and therefore have been given up in the present enactment.

The object of this public tion is to explain the changes introduced in the Law of Specific Relief by the resent Act. This it does by discussing the

PREFACE TO THE FOURTH EDITION

The popular treatise on Specific Relief Act of Iyer and Anand was last published as Third Edition in 1949.

It ran out in 1954 and hence this Fourth Edition.

In this Fourth Edition the treatment of the subject in the previous edition has not been disturbed. Such portions as required re-writing have been written afresh; the case-law up to date has been incorporated with consequent revision wherever necessary.

The important and distinctive features of the Fourth Edition are as follows:

(1) More than 900 cases old and new have been incorporated.

(2) The decisions from 1950 in all the 18 High Courts, in the Supreme Court, and some English and American cases have been added from a close study of the original reports, noticing and explaining the distinctions made therein.

(3) Opinions of the Editor have been given in all cases in which conflicts in decisions are noticed, with a view to provoke thought in the minds of the Reader.

(4) Important and difficult aspects which have required fuller and better treatment have been now added in a brief but exhaustive and analytical manner.

(5) Among those aspects so discussed may be stated the following to facilitate reference:

(*i*) A note on possessory title has been added (pp. 62 to 64).

(*ii*) Doctrine of mutuality in relation to contracts for sale of minor's immoveable property by his guardian and in particular the modern theory (pp. 96 to 111 and 441 to 448).

(*iii*) Delay and laches how far fatal in a suit for specific performance and in particular the modern view (pp. 252 to 259).

(*iv*) Time when essence of contract and how it can be made so when originally it was not so (pp. 257 to 259).

(*v*) Exceptions to the rule that a stranger cannot sue for specific performance with an analysis on the subject (pp. 283 to 286).

(*vi*) When and how far is a subsequent purchaser of land protected, with a clear analysis on the point (pp. 350 to 353).

(*vii*) Points of similarity and difference in the reliefs obtainable under Sec. 27-A, Specific Relief Act and Sec. 53-A, Transfer of Property Act (pp. 357 to 359).

(*viii*) When and how far cancellation is granted and in what manner, with practical hints and analysis (pp. 429 and 430).

(*ix*) Refund when allowed and when not and how far allowed when transactions are challenged by a minor and the equities available to the transferee, with practical hints (pp. 441 to 448).

(*x*) Declaration when property is in *custodia legis* (pp. 520 to 532).

(*xi*) In a declaration suit when further relief should be asked for and when unnecessary analysis (pp. 547 and 548).

(*xii*) Powers of the High Courts to issue writs under Sec. 45, Specific Relief Act and under Art. 226 of the Constitution—discussed (pp. 586 and 587).

(*xiii*) Party walls and injunctions relating thereto (pp. 694 and 695).

(*xiv*) Injunction when, how far and under what circumstances can be issued in express and implied negative contracts with a clear analysis (pp. 785 and 786, 791 and 792).

(*xv*) Immediately after each section Synopsis is thoughtfully appended, by the Publishers, in order to enable easy reference of the Commentaries. This will be found particularly useful under Sec. 42 and Sec. 54 which comprise large number of items.

The case-law is brought to October, 1955.

It is hoped that the Book will be found useful to the Bench and the Bar alike.

Dated the 19*th October*, 1955. MANTHA RAMA MURTI

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COMPARATIVE CHART

Comparative chart of the new sections to old and vice versa

New sections	Old sections	New sections	Old sections
1 (1)	1	12 (1)	17
1 (2)	1	12 (2)	14
1 (3)	1	12 (3)	15
2 (Para. I)	3(Para. I)	12 (4)	16
2 (a)	3 Para. I, item I	12 Explanation	13
2 (b)	3 Para. I, item IV	13 (1)	18 (Para. I)
2 (c)	3 Para. I, item II	13 (1) (a)	18 (a)
2 (d)	3 Para. I, item III	13 (1) (b)	18 (b)
2 (e)	3 (Last para.)	13 (1) (c)	18 (c)
3 (a)	4 (b)	13 (1) (d)	18 (d)
3 (b)	4 (c)	13 (2)	New
4	7	24 (1)	21 (Para. I)
5	8	14 (1) (a)	21 (a)
6 (1)	9 (Para. I)	14 (1) (b)	21 (b)
6 (2) (a)	New	14 (1) (c)	2 (d)
6 (2) (b)	9 (Para. III)	14 (1) (d)	21 (g)
6 (3)	9 (Para. IV)	14 (2)	12 (Last Para.)
6 (4)	9 (Para. II)	14 (3)	New
7	10 Explanation and illustration	14 (3) (Provisos)	New
		15 (Para. I)	23 (Para. I)
8	11	15 (a)	23 (a)
8 (a)	11 (a)	15 (b) and (Proviso)	
8 (b)	11 (b)		23 (b)
8 (c)	11 (c)	15 (c)	23 (c)
8 (d)	11 (d)	15 d)	23 (d)
Explanation	New	15 (e)	23 (e)
9	New	15 (f)	23 (f)
Explanation	New	15 (g)	23 (g)
10 (Para. I)	12 (Para. I)	15 (h)	23 (h)
10 (a)	12 (b)	15 (Proviso)	New
10 (b)	12 (c)	16	24
10 Explanation	12 Explanation	16 (a)	24 (a)
11 (1)	12 (a)	16 (b)	24 (b)
11 (2)	21 (e)	16 (c)	New

New sections	Old sections	New sections	Old sections
16 Explanation	New	23 (1) (Second Portion)	New
17 (1)	25 (First Para.)	23 (2)	New
17 (1) (a)	25 (a)	24	29
17 (1) (b)	25 (b)	25	30
17 (2)	New	26 (1) (a)	31 (First Portion)
18 (Para. I)	26 (Para. I)	26 (1) (b)	New
18 (a)	26 (a)	26 (1) (c)	New
	26 (b)	26 (2) (Para. II)	31 (Second Portion)
	26 (c)		
18 (b)	26 (d)	26 (3)	34
18 (c)	26 (e)	26 (4)	New
19 (Para. I)	27 (Para. I)	26 (Proviso)	New
19 (a)	27 (a)	27 (1)	35 (Para. I)
19 (b)	27 (b)	27 (1) (a)	35 (a)
19 (c)	27 (c)	27 (1) (b)	35 (b)
19 (d)	27 (d)	27 (2)	New
19 (e)	27 (e)	27 Explanation	New
19 (Proviso)	New	28 (1)	35 (c) and Last Para
20 (1)	22 (First Para.)		
20 (2)	22 (Second Para.)	28 (2)	35 (c) Item I
20 (2) (a)	22 Para II, Item I	28 (3)	New
20 (2) (b)	22 Para II, Item II	28 (4)	New
22 (2) (c)	New	28 (5)	New
20 (2) (Explanations I, II)	New	29	37
		30	38
		31 (1)	39 (Para. I)
20 (3)	22 Para III, Item III	31 (2)	39 (Para. II)
		32	40
20 (4)	New		41
21 (1)	19 (First Para.)	33 (2)	New
21 (2)	19 (Para. II)	34	42
21 (3)	19 (Para. III)	35	43
21 (4)	19 (Para. IV)	36	52
21 (5) and Proviso	New		
21 Explanation.	19 Explanation.		
22	New		
23 (1) (First Portion)	20		

COMPARATIVE CHART

New sections	Old sections	New sections	Old sections
37 (1)	53 (Para. I)	41 (b)	56 (b)
37 (2)	53 (Para. II)	41 (c)	56 (c)
38 (1)	54 (Para. I)	41 (d)	56 (e)
38 (2)	54 (Para. II)	41 (e)	56 (f)
38 (3)	54 (Para. III)	41 (f)	56 (g)
38 (3) (a)	54 III Para (a)	41 (g)	56 (h)
38 (3) (b)	54 III Para (b)	41 (h)	56 (i)
38 (3) (c)	54 III Para (c)	41 (i)	56 (j)
38 (3) (d)	54 III Para (d)	48 (j)	56 (k)
39	55	42	57
40	New	43	New
41 (a)	56 (a)	44	New

Comparative chart of the old sections to new and vice versa

Old sections	New sections	Old sections	New sections
1 Part I	1 (1)	18 (d)	13 (1) (d)
1 Part II	1 (2)	19 (Para. I)	21 (1)
1 Part III	1 (3)	19 (Para. II)	21 (2)
2 Repealed	Omitted	19 (Para. III)	21 (3)
3	2	19 (Para. IV)	21 (4)
4 (a)	New	19 Explanation	21 Explanation
4 (b)	3 (a)	20	23 (1)
4 (c)	3 (b)	21 (Para. I)	14 (1)
5	Omitted	21 (a)	14 (1) (a)
6	Omitted	21 (b)	14 (1) (b)
7	4	21 (c)	Omitted
8	5	21 (d)	14 (1) (c)
9 Part I	6 (1)	21 (e)	11 (2)
9 Part II	6 (4)	21 (f)	Omitted
9 Part III	6 (2) (b)	21 (g)	14 (1) (d)
9 Part IV	6 (3)	21 (h)	Omitted
10	7	21 (Last Para.)	14 (2)
11	8	22 (Para. I)	20 (1)
12 (Para. I)	10 (Para. II)	22 (Para. II)	20 (2)
12 (a)	11 (1)	22 Para. II (Item I)	20 (2) (a)
12 (b)	10 (a)	22 Para. II (Item II)	20 (2) (b)
12 (c)	10 (b)	22 Para. III and (Item III)	20 (3)
12 (d)	Omitted	23 (Para. I)	15 (Para. I)
12 Explanation	10 Explanation	23 (a)	15 (a)
13	12 Explanation	23 (b)	15 (b) and (Proviso)
14	12 (2)	23 (c)	15 (c)
15	12 (3)	23 (d)	15 (d)
16	12 (4)	23 (e)	15 (e)
17	12 (1)	23 (f)	15 (f)
18 (Para. I)	13 (1)	23 (g)	15 (g)
18 (a)	13 (1) (a)	23 (h)	15 (h)
18 (b)	13 (1) (b)		
18 (c)	13 (1) (c)		

COMPARATIVE CHART

Old sections	New sections	Old sections	New sections
24	16	39 (Para. I)	31 (1)
24 (a)	16 (a)	39 (Para. II)	31 (2)
24 (b)	16 (b)	40	32
24 (c)	Omitted	41	33 (1)
24 (d)	Omitted	42	34
25 (Para. I)	17 (1)	43	35
25 (a)	17 (a)	44	Omitted
25 (b)	17 (b)	45	Omitted
25 (c)	Omitted	46	Omitted
26	18	47	Omitted
26 (a)	18 (a)	48	Omitted
26 (b)	18 (a)	49	Omitted
26 (c)	18 (a)	50	Omitted
26 (d)	18 (b)	51	Omitted
26 (c)	18 (c)	52	36
27	19	53 (Para. I)	37 (1)
27 (a)	19 (a)	53 (Para. II)	37 (2)
27 (b)	19 (b)	54 (Para. I)	38 (1)
27 (c)	19 (c)	54 (para. II)	38 (2)
27 (d)	19 (d)	54 (Para. III)	38 (3)
27 (e)	19 (e)	54 III Para. (a)	38 (3) (a)
27-A	Omitted	54 III Para. (b)	38 (3) (b)
28	Omitted	54 III Para. (c)	38 (3) (c)
29	24	54 III Para. (d)	Omitted
30	25	54 III Para. (e)	38 (3) (d)
31	26 (1) (a), Part I	54 Explanation	Omitted
	26 (2)	55	39
32	Omitted	56 (a)	41 (a)
33	Omitted	56 (b)	41 (b)
34	26 (3)	56 (c)	41 (c)
35 (Para. I)	27 (1)	56 (d)	Omitted
35 (a)	27 (1) (a)	56 (e)	41 (d)
35 (b)	27 (1) (b)	56 (f)	41 (e)
35 (c) (Para. I & II)	28 (1)	56 (g)	41 (f)
		56 (h)	41 (g)
36	Omitted	56 (i)	41 (h)
37	29	56 (j)	41 (i)
38	30	56 (k)	41 (j)
		57	42

THE SPECIFIC RELIEF ACT, 1963

(No. 47 of 1963)

[13*th December*, 1963.]

An Act to define and amend the law relating to certain kinds of specific relief

Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows :

PART I

Preliminary

1. Short title, extent and commencement.—(1) The Act may be called the Specific Relief Act, 1963.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Comment

Enforcement of Act.—Section 44 of the new Act of 1963 repeals the Specific Relief Act, 1877. This Act came into force on 1st March, 1964.'

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "obligation" includes every duty enforceable by law;

(*b*) "settlement" means an instrument (other than a will or codicil as defined by the Indian Succession Act, 1925 (39 of 1925) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of;

(*c*) "trust" has the same meaning as in Sec. 3 of the Indian Trusts Act, 1882 (2 of 1882), and includes an obligation in the nature of a trust within the meaning of Chapter IX of the Act;

(*d*) "trustee" includes every person holding property in trust;

(*e*) all other words and expressions used herein but not defined, and defined in the Indian Contract Act, 1872 (9 of 1872), have the meaning respectively assigned to them in that Act.

3. Savings.—Except as otherwise provided herein, nothing in this Act shall be deemed—

(*a*) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

(*b*) to affect the operation of the Indian Registration Act, 1908 (16 of 1908), on documents.

4. Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws.— Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law.

---

1. Vide *Gazette of India*, Pt. II, Sec. 3 (*ii*), No. 3, dated the 18th January, 1964

PART II

Specific Relief

CHAPTER I

RECOVERING POSSESSION OF PROPERTY

5. Recovery of specific immoveable property.—A person entitled to the possession of specific immoveable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

6. Suit by person dispossessed of immoveable property.—(1) If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought—

(*a*) after the expiry of six months from the date of dispossession; or

(*b*) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

Comment

This section corresponds to the old Sec. 9 of the repealed Act of 1877. The new provisions contained in Sec. 6 are substantially the same as given in old Sec. 9 except that the sub-section (2) of Sec. 6 now specifically provides that after the expiry of six months from the date of dispossession a suit for recovery of possession under Sec. 6 will be barred by limitation.

7. Recovery of specific moveable property.—A person entitled to the possession of specific moveable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

Explanation 1.—A trustee may sue under this section for the possession of moveable property to the beneficial interest in which the person for whom he as trustee is entitled.

Explanation 2.—A special or temporary right to the present possession of moveable property is sufficient to support a suit under this section.

8. Liability of person in possession, not as owner to deliver to persons entitled to immediate possession.—Any person having the possession or control of a particular article of moveable property, of which he is not the owner may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:

(*a*) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;

(*b*) when compensation in money would not afford the plaintiff to adequate relief for the loss of the thing claimed;

(*c*) when it would be extremely difficult to ascertain the actual damages caused by its loss;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Explanation—Unless and until the contrary is proved, the Court shall, in respect of any article of moveable property claimed under Cl. (*b*) or Cl. (*c*) of this section, presume—

(*a*) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;

(*b*) that it would be extremely difficult to ascertain the actual damage caused by its loss.

CHAPTER II

SPECIFICALLY PERFORMANCE OF CONTRACTS

9. Defences respecting suits for relief based on contract.—Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

CONTRACTS WHICH CAN BE SPECIFICALLY ENFORCED

10. Cases in which specific performance of contract enforceable.—Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

(*a*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(*b*) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.—Unless and until the contrary is proved, the Court shall presume—

(*i*) that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money; and

(*ii*) that the breach of a contract to transfer moveable property can be so relieved except in the following cases :

(*a*) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(*b*) where the property is held by the defendant as the agent or trustee of the plaintiff.

Comment

A suit for the recovery of a specified sum under a contract cannot be said to be a suit for the specific performance where pecuniary compensation would not afford adequate relief. [Dhapat *v.* Dalla, A.I.R. 1970 All. 206 at p. 208].

11. Cases in which specific performance of contracts connected with trusts enforceable.—(1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

12. Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part must be left unperformed either—

(*a*) forms a considerable part of the whole, though admitting of compensation in money; or

(*b*) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(*i*) in a case falling under C1. (*a*) pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under C1. (*b*), [1] [pays or has paid] the consideration for the whole of the contract without any abatement; and

(*ii*) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.

13. Rights of purchaser or lessee against person with no title or imperfect title.—(1) Where a person contracts to sell or let certain immoveable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely:

(*a*) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(*b*) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to

1. Ins. by Repealing and Amending Act, 1964 (52 of 1964), Second Schedule

validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;

(*c*) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;

(*d*) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs, on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of moveable property.

CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED

14. Contracts not specifically enforceable.—(1) The following contracts cannot be specifically enforced, namely :

(*a*) a contract for the non-performance of which compensation in money is an adequate relief;

(*b*) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(*c*) a contract which is in its nature determinable;

(*d*) a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in Cl. (*a*) or Cl. (*c*) or Cl. (*d*) of sub-section (1), the Court may enforce specific performance in the following cases :

(*a*) where the suit is for the enforcement of a contract,—

(*i*) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once :

Provided that where only a part of the loan has been advance the lender is willing to advance the remaining part of the loan in terms of the contract; or

(*ii*) to take up and pay for any debentures of a company;

(*b*) where the suit is for,—

(*i*) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(*ii*) the purchase of a share of a partner in a firm;

(*c*) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land :

Provided that the following conditions are fulfilled, namely :

(*i*) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work;

(*ii*) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and

(*iii*) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

PERSONS FOR OR AGAINST WHOM CONTRACTS MAY BE SPECIFICALLY ENFORCED

15. Who may obtain specific performance.—Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(*a*) any party thereto;

(*b*) the representative-in-interest or the principal of any party thereto:

Provided that where the learning skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative-in-interest or his principal, has been accepted by the other party;

(*c*) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder;

(*d*) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

(*e*) a reversioner in possession, where the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant;

(*f*) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(*g*) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(*h*) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract:

Comment

A person not being a party to the deed is not bound by the covenants in the deed, nor could it enforce the covenants. [M. C. Chacko *v.* State Bank of Travanocre, A. I. R. 1970 S. C. 504 at p. 507.]

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(*a*) who would not be entitled to recover compensation for its breach; or

(*b*) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or act in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(*c*) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of Cl. (*c*),—

(*i*) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(*ii*) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

17. Contract to sell or let property by one who has no title, not specifically enforceable.—(1) A contract to sell or let any immoveable property cannot be specifically enforced in favour of a vendor or lessor—

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the property;

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of moveable property.

18. Non-enforcement except with variation.—Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely :

(*a*) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;

(*b*) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce;

(*c*) where the parties have, subsequently to the execution of the contract, varied its terms.

19. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, specific performance of contract may be enforced against—

(*a*) either party thereto;

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(*d*) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(*e*) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company :

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

DISCRETION AND POWERS OF COURT

20. Discretion as to decreeing specific performance.—(1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance :

(*a*) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(*b*) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(*c*) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Cl. (*a*) or hardship within the meaning of Cl. (*b*).

Explanation 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of Cl. (*b*) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Comment

This section provides that where the performance of the contract would involve more hardship on the defendant which he did not foresee, whereas its non performance would involve no such hardship on the plaintiff, the Court is not bound to grant the relief of specific performance, because it is lawful to do so and the Court had the discretion to refuse to enforce that contract between the parties [Fertilizer Corporation of India *v.* M. S. Domestic Engineering Installation, A. I. R. 1970 All. 31 at p. 42.]

21. Power to award compensation in certain cases.—(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If in any such suit, the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Sec. 73 of the Indian Contract Act, 1872.

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint :

Provided that where the plaintiff has not claimed any such compensation in the plaint, the Court shall at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.—The circumstances that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

22. Power to grant relief for possession, partition, refund of earnest money, etc.—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immoveable property may, in an appropriate case, ask for—

(*a*) possession, or partition and separate possession, of the property, in addition to such performance; or

(*b*) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [1][made by] him, in case his claim for specific performance is refused.

1. Subs. by Repealing and Amending Act, 1964 (52 of 1964), 2nd Sch.

(2) No relief under Cl. (*a*) or Cl. (*b*) of sub-section (1) shall be granted by the Court unless it has been specifically claimed :

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms may as be just for including a claim for such relief.

(3) The power of the Court to grant relief under Cl. (*b*) of sub-section (1) shall be without prejudice to its powers to award compensation under Sec. 21.

23. Liquidation of damages not a bar to specific performance.—(1) A contract, otherwise proper to be specifically enforced, may be so enforced though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the Court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the Court shall not also decree payment of the sum so named in the contract.

24. Bar of suit for compensation for breach after dismissal of suit for specific performance.—The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

ENFORCEMENT OF AWARDS AND DIRECTION TO EXECUTE SETTLEMENTS

25. Application of preceding sections to certain awards and testamentary directions to execute settlements.—The provisions of this Chapter as to contracts shall apply to awards to which the Arbitration Act, 1940, does not apply and to directions in a will or codicil to execute a particular settlement.

CHAPTER III

RECTIFICATION OF INSTRUMENTS

26. When instrument may be rectified.—(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956, applies) does not express their real intention, then—

(*a*) either party or his representative-in-interest may institute a suit to have the instrument rectified; or

(*b*) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(*c*) a defendant in any such suit as is referred to in Cl. (*b*), may in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the Court thinks fit may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed :

Provided that where a party has not claimed any such relief in his pleading the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

CHAPTER IV

RESCISSION OF CONTRACTS

27. When rescission may be adjusted or refused.—(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :

(*a*) where the contract is voidable or terminable by the plaintiff;

(*b*) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

(2) Notwithstanding anything contained in sub-section (1), the Court may refuse to rescind the contract—

(*a*) where the plaintiff has expressly or impliedly ratified the contract; or

(*b*) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or

(*c*) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or

(*d*) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

Explanation.—In this section "contract" in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.

28. Rescission in certain circumstances of contracts for the sale or lease of immoveable property, the specific performance of which has been decreed.—(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immoveable property has

been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase-money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the Court—

(*a*) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(*b*) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connexion with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee such further relief as the may be entitled to, including in appropriate cases all or any of the following reliefs, namely:

(*a*) the execution of a proper conveyance or lease by the vendor or lessor;

(*b*) the delivery of possession or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the Court.

Comment

A decree for specific performance is in the nature of a decree. [Vaiyapuri Reddy *v.* Sivalinga Reddiar, (1970) 1 M. L. J. 92 at p. 93.]

29. Alternative prayer for rescission in suit for specific performance.—A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, if may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

30. Court may require parties rescinding to do equity.— On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

CHAPTER V

CANCELLATION OF INSTRUMENTS

31. When cancellation may be ordered.— (1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

32. What instruments may be partially cancelled.— Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.—(1) On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resists any suit on the ground—

(*a*) that the instrument sought to be enforced against him in the suit is voidable, the Court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;

(*b*) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under Sec. 11 of the Indian Contract Act, 1872, the Court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefitted thereby.

CHAPTER VI

DECLARATORY DECREES

34. Discretion of Court as to declaration of status or right.— Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying ,of interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief :

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

Comment

This section substantially reproduces Sec. 42 of the Repealed Specific Relief Act, 1877.

35. Effect of declaration.—A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

PART III

Preventive Relief

CHAPTER VII

INJUNCTIONS GENERALLY

36. Preventive relief how granted.— Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

37. Temporary and perpetual injunctions.— (1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

CHAPTER VIII

PERPETUAL INJUNCTIONS

38. Perpetual injunction when granted.— (1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely :

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(*c*) where the invasion is such that compensation in money would not afford adequate relief;

(*d*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

39. Manda tory injunctions.—When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

40. Damages in lieu of, or in addition to, injunction.—(1) The plaintiff in a suit for perpetual injunction under Sec. 38, or mandatory injunction under Sec. 39, may claim damages either in addition to, or in substitution for, such injunction and the Court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint :

Provided that where no such damages have been claimed in the plaint, the Court shall, at any stage of the proceeding, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

41. Injunction when refused.—An injunction cannot be granted—

(*a*) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(*b*) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(*c*) to restrain any person from applying to any legislative body;

(*d*) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

(*e*) to prevent the breach of a contract the performance of which would not be specifically enforced;

(*f*) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(*g*) to prevent a continuing breach in which the plaintiff has acquiesced;

(*h*) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(*i*) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court;

(*j*) when the plaintiff has no personal interest in the matter.

42. Injunction to perform negative agreement.—Notwithstanding anything contained in Cl. (*e*) of Sec. 41, where a contract comprises an affirmative agreement to do certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement :

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him.

43. Amendment of Act 10 of 1940.—In Sec. 32 of the Arbitration Act, 1940, after the words "nor shall any arbitration, agreement or award be", the word "enforced" shall be inserted.

44. Repeal.—The Specific Relief Act, 1877, is hereby repealed.

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INTRODUCTION

One of the most common of all pleas in civil litigation is that a suit is barred by the provisions of the Specific Relief Act. There are few suits indeed in which this plea is not raised.

The old Specific Relief Act was passed in 1877, and has since been amended by Acts 4 of 1882, 12 of 1891, 9 of 1899, 21 of 1929, 10 of 1940 and 3 of 1951. It has also been adapted by the Adaptation Orders, A.O. 1937, A.O. 1948 and A.O. 1950. In 1951, it was extended to Part B States and now it extends to the whole of India except the State of Jammu and Kashmir and the scheduled districts under the Scheduled Districts Act, 1874.

The Act was originally drafted upon the lines of the draft New York Civil Code, 1862 and its main provisions embody the doctrines evolved by the English Equity Courts, which had previous to the Act been applied in India as principles of equity, justice and good conscience. The Act, on the whole, has worked well, but as observed by Banerji in his Law *of Specific Relief*, 2nd Ed., on page 34 :

> "There is room for improvement both in the expression and the substance."

It is a unique enactment. Its significance is unquestioned but its place is undetermined. Pollock and Mulla in their well-known Commentary on the *Specific Relief Act* observe :

> "Specific Relief, as a form of judicial redress, belongs to the Law of Procedure, and in a body of written law arranged according to the natural affinities of the subject-matter, would find its place as a distinct part of other division of the Civil Procedure Code.
>
> "If the work were to be done afresh with regard to historical accidents, there would be no reason for having a separate Specific Relief Act at all; its contents would be divided between the Civil Procedure Code and the Transfer of Property Act. Such a drastic reform may well, as things are, not be worth the pains, but some decision in detail appears desirable."

This aspect of the Act engaged the consideration of the Law Commission on whose recommendations the Bill of the new Act (Act 47 of 1963) has been drafted/was drafted.

The new Specific Relief Act, 1963, repeals an Act almost a century old and obviously unsuited to many of our present requirements. Dealing with this aspect, the Law Commission observed as follows :

> "We have given careful consideration to the suggestion, and are unable to accept it. The main consideration which has brought us to this conclusion is that the Specific Relief Act deals with certain equitable principles and remedies which stand apart both historically as well as intrinsically, from the common law rules which are embodied in our Code of Civil Procedure. The subject bealt with by the Act such as specific performance, declaratory decrees, injuctions, rescission and rectifications, usually find a separate treatment in legal

literature. Moreover, the legal profession and the courts have become used to the present arrangements and a change with the sole object of formal perfection would not be justified."

The Act deals with certain kinds of equitable remedies. These are (1) Recovery of possession of property, (2) Specific performance of contracts, (3) Rectification of instruments, (4) Rescission of contracts, (5) Cancellation of instruments, (6) Declaratory decrees, and (7) Injunctions. Besides these, there are certain other forms of specific relief mentioned in Appendix A, Forms 41—6 and 49 of the Code of Civil Procedure and in status, such as, the Transfer of Property Act, Trusts Act, Partnership Act. They are different in origin and nature and the Law Commission found that no advantage would be gained by including them in the Act.

The new Act does not disturb the existing pattern and classification of law while seeking to improve both the language and the substance of the Act. But it is difficult to avoid the inherent defects which must exist in the codification of equitable principles.

There was a suggestion that the Act should also deal with compensatory relief but it does not find favour with the Law Commission in view that compensatory relief is inconsistent with and generally an alternative to specific relief and is therefore best dealt with separately. In so far as it is complementary to specific relief, the Act deals with it.

The Act extends to the whole of India except the State of Jammu and Kashmir.

The definition of "trust" in Sec. 3 of the old Act is not satisfactory inasmuch as it refers to "express", "implied" and "constructive" fiduciary ownership, without explaining those terms. Since a definition of "trust" has subsequently been enacted in the Trusts Act (II of 1882), it is desirable that there should be parity between the provisions of the two enactments. The definition in the new Act would now comprise a trust as defined in Sec. 3 of the Trusts Act as well as all obligations in the nature of trusts which are included in Chapter IX of the Act. Consequential changes in the definition of "trustee" have also been made. Clause (*a*) of Sec. 4 has been omitted as unnecessary. Under Sec. 2 (*h*) of the Contract Act, only "an agreement enforceable by law is a contract". A mere agreement is not enforceable in law. There is, therefore, no question of any specific relief being granted in respect of a mere agreement which is not a contract. Sections 5 and 6 of the old Act have been omitted on the ground that they embody propositions too elementary to be codified and serve no useful purpose. Whitley and Stokes considered them unnecessary and recommended their repeal.

Section 7 of the old Act provided that specific relief cannot be granted for the mere purpose of enforcing a penal law. This section has been re-numbered as Sec. 4 of the new Act and recast so as to bring out more clearly the principle that specific relief being a civil remedy, the plaintiff must show some individual right to it, thus adding to its present negative form a positive content.

Sections 8, 9 and 10 of the old Act have been re-numbered as Secs. 5, 6 and 7 of the new Act with the substitution of the word "provided" for the word "prescribed" occurring in both Secs. 8 and 10 of the old Act. Section 11 of the old Act has been re-numbered as Sec. 8 of the new Act, and an Explanation modelled on the Explanation to Sec. 12 of the old Act has been added whereby the burden of proving that the case does not fall within Cl. (*b*) or

Cl. (*c*) is laid on the defendant. In such case it should be for the defendant to prove that the article in respect of which possession is claimed is an ordinary article of commerce having no special value or interest to the plaintiff or that the damage is assessable in money.

Section 9 is new. In India the defences that are available under the Law of Contract, such as, incapacity of parties, absence of a concluded contract, the uncertainty of the contract, coercion, fraud, misrepresentation, mistake, illegality or want of authority are all dealt with under the Contract Act. Section 9 prescribes in a compendious way all the defences that are open to a defendant; and incidentally makes Sec. 4 (*a*) of the old Act, which has now been omitted, all the more unnecessary.

Section 12 of the old Act contains four clauses: (*a*), (*b*), (*c*) and (*d*). Clause (*a*) relates to an obligation arising out of a trust. The only references to trust, so far as specific performance is concerned, are in Cl. (*a*) of Sec. 12 and Cl. (*c*) of Sec. 21. In the new Act both of them are included in a new section, Sec. 11. Clause (*a*) is out of place in Sec. 12 as that section relates to executory contracts whereas in the case of an obligation arising out of a trust it arises out of an executed contract. Clause (*d*) of Sec. 12 has been omitted altogether as it seems to sanction the doubtful doctrine that the insolvency of the defendant is a ground for decreeing specific performance. The ability of the defendant to pay damages never entered into the consideration of the Courts of Equity in England. It is the contract itself which gives to or takes away from the Court its jurisdiction, not the wealth or poverty of the defendant. Clauses (*a*) and (*d*) of Sec. 12 having been thus deleted, the remaining Cls. (*b*) and (*c*) have been incorporated in Sec. 10 of the new Act which dealt with cases in which specific performance of a contract may, in the discretion of the Court, be enforced. Clause (*b*) of Sec. 12 of the old Act re-numbered as Cl. (*a*) of Sec. 10 of the new Act provides for specific performance when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done, while Cl. (*c*) of Sec. 12 of the old Act re-numbered as Cl. (*b*) of Sec. 10 of the new Act provides for specific performance when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

As regards the Explanation to Sec. 12 of the old Act the Law Commission felt that the presumption relating to moveable property is somewhat misleading in its present form and it would be conducive to a better understanding of the law if the exceptional cases where the presumption of adequacy of damages is not applied are also specified. The Explanation has accordingly been made more explanatory and split up in sub-clauses (*i*) and (*ii*); sub-clause (*i*) is related to immoveable property in respect of which no change has been considered necessary while in sub-clause (*ii*) dealing with moveable property the exceptional cases where damages would not be an adequate relief and consequently specific performance would be incumbent have been specified. These cases are—

(*a*) Where the property is not an ordinary article of commerce or is otherwise of special value or interest to the plaintiff.[1]

(*b*) Where the property is held by the defendant as agent or trustee of the plaintiff.[2]

(*c*) Where the property consists of goods not easily procurable in the market.

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1. *Cf.* Pusey *v.* Pusey, (1684) 1 Vern. 273; 2. Wood *v.* Rowcliffe, (1844) 3 Hare 304, Flacke *v.* Gray, (1859) 4 Drew, 65.

The last exception has been specially developed in the United States[1] courts have enforced specific performance of contracts to furnish gas, water or other necessary materials to a manufacturing establishment, where the thing contracted for is not immediately available from other sources and a breach of the contract would stop the operations of the plaintiff's establishment. The same principle is applied where the goods are such that they can be supplied by no one except the defendant. A contract to furnish stone from a certain quarry for building was enforced where the stone was of a peculiar colour and the building was partially constructed from the stone already furnished. Even a contract for the delivery of a motion-picture film to an exhibitor has been enforced.

In view of the vast economic developments which are taking place in India, this provision has been borrowed from the American law.

In the old Act Secs. 14 to 17 deal with claims for specific relief of a part of a contract and Sec. 13 enshrines a principle generally applicable to cases falling within Secs. 14 to 17. All these sections have now been grouped together as Sec. 12 of the new Act. The various sub-clauses of Sec. 12 of the new Act correspond to the sections of the old Act as follows:

Sub-clause (1) corresponds to Sec. 17.

Sub-clause (2) corresponds to Sec. 14.

Sub-clause (3) corresponsds to Sec. 15.

But one important change which has been made in sub-clause (3) is that then the part which must be left unperformed forms a considerable portion of the whole but admits of compensation in money, the plaintiff is allowed a proportionate abatement of the consideration when he is to relinquish all claims to further performance or any further compensation for the breach. In this respect the existing position is inequitable.

Sub-clause (4) corresponds to Sec. 16.

The Explanation reproduces Sec. 13 with verbal changes.

Section 13 of the new Act is Sec. 18 of the old Act with the following amendments:

(*a*) it is made clear that this clause applies also to absence of title;

(*b*) by inserting the words "subject to the other provisions of this Chapter", it is made clear that other provisions of this Chapter, like Cl. 11, apply to cases under sub-clause (*a*);

(*c*) in sub-clause (*a*), for the words "sale or lease", the word "contract" has been substituted so that it is made clear that the sub-clause applies only to contracts to sell lease or hire;

(*d*) sub-clause (*b*) is modified so that a plaintiff would also be enabled to require a vendor to get a conveyance from a person who is bound to convey at the request of the vendor;

(*e*) in sub-clause (*c*), the addition of the words "wherever necessary" makes it clear that a re-conveyance need be obtained only when it is required under law.

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1. 49 Am. Juris., Secs. 126, 128, pp. 149, 152

Section 14 of the new Act is Sec. 21 of the old Act with certain amendments base on cupudicial precedents and principles applied in England and America. It ddeals with contracts not specifically enforceable. Clause (*c*) of Sec. 21 of the old Act which provided that a contract the terms of which the Court cannot find with reasonable certainty is not enforceable has been omitted in Sec. 14 of the new Act on the basis of the view taken by Pollock and Mulla (*Specific Relief Act*, page 200) that it is redundant inasmuch as under Sec. 29 of the Contract Act, a contract "which is not certain or capable of being made certain" is void. Clauses (*f*) and (*h*) of Sec. 21 of the old Act have also been dropped as unnecessary in view of Sec. 9 of the new Act. Clause (*f*) dealt with contract by or on behalf of a corporation or public company in excess of its powers. Clause (*e*) of the said section which dealt with trusts has been dropped as its provisions have been incorporated in Sec. 11 of the new Act. The remaining clauses of Sec. 21 of the old Act remain intact with certain verbal changes.

Clause (*g*) of Sec. 21 of the old Act provided that a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date is not enforceable. This time-limit of three years was arbitrary and constituted a departure from the corresponding English law. This arbitrary time-limit has been done away within Sec. 14 of the new Act which provides that the Court will not decree specific performance if the contract involves the performance of such a continuous duty that the Court is not able to supervise it. The law has thus been made more logical. Sub-clause (3) of this section is new and incorporates the exceptional case in which specific performance is granted notwithstanding the earlier provisions of the section.

These exceptional cases are as follows:

(1) Where a loan has been advanced either in whole or in part by the lender on a contract to execute a mortgage but the borrower refuses to execute the mortgage, specific performance of the contract can be obtained if the borrower is not willing to repay the loan at once.[1] Where a part of the loan only has been advanced, the lender must be ready and willing to advance the remaining sum according to the agreement.

(2) Another such case is the specific performance of a contract to subscribe for debentures of a company.

(3) A contract to build or repair involving the performance of a continuous duty which the Court cannot supervise would not generally be specifically enforced.[2] But such a contract is enforced in England[3] and in America[4] in certain exeptional circumstances. Such a contract would be specifically enforced if the building or work is defined by the contract with sufficient particularity so as to enable the Court to determine the exact nature of the work, or that the plaintiff has a substantial interest, in the performance of the contract so that compensation for its breach would not be an adequate relief and that the defendant has under the contract obtained possession of the land on which the work is to be carried out.

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1. Jewan Lal *v.* Nilmoni, A. I. R. 1928 P. C. 80; Fry, *Specific Performance*, 6th Ed., p. 24 : 49 Am. Juris., Sec. 83, p. 101.
2. Ramchandra *v.* Ramchandra, I. L. R. 22 Bom. 46.
3. Halsbury, 2nd Ed., Vol. 31, para. 365, p. 333; Fry, 6th Ed., p. 48; Dart, *Vendor and Purchaser*, Vol. II, p. 879; Wolverhamption Corporation *v.* Emmons, (1901) 1 K. B. 515.
4. Pomeroy, *Specific Performance*, 3rd Ed., Sec. 23; Story, *Equity Jurisprudence*, 1920, p. 308.

Section 15 of the new Act deals with persons who may obtain specific performance. This section corresponds to Sec. 23 of the old Act. The words "his part" in the concluding portion of Cl. (*b*) of the said Sec. 23 were ambiguous and led to a conflict of opinion amongst commentators. This conflict has been removed by making it clear that in a contract of a personal nature, performance by a third party is not to be imposed on the other party to the contract except where he has accepted such substituted performance; sub-clauses (*c*), (*d*), (*e*) and (*f*) could be substituted by a simple provision providing that a third party to a contract who is entitled to a benefit thereunder or has an interest therein may sue on the contract subject to certain limitations. This substitution would, however, have to await a suitable amendment being made in this behalf in the Contract Act, and the clauses have been reproduced as they stand for the time being; in sub-clauses (*g*) and (*h*) the word "public" has been omitted since the nature of these provisions is such that they should apply to all companies. Further, in sub-clause (*h*) it is provided that the contract would be enforceable by or against a company only if it has accepted the contract and has signified its acceptance to the other party to the contract.

Section 16 of the new Act entitled "Personal bars to relief" is a re-enactment of Sec. 24 of the old Act with the following modifications:

(*i*) in sub-clause (*a*), for the words "is not entitled", the words "would not be entitled" have been substituted in order to make the meaning clear;

(*ii*) in sub-clause (*b*), following the principles enunciated by case-law it has been provided that specific performance cannot be enforced where the plaintiff has acted in fraud of the contract or acts at variance with or in subversion of the relationship intended to be established by the contract;

(*iii*) clasue (*c*) of Sec. 24 has been omitted as unnecessary in view of Order II, rule 2 of the Code of Civil Procedure, 1908;

(*iv*) clause (*b*) of Sec. 24 gives effect to a provision of English law as it stood under a Statute of the Sixteenth Century, but the law has since been changed. A prior settlement of property would divest the title of the settlor immediately and any conveyance thereafter from settlor to another, even if it be for consideration would be ineffective to convey title. This provision is therefore totally unnecessary and has consequently been omitted in the new section;

(*v*) sub-clause (*c*) of Sec. 16 of the new Act is a new provision which incorporates the principles laid down by case-law that in a suit for specific performance the plaintiff must show that all conditions precedent have been fulfilled and also allege and prove a continuous readiness and willingness to perform the contract on his part from the date of the contract to the time of the hearing of the suit. The plaintiff, however, need not prove performance of or overreadiness or willingness to perform non-essential terms;

(*vi*) by an Explanation it is made clear that it is not essential that the plaintiff should tender money payable under a contract, say, for sale to the defendant or to deposit it in Court except when so directed. Further, the plaintiff should be entitled to specific performance if he avers performance or readiness or willingness to perform the contract according to its construction.

Section 17 is Sec. 25 of the old Act with the following modifications:

Clause (*c*) of Sec. 25 is omitted for the reasons given in the treatment of the foregoing section.

Although Sec. 25 refers to both moveable and immoveable property, it is not clear how far Secs. 18 and 25 apply to contracts for the letting of moveable property. Sub-clause (1) is therefore confined to immoveable property, but sub-clause (2) provides that the provisions of sub-clause (1) will also apply to moveable property in so far as such application is possible.

Section 18 corresponds to Sec. 26 with the following changes:

(*i*) sub-clause (*a*) amalgamates Cls. (*a*), (*b*) and (*c*) of Sec. 26;

(*ii*) in sub-clause (*c*), for the words "contracted to vary", the words "varies its terms" have been substituted as a drafting change.

Section 19 is Sec. 27 of the old Act with the following changes:

(*i*) in sub-clause (*d*), the word "public" has been omitted as this provision should apply to all companies;

(*ii*) sub-clause (*e*) has been modified on the lines of the amendment of Sec. 23. (*b*) of the old Act as effected in Sec. 15 (*b*), the corresponding provision of the new Act.

Section 20 reproduces Sec. 22 of the Act with the followng modifications:

(*i*) sub-section (2) (*a*) is item 1 of Sec. 22 of the old Act. Item (1) of Sec. 22 of the old Act is somewhat vague. There are circumstances in which a court of equity refuses to decree specific performance on the ground of unfairness even though in law the circumstances are not such as to render the contract voidable. The scope of this sub-clause is therefore widened to provide that the unfair advantage may be due to circumstances which may not be sufficient to render the contract voidable;

(*ii*) the two Explanations based on case-law seek to explain in what cases unfair advantage or hardship shall not be presumed and with reference to what circumstances hardship should ordinarily be determined;

(*iii*) the doctrine that a contract to be specifically enforceable must as a general rule be mutual has now very little scope for application in India. That doctrine is now being abolished and in its place, the following principle is laid down, namely, that the fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party.

Sub-clause (4) gives effect to this new principle.

Section 21 is Sec. 19 of the old Act with the following changes:

(*i*) sub-clause (4) makes it clear that the compensation to be awarded is to be determined on the basis of Sec. 73 of the Indian Contract Act, 1872.

(*ii*) it is provided in sub-clause (5) that compensation has to be specifically asked for before it can be granted, and that the Court should allow the plaintiff to amend his plaint at any stage of the proceeding for the purpose.

Section 22 is new. Sub-clsuse (1) (*a*) introduces a rule, now settled by judicial decisions that in order to avoid a multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking the right to possession accrues only when specific performance is decreed.

In some cases it has been held that the Court may, in a suit for specific performance, direct a refund of earnest money while refusing specific performance if the facts disclose a case for a refund. Sub-clause (*b*) gives effect to this and also permits the plaintiff to claim any other relief.

It is , however, provided that any such relief will not be granted unless a claim in that behalf is made by the plaintiff either initially or by an amendment at a later stage, but that does not prejudice his right to compensation under Cl. 21.

Section 23 is Sec. 20 of the old Act amplified so as to codify the law on the subject. In applying Sec. 20 of the old Act courts have tried to ascertain the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum or whether he is bound to do a certain thing, with a penal sum or sum by way of liquidated damages attached as security. In the latter case, the Court, notwithstanding the penal clause enforces performance if the contract be such that without the penal clause it would have been proper to enforce specific performance.

Section 24 is Sec. 29 of the old Act. Provisions have been included in the new Act enabling the plaintiff to ask for reliefs such as refund of earnest money, etc. and by way of abundant caution it is made clear in this clause that the dismissal of a suit for specific performance shall not bar a suit for any relief other than damages.

Section 25 is Sec. 30 of the old Act. After the passing of the Arbitration Act, 1940, the provisions of this clause should be confined to cases of arbitration under other laws the operation of which is saved by Secs. 46 and 47 of the Arbitration Act, 1940. As respects cases to which the Arbitration Act, 1940, applies, that Act prescribes the procedure to be followed for their enforcement. Section 27-A of the old Act is omitted for the reason that suitable provision is to be made in this behalf in the Registration Act and Sec. 28 has been omitted for the reason the material provisions thereof have been incorporated in their appropriate places in the Act.

Section 26 is Sec. 31 of the old Act with the following modifications :

(*i*) under Sec. 31 of the Companies Act, 1956, the articles of association of a company may be altered by the company by special resolution and it is, therefore, advisable to exclude articles of association from the scope of this clause;

(*ii*) it is provided in sub-clause (1) that the relief of rectification may be obtained not only in a suit specifically brought for the purpose as at present but also in a suit in which any right arising under the contract or other instrument is in issue. It is further provided that the relief will be open to either party but only if it is specifically asked for in his pleading whether initially or by amendment;

(*iii*) Sec. 32 of the old Act has been omitted as it is ambiguous; and if it means that the Court will not rectify an invalid instrument it is not necessary;

(*iv*) Sec. 33 of the old Act has been omitted as unnecessary as this provision seeks to merely enjoin the Court to discover the real intention of the parties. In any event, Sec. 26 of the new Act renders this section of the old Act unnecessary;.

(*v*) Sec. 34 of the old Act has been incorporated in sub-clause (3).

Section 27 is Sec. 35 of the old Act with the following modifications:

(*i*) Sec. 35 (*c*) of the old Act and the two paragraphs succeeding it have been omitted in view of Sec. 28 of the new Act, otherwise sub-clause (1) is a reproduction of Sec. 35;

(*ii*) sub-clause (2) codifies the principles followed by courts in refusing to rescind a contract;

(*iii*) the requirement of "writing" at the beginning of Sec. 35 has been omitted by the Transfer of Property Act, 1882, in relation to territories where that Act is in force; hence the Explanation.

Section 28 is new. Under Sec. 35 (*c*) of the old Act, the vendor or lessor has the option of bringing a separate suit for the rescission of a contract or to apply for rescission in the same suit under the third paragraph of the section, but there is no reason why the vendor or lessor should be allowed to harass the other party in a separate proceeding when the relief of rescission can be made available in the same suit. At the same time suitable reliefs should also be made available to the purchaser or lessee when he makes the payments due, but the vendor or lessor does not comply with the terms of the decree. This section therefore seeks to provide complete relief to both the parties in terms of the decree for specific performance in the same suit without having to resort to separate proceedings.

Section 36 of the old Act has been omitted as it is in conflict with Sec. 22 of the Indian Contract Act, 1872, and does not appear to enshrine any sound principle.

Section 29 re-enacts Sec. 37 of the old Act; Sec. 31, Sec. 39 of the old Act; Sec. 32, Sec. 40; Sec. 34, Sec. 42; Sec. 35, Sec. 43; Sec. 36, Sec 52; Sec. 37, Sec. 53; Sec. 39, Sec. 55 and Sec. 42, Sec. 57 of the old Act without any changes.

Section 30 of the new Act is Sec. 38 of the old Act amplified to provide that while decreeing rescission the Court might direct not only payment of compensation to the defendant but also restoration of any benefit received by the plaintiff under contract.

Section 33 of the new Act corresponds to Sec. 41 of the old Act.

Under Sec. 41 of the old Act a plaintiff who obtains cancellation of an instrument may be required to make compensation to the defendant. This provision has been expanded to provide for the following matters:

(*i*) the plaintiff may also have to restore any benefit which he may have obtained under the instrument;

(*ii*) the whole principle has been extended to apply in favour of a plaintiff in a case where the defendant successfully resists a suit on the ground that it is void or that it is voidable and he has avoided it;

(*iii*) it is, however, provided that in the case of a contract,which is void by reason of the defendant being a minor or lunatic at the time of the contract, the defendant must restore any benefit, whether proprietary or monetary, which he has actually received under the contract. There is, however, no question of any liability for making compensation in such a case.

Section 38 of the new Act is Sec. 54 of the old Act with the following changes:

(*i*) for the word "applicant", the word "plaintiff" has been substituted as the former expression is inaccurate;

(*ii*) Sec. 54 (*d*) of the old Act has been omitted for the reasons given in respect of the omission of Sec. 12 (*d*) of the old Act.

Section 40 of the new Act is new and gives effect to the principles already accepted that the Court can, in an action for injunction, exercise its discretion to award damages either in addition to or in substitution for an injunction.

Section 41 of the new Act is Sec. 56 of the old Act with the following changes :

(*i*) the expression "to stay proceedings" in Cls. (*a*), (*b*) and (*c*) of Sec. 56 has given to rise to controversy as to whether any injunction can be directed against the Court itself before which the proceeding is pending. An injunction is a remedy *in personam* which is directed against the litigant and this is now made clear;

(*ii*) Sec. 56 (*d*) has been omitted; the first part of it is inconsistent with Art. 361 (1) of the Constitution, and the second part is unnecessary.

Section 43 makes a consequential amendment in the Arbitration Act, 1940.

Section 44 of the new Act repeals the old Specific Relief Act.

The new Specific Relief Act enacted by Parliament as a new and independent Act based on the recommendation of the Law Commission reflects an evolutionary process; determined by judicial precedents, principles of India, English and American law and our current requirements, it is like our Constitution the rich embodiment, the saturated essence of legal wisdom and legal experience. Its Bill was introduced in the Lok Sabha on the 15th June, 1962. On the 9th August, 1962, a motion was made and accepted for its reference to the Joint Committee. The Rajya Sabha discussed this motion on the 21st August, 1962. The Joint Committee held four sittings and submitted its report on the 9th November, 1962, and the Lok Sabha passed it on the 13th August, 1963. It was passed by the Rajya Sabha without any amendment. The new Act now launches upon its career for a trial.

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The Specific Relief Act, 1963

(ACT NO. 47 OF 1963)[1]

New

An Act to define and amend the law relating to certain kinds of specific relief

Preamble.—Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows :

Old

An Act to define and amend the law relating to certain kinds of specific relief

Preamble.—Whereas it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits; It is hereby enacted as follows :

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1. History of legislation.—The Specific Relief Act was passed in 1877 and had since been amended by Acts 4 of 1882, 12 of 1891, 9 of 1899, 21 of 1929, 10 of 1940 and 3 of 1951. It had also been adapted by the Adaptation Orders, A.O. 1937, A.O. 1948 and A.O. 1950. In 1951, it was extended to Part B States and thereafter it was extended to the whole of India except the State of Jammu and Kashmir and the scheduled districts under the Scheduled Districts Act, 1874.

The Act was originally drafted upon the lines of the draft New York Civil Code, 1862, and its main provisions embodied the doctrines evolved by the English Equity Courts, which had previous to the Act been applied in India as principles of equity, justice and good conscience. The Act, on the whole, had worked well but "there was room for improvement both in the expression and the substance".[2]

In making their recommendations the Law Commission of India considered the various suggestions received by them and gave effect to such of them as appeared to them to be suitable. They dealt with two suggestions of a fundamental nature in the following words:

"It has been suggested that there is no justification for a separate enactment on 'specific relief' and that the provisions of this Act should be transferred to the Code of Civil Procedure and other enactments. This suggestion is founded on certain observations of Pollock and Mulla:[3]

'Specific relief, as a form of judicial redress, belongs to the Law of Procedure, and, in a body of written law arranged according to the natural affinities of the subject-matter, would find its place as a distinct part or other division of the Civil Procedure Code... ... ...

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1. Published in the *Gazette of India, Extraordinary*, No. 43, Pt. II, Sec. 1, dated the 16th December, 1963.
2. Banerji's *Law of Specific Relief*, 2nd Ed., p. 34.
3. *Specific Relief Act*, 8th Ed., pp. 735, 737.

'If the work were to be done afresh without regard to historical accidents, there would be no reason for having a separate Specific Relief Act at all; its contents would be divided between the Civil Procedure Code and the Transfer of Property Act. Such a drastic reform may well, as things are, not be worth the pains, but some decision in detail appears desirable.'[1]

"It is to be noticed that even Pollock and Mulla did not consider such a drastic change worth the labour involved. We have given careful consideration to the suggestion, and are unable to accept it. The main consideration which has brought us to this conclusion is that the Specific Relief Act deals with certain equitable principles and remedies which stand apart, both historically as well as intrinsically, from the common law rules which are embodied in our Code of Civil Procedure. The subjects dealt with by the Act, such as specific performance, declaratory decrees, injunction, rescission and rectification usually find a separate treatment in legal literature. Moreover, the legal profession and the Courts have become used to the present arrangement and a change with the sole object of formal perfection would not be justified.

"A further suggestion is that the Act should also deal with compensatory relief. We are, however, of the view that compensatory relief is inconsistent with and generally an alternative to specific relief and is, therefore, best dealt with separately. In so far as it is complementary to specific relief, the Act deals with it."[2]

The Specific Relief Act, 1963, is the outcome of the acceptance by the Central Government of the recommendations made by the Law Commission of India. They studied, deliberated and submitted their reports recommending for a complete and thorough overhaul of the then operating Specific Relief Act, 1877. Their recommendations were embodied in the Ninth Report, which discussed in some details the provisions, their effect, and made valuable suggestions. The Report was submitted on as early as 19th July, 1958. The Government studied the report and took decisions in favour of working out of the recommendations of the Law Commission, on the Specific Relief Act. A Bill, seeking to amend the Specific Relief Act, 1877, was introduced in the Lok Sabha on 23rd December, 1960 which lapsed due to the dissolution of the Lok Sabha. Therefore, it could not become the law then. The Bill was again introduced in the Lok Sabha and passed by both the Houses of the Parliament, i. e. the Lok Sabha and the Rajya Sabha. It has since been assented to by the President on 13th December, 1963. It has been published in the *Gazette of India, Extraordinary*, No. 43, Part II, Sec. 1, dated the 16th December, 1963, and has thus become a full fledged law:

> "The Legislature has tried to improve both the language and the substance of the Act. But it is difficult to avoid the inherent defect which must exist in the codification of equitable principles. As Sir Raymond Evershed, Master of the Rolls, has said, 'As equity lawyer, let me acknowledge that I have a natural inclination to favour the undefined and undefinable in the form of principles which have never lost, by unnecessary and constructing definition, their capacity for useful growth. And I would like, here, to make the important point that these undefined principles of equity could

1. Mulla's *Specific Relief Act*, 8th Ed., pp. 735-37.
2. Report of the Law Commission of India on the Specific Relief Act, 1877, pp. 1-2,

never, as far as I can see, (save to a very limited extent) be effectively or usefully comprehended, by codification, in the enacted law. At least in so far as they were so comprehended, the functions of the Courts in regard to them might thereby be changed—and surely not changed for the public advantage—from the more or less creative faculty of seeing whether the new relationship or the new set of facts was within or without the embrace of the principle to the narrower task of interpreting the Parliamentary language'."[1]

All the illustrations in the old Act have been omitted. It is true that Whitley and Stokes, in their introduction to the *Anglo-Indian Codes*,[2] quoted Macaulay's expectation that the "illustrations will greatly facilitate the understanding of the law". It may be stated, however, that the illustrations have not, on the whole, served to clarify the provisions of the Act. Some of the illustrations are not warranted by the terms of the relevant sections; others have tended to prevent the development of equitable jurisprudence. Moreover, the Indian Legislature has for some time past given up the practice of inserting illustrations in Acts.[3]

2. Act not exhaustive.—The Specific Relief Act, 1963, is not an exhaustive enactment. It does not consolidate the whole law on the subject. As the preamble would indicate, it is an Act "to define and amend the law relating to certain kinds of specific relief". It does not purport to lay down the law relating to specific relief in all its ramifications. In *Ramdas Khatau & Co.* v. *Atlas Mills Co. Ltd*,[4] it was held that the Specific Relief Act, 1877, was not exhaustive. In *Rahmathunnisa Begum* v. *Shimoga Co-operative Bank Ltd*[5] the Court said that the Specific Relief Act, 1877, is founded on English equity jurisprudence and that it is permissible to refer to English law on the subject wherever the Act did not deal specifically with any topic.[6]

3. Object of the Act.—The object of the Act may best be stated in the words of Statements of Objects and Reasons which run as under :

> "This Bill seeks to implement the recommendations of the Law Commission contained in its Ninth Report on the Specific Relief Act, 1877, except in regard to Sec. 42 which is being retained as it now stands. An earlier Bill on the subject introduced in the Lok Sabha on the 23rd December, 1960, lapsed on its dissolution. The notes on clauses, extracted from the Report of the Law Commission, explain the changes made in the existing Act."

4. Scope of the Act.—The Specific Relief Act embodies what in essence is adjective law and the substantive law must be looked for elsewhere.[7] It purports to define and amend the law relating to certain kinds of specific reliefs obtainable in Civil Courts. It does not deal with the remaining remedies, which are connected with compensatory relief except incidentally and to the limited extent to which it is either supplementary or alternative to specific relief. The Indian Courts are competent to grant other specific remedies also which are to be found described in statutes other than the Specific Relief Act.

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1. 72 L. Q. R., pp. 43-44.
2. Volume I, p. xxiv.
3. Report of the Law Commission of India on the Specific Relief Act, 1877, pp. 2-3.
4. A. I. R. 1931 Bom. 151.
5. A. I. R. 1951 Mys. 59.
6. *See* also Firm Kishore Chand Shiva Charan Lal *v.* Budaun Electric Supply Co. Ltd., A. I. R. 1944 All. 66 at p. 77; Hungerford Investment Trust Ltd. *v.* Haridas Mundhra, A. I. R. 1972 S. C. 1826 at p. 1832.
7. Ali Husain *v.* Raj Kumar Haldar, A.I.R. 1943 Cal. 417 at p. 426 : 203 I. C. 473 (F. B.) : I. L. R. (1943) 2 Cal. 605 : 16 R. C. 226 ; 77 C. L. J. 216.

For example, the Transfer of Property Act deals with remedies open to a mortgagor and a mortgagee on a contract of mortgage. Partnership Act grants remedy of dissolution and accounts. Similarly a suit for accounts and administration of the property of a deceased may be brought in a Civil Court. Section 145 (new), Cr. P. C. provides a remedy for the restoration of recent dispossession.

5. Guidelines as to when specific performance could be ordered and when not.—Specific performance of an agreement to sell immoveable property is not invariably ordered as a matter of right. The relief is discretionary, but the discretion being a judicial one, it has to be exercised neither arbitrarily nor unreasonably, but according to law and reason. The Specific Relief Act has provided certain guidelines as to when specific performance could be ordered and when not. Section 28 of the Specific Relief Act, 1877, is one of them, which provides what parties cannot be compelled to perform Specific performance of an agreement cannot be enforced against a party thereto if the consideration to be received by him "is so grossly inadequate with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff". Two matters will have to be considered: one while consideration was obviously inadequate, was it grossly inadequate; and the other whether the fact by itself or in association with other circumstances would amount to undue advantage taken by the party asking for enforcement of the agreement. The first one involves a question of degree. If the inadequacy of consideration is so much as to shock the conscience of the Court in respect of the fairness of the agreement it is a case of gross inadequacy of consideration. It is not any inadequacy of consideration that will help a defence in a suit for specific performance but when the inadequacy is unconscionable or is so patently unjust that it savours by itself of fraud or that it amounts to that when it is taken in conjunction with other circumstances, that exist on the date of the contract. The concept of joint Hindu family property is that each of the coparceners is entitled to the same right as the other and they all hold together the coparcenary property and that when a partition is effected all that happens is, not a transfer of interest from one to the other, but only release of the interest of one coparcener in favour of the other in specific immoveable property allotted to the latter as and for his share. In such circumstances, it is doubtful whether there is any occasion to apply Sec. 27 (*b*) [corresponding to new Sec. 19 (*b*)] for, in such a case, there is no room for applying the language "any other person claiming under him". A sharer on partition does not derive title to his share from any one else and, therefore, it cannot be said that he is claiming under somebody for the purpose of the application of the section. Even assuming, therefore, that the compromise decree was collusive, it is not possible to apply Sec. 27 to a case like this.[1]

6. Define and amend, i. e. to explain and enunciate and codify—This Act provides law with respect to various reliefs which can be granted under its provisions. As to the instances of other forms of specific relief not given by this Act, *see* Civil Procedure Code, 1908, First Schedule, Forms Nos. 41 to 46 which deal with administration by a creditor on behalf of himself and all other creditors, and by specific and pecuniary legatees, execution of trusts, foreclosure or sale, and redemption. Form No. 49 deals with partnership. The Act, therefore, does not purport to be an exhaustive enactment. The Preamble to the Specific Relief Act is in precisely the same form as the Preamble to the Contract Act, and it has been said by the Privy Council with

1. K. Appa Rao *v.* P. Balasubramania Gramani, A. I. R. 1976 Mad, 70 at pp. 71-72

regard to the Contract Act, that that Act is not exhaustive.[1] By parity of reasoning it can be said that the Specific Relief Act is not exhaustive.[2] The jurisdiction of courts in India to grant specific performance of contracts was not created by the passing of this Act. The Courts had already jurisdiction independently of the Act which only purports to define and amend the law relating to certain kinds of specific relief obtainable in civil suits instituted in courts of the territories to which the Act has been extended.[3]

7. Interpretation of the Act.—The ordinary rule of interpretation is well settled that when there is a positive enactment of the Indian Legislature the proper course is to examine the language of the statute and to ascertain its proper meaning uninfluenced by any consideration derived from the English law on which it may be founded.[4] Where the language of the two sections is almost identical, courts would hesitate very much to depart from the view expressed by such eminent learned Judges in England who have had great experience of Company Law unless there was something internal in the section itself which would justify its interpretation in a different way.[5] Consequently, wherever the Act does not deal specifically with any matter it is permissible to refer to English law.[6] In India, apart from the General Clauses Act, the decisions of English courts rendered with reference to English statutes are indeed a source of rules of interpretation of statutes. In deciding whether it is legitimate to adopt a particular rule of interpretation, one must have regard to the kind of statute with reference to which it was formulated, the Court which formulated it and the legislative practice of the time. There is otherwise the risk of being misled by conflicting rules.[7] It is also equally clear that where the language of a section in the Indian Act is borrowed from an English statute it is permissible to interpret it in the light of the latter.[8]

In *Ardeshar H. Mama* v. *Flora Sassoon*,[9] their Lordships of the Privy Council have interpreted the sections of the Specific Relief Act, both as to substantive law and practice, in the light of the principles recognized by the English courts.[10] The following extract from the judgment of their Lordships

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1. Jwala Dutt Pillani *v.* Bansilal Motilal, A. I. R. 1929 P. C. 132 : 115 I. C. 707 : 56 I. A. 174 : I. L. R. 53 Bom. 414 (P. C.).
2. Ram Das Khatau & Co. *v.* Atlas Mills & Co., A. I. R. 1931 Bom. 151 at pp. 155-56.
3. *Ibid.*
4. Rama Nandi Kuer *v.* Kalawati Kuer, A. I. R. 1928 P. C. 2 at p. 4 : 107 I. C. 14 : 55 I. A. 18 : I. L. R. 7 Pat. 221 (P. C.); Diwan Chand v. Manak Chand, I. L. R. 16 Lah 392 : 155 I. C. 938 : 36 Punj. L. R. 185 : A. I. R. 1934 Lah. 809; Iswarayya *v.* Swarnam Iswarayya, I. L. R. 54 Mad. 774 (P. C.) : 58 I. A. 350 : 133 I. C. 716 : 34 L. W. 518 : 33 Bom. L. R. 1402 : 1931 A. L. J. 808 : 35 C. W. N. 1185 : 8 O. W. N. 10 : 61 M. L. J. 367 : A. I. R. 1931 P. C. 234; *see* also Aung Hla *v.* Emperor, I.L.R.9 Rang, 404: A. I. R. 1931 Rang. 235: 135 I. C. 849 : 43 I. A. 262 : 55 I. C. 519; Sardar Diwan Singh *v.* Emperor, 155 I. C. 450 : A. I. R. 1935 Nag. 90.
5. Shiam Lal J. Dewan *v.* Official Liquidators of the U. P. Oil Mills Co. Ltd., A. I. R. 1933 All. 789 at p. 793 : 1933 A. L. J. 1203 : 3 A. W. R. 201 (F. B.); Dost Mohammad *v.* Mokand Lal, 134 I. C. 819 : A. I. R. 1931 Lah. 756: 32 Punj. L. R. 667; Bhemaji *v.* Chuni Lal, I. L. R. 57 Bom. 623 : 138 I. C. 824: A. I. R. 1932 Bom. 344 : 34 Bom. L. R. 638; Iswarayya *v.* Swarnam Iswarayya, I. L. R. 54 Mad. 774 (P. C.) : 58 I. A. 350 : 133 I. C. 716 : A.I.R. 1931 P. C. 234 : 61 M. L. J. 367 : 34 L. W. 518 (P. C.),
6. Rahmathunnisa *v.* Shimoga Co-operative Bank Ltd., A. I. R. 1951 Mys. 59 at p. 62 : I. L. R. (1951) Mys. 196.
7. Badsha Mia *v.* Rajjab Ali, A. I. R. 1946 Cal. 348 at p. 353 : 81 C. L. J. 16 : 50 C. W. N. 578 : 225 I. C. 280.
8. Dost Mohammad *v.* Mokand Lal, A. I. R. 1931 Lah. 756 a p. 757.
9. I. L. R. 52 Bom. 597 (P. C.) : 113 I. C. 413 : A. I. R. 1928 P. C. 208 : 51 I. A. 360 : 32 C. W. N. 953 : 30 Bom. L. R. 1242 : 28 L. W. 257 : 55 M. L. J. 523 : 1928 M. W. N. 893 : 48 C. L. J. 451 : 26 A. L. J. 1220.
10. Akshyalingam Pillai *v.* Avayabalammal, A. I. R. 1933 Mad. 386 at p. 387 : I. L. R. 53 Mad. 796 : 144 I C. 621 : 64 M. L. J. 536 : 1933 M. W. N. 265 : 27 L. W. 417.

noted above would pay perusal : "The answer to this question", observed their Lordships, "depends upon the true construction and effect of the Specific Relief Act, 1877, and in particular, of its Part II, Chapter II, which deals with the specific performance of contracts. The Act, like the Indian Contract Act 1872, is a Code. The Chapter in question is a codification with modifications deemed to be called for by Indian conditions and procedure of the then existing rules and practice of the English law in relation to the doctrine of specific performance. In the present case, it will aid the interpretation of the relevant sections to have in mind what the English system on which the Act is based was in its origin and in its fullness at the date of codification. Even a summary account of that system—necessarily incomplete and quite elementary—will serve, as their Lordships believe, to throw light upon certain provisions of the Specific Relief Act, from the lack of which a full appreciation of their meaning has not consistently been manifested." In the case of a statute which is plain in its terms, it is not legitimate to construe it by reading into it a basis derived from the English law which may not necessarily have been its basis at all and which is not in accordance with the plain meaning of the statute. Cases decided in England on the basis of the English law ought not to be applied rigidly to the construction of an Indian statute unless there is a corresponding statute in England.[1] It is always dangerous to construe an Indian Act by reference to an English Act, however closely the language of the two Acts may approximate.[2] The Calcutta High Court also has clearly pointed out that the law on the point of specific performance must be taken to have been codified by Secs. 14 to 17 (corresponding to Sec. 12 of the present Act) and the English authorities can only be resorted to for the purpose of explaining those sections.[3] Therefore there cannot be any manner of doubt that where there is an express divergence in the Act from the English law the Act will be strictly adhered to.[4] But on points not covered by the Act, the Courts in India may with advantage apply rules of the English law consistent with principles of justice, equity and good conscience.[5] In fact both courts in India as well as their Lordships of the Privy Council have actually done so."[6]

8. Certain kinds of specific relief obtainable in civil suits.—The expression "specific relief" means a relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. "Specific relief, apart from any question of compensation, may be regarded as a conscious attempt on the part of a court of equity, to do complete justice either (*i*) by determining and declaring or enforcing for the benefit of one party of primary right of that party to have the very thing done or omitted which another party has contracted to do or omit, on the corresponding primary duty of that other party to do or omit exactly what he has contracted to do or omit, or (*ii*) by enforcing for the benefit of one party some non-contractual obligation which arises out of his juridical relations with another party, and upon the evidence before the Court, is imposed by the rules of equity upon that other party."[7]

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1. Government of Bombay *v.* Sakur, A. I. R. 1947 Bom. 38 at p. 40 : 48 Bom. L. R. 746 : 228 I. C. 251 (S. B.).
2. Thiagaraja *v.* Emperor, 1947 A. L. J. 351 : 51 C. W. N. 732 : 1947 A. W. R. (P. C.) 49 : (1947) 1 M. L. J. 404 (P. C.).
3. Promotho *v.* Gortha, A.I.R. 1925 Cal. 380.
4. Akshyalingam Pillai *v.* Avayabalammal, A. .I R. 1933 Mad. 386 at p. 387:I. L.R. 58 Mad. 796: 144 I. C. 621 : 64 M. L. J. 536 : 1933 M. W. N. 265 : 27 L. W. 417.
5. Lachmi Narain *v.* Beni Ram, I. L. R. 52 All. 476 at p. 484.
6. Maharaja of Jaypore *v.* Rukmani, I. L. R. 42 Mad. 589 : A.I.R. 1919 P. C. 1; Kalyan Das *v.* Jan Bibi, I. L. R. 51 All. 454 : A. I. R. 1929 All. 12; Mohd. Raza *v.* Abbas Bandi, 59 I. A. 236 : A. I. R. 1932 P. C. 158.
7. Collet's *Law of Specific Relief in India*, 5th Ed., pp. 3, 4.

In a case of trespass on land the person aggrieved has three remedies open to him : (*a*) a remedy to bring a criminal action for punishment of the trespasser; (*b*) to claim damages for the injury done by the wrong-doer to him; and (*c*) to recovery of the property trespassed. In the third case the suit is one relating to specific enforcement by claiming a relief for possession of the property of which he is dispossessed by the wrong-doer.

9. Executory contracts—Positive and negative reliefs.—In executory contracts a suit may be brought to compel the performance of the contract by the person in default. Such relief may be either positive or negative in character : positive when a claim to the performance of it is made, negative when it is desired to prevent the doing of a thing enjoined or undertaken as not to be done. Sections 5 to 35 deal with positive reliefs, while Secs. 36 to 42 deal with preventive reliefs, i. e. temporary and perpetual injunctions. The expression "specific relief" is used in contrast to compensatory relief. In the former the suitor obtains the very thing to which he is entitled, in the latter compensation and damages for the loss of it. The Act does not deal with compensatory relief at all, except incidentally and so far as it is either supplementary or alternative to the specific relief. If *A* agrees to sell a house to his neighbour and then refuses to perform his agreement his neighbour might seek relief either by compelling *A* to sell the house or by making him pay damages for not selling the house; and so also if *A* published a practical copy of his neighbour's writings and invaded his copyright his neighbour might seek either specific relief by restraining *A* from so doing (negative relief) or compensatory relief by making *A* pay damages for the wrong inflicted by him. It is obvious that the first kind of relief does more exact and complete justice, whenever it was applicable. But in the complicated transactions of life that kind of relief is often not applicable, and more inconvenience and hardship are likely to be caused by attempts to carry the contract into effect according to its specific terms, than by the simpler and rougher method of giving compensation for the breach of it. So very different considerations regulate the exercise of jurisdiction by way of specific relief (whether in the performance of a contract or in the prevention of a wrong) and the exercise of jurisdiction by the simpler and rougher method of giving relief by compensation.[1]

The Act deals with certain kinds of equitable remedies. They are :

(1) recovery of possession of property (Secs. 8 to 11);

(2) specific performance of contracts;

(3) rectification of instruments;

(4) rescission of contracts;

(5) cancellation of instruments;

(6) declaratory decrees and injunctions.

The other forms of specific relief mentioned in Appendix A, Forms 41-6 and 49 of the Code of Civil Procedure and in statutes, such as, the Transfer of Property Act, Trusts Act, Partnership Act, are different in origin and nature and are not included in this Act.

1. *Vide* Objects and Reasons

PART I
PRELIMINARY

New	Old
1. Short title, extent and commencement.—(1) This Act may be called the Specific Relief Act, 1963.	**1. Short title.**—This Act may be called "The Specific Relief Act, 1877".
(2) It extends to the whole of India except the State of Jammu and Kashmir.	**Local extent.**—It extends to the whole of India, except the State of Jammu and Kashmir and the Scheduled districts as defined in Act No. XIV of 1874,
(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.	**Commencement.**—And it shall come into force on the first day of May, 1877.

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1. Legislative changes.—The marginal notes that were separately given to separate clauses of Sec. 1 of the repealed Specific Relief Act, 1877, have now been combined under common marginal notes as "Short title, extent and commencement" in the new Sec. 1. Previously the three clauses of Sec. 1 of the repealed Act were not numbered, now they have been numbered as sub-sections (1), (2) and (3), respectively.

Under sub-section (1) there is no change except the change of year. Sub-section (2) of the present Sec. 1 has replaced para. (2) of the repealed Sec. 1 of the Act. Formerly the Specific Relief Act, 1877, extended to all the provinces of India except the scheduled districts as defined in Act No. 14 of 1874. Now the present Act extends to the whole of India except the State of Jammu and Kashmir.

Under sub-section (3) the date of commencement is the date to be appointed and notified by the Central Government by the notification in the official Gazette.

2. Title.—This Act has been named as the Specific Relief Act, 1963.

3. Territorial extent.—This Act extends to the whole of India except the State of Jammu and Kashmir.

4. Reasons for the change.—The Law Commission of India in their Ninth Report on the Specific Relief Act, 1877, says : "The Act should be extended to the territories known as the scheduled districts. If the Transfer of Property Act, 1882, can apply to the scheduled districts, there is no reason why the Specific Relief Act should not, particularly in view of the fact that courts have applied the provisions of the Act to these areas, as principles of "justice, equity and good conscience".[1]

"No doubt, there are the scheduled and tribal areas for which special provisions have been made in the Fifth and Sixth Schedules to the Constitution. Paragraph 5 of the Fifth Schedule and para. 12 (1) (*b*) of the Sixth Schedule empower the Governor of the State in which a scheduled or tribal area is included, to exclude the operation of general Acts of Parliament or of the Legislature of the State to such areas, by issuing notifications. Thus, the present practice would appear to be to extend all general Acts of Parliament to the whole of India, leaving it to the Governor to exclude the operation of such of them in any tribal or scheduled area, as he may deem fit. It is therefore unnecessary to make any special provision for such area."[2]

5. India.—Before Indian Independence Act (10 and 11 Geo. VI, c. 30) came into force on the 15th August, 1947, India was divided into (1) British India (consisting of nine Governors' Provinces and five Chief Commissioners' Provinces), and (2) Native State numbering about 561. The Indian Independence Act ushered into existence two separate dominions :

(1) Pakistan comprising former British Indian Provinces of Sind, Baluchistan, West Punjab, the North-West Frontier Provinces and East Bengal, and

(2) India comprising the rest of British India.

By a rapid process of accession and merger the Indian States lying in the Dominion of India became integral units of the Indian Union. Now India is a Union of States.

"India" shall mean,—

Dominion of India comprising—

(*a*) as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;

(*b*) as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and

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1. Janardan v. Bhairab, 30 I. C. 365 (Cal.). 2. Report of the Law Commission on the Specific Relief Act, pp. 3-4.

(*c*) as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India.[1]

For purpose of this Act "India" means the territory of India excluding the State of Jammu and Kashmir.

Under Art. 1 (3) of the Constitution of India, the territory of India shall comprise—

(*a*) the territories of the States,

(*b*) the Union territories specified in the First Schedule, and

(*c*) such other territories as may be acquired.

The territories of the States and the Union are specified in First Schedule to the Constitution which is reproduced below :

[2]FIRST SCHEDULE

[Articles 1 and 4]

1. THE STATES

1. [3][**Andhra Pradesh.**—The territories specified in sub-section (1) of Sec. 3 of the Andhra State Act, 1953, sub-section (1) of Sec. 3 of the States Re-organization Act, 1956, the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, and the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968, but excluding the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.]

2. Assam.—The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi State and Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951, [4][and the territories specified in sub-section (1) of Sec. 3 of the State of Nagaland Act, 1962].

3. Bihar.—The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province, but excluding the territories specified in sub-section (1) of Sec. 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.

4. [5][**Gujarat.**—The territories referred to in sub-section (1) of Sec. 3 of the States Re-organization Act, 1960.]

5. Kerala.—The territories specified in sub-section (1) of Sec. 5 of the States Re-organization Act, 1956.

6. Madhya Pradesh.—The territories specified in sub-section (1) of Sec. 9 of the States Re-organization Act, 1956, [6][and the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959].

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1. *Vide* General Clauses Act, 1897, Sec. 3 (28).
2. The First Schedule was subs. by the Constitution (Seventh Amendment) Act, 1956.
3. Subs. by Andhra Pradesh and Mysore (Transfer of Territories) Act, 1968 (36 of 1968), Secs. 3-4.
4. Added by the State of Nagaland Act, 1962.
5. Subs. by the Bombay Re-organization Act, 1960.
6. Ins. by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.

7. [1][**Tamil Nadu.**]—The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in Sec. 4 of the States Re-organization Act, 1956, [2][and the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959] but excluding the territories specified in sub-section (1) of Sec. 3 and sub-section (1) of Sec. 4 of the Andhra State Act, 1953 and [3][the territories specified in Cl. (*b*) of sub-section (1) of Sec. 5, Sec. 6 and Cl. (*d*) of sub-section (1) of Sec. 7 of the States Re-organization Act, 1956, and the territories specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959].

[**8.**] [4][**Maharashtra.**—The territories specified in sub-section (1) of Sec. 8 of the States Re-organization Act, 1956, but excluding the territories referred to in sub-section (1) of Sec. 3 of the Bombay Re-organization Act, 1960].

[5][**9.**] **Mysore.**—The territories specified in sub-section (1) of Sec. 7 of the States Re-organization Act, 1956, [6][but excluding the territory specified in the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968].

[5][**10.**] **Orissa.**—The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that Province.

[5][**11.**] **Punjab.**—The territories specified in Sec. 11 of the States Re-organization Act, 1956 [7][and the territories referred to in Part II of the First Schedule to the Acquired Territories (Merger) Act, 1960], [8][but excluding the territories referred to in Part II of the First Schedule to the Constitution (Ninth Amendment) Act, 1960], [9][and the territories specified in sub-section (1) of Secs. 3 and 4 and sub-section (1) of Sec. 5 of the Punjab Re-organization Act, 1966].

[5][**12.**] **Rajasthan.**—The territories specified in Sec. 10 of the States Re-organization Act, 1956 [10][but excluding the territories specified in the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959].

[5][**13.**] **Uttar Pradesh.**—The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that Province.

[5][**14.**] **West Bengal.**—The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in Cl. (*c*) of Sec. 2 or the Chandernagore (Merger) Act, 1954 and also the territories specified in sub-section (1) of Sec. 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.

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1. Subs. for the word "Madras" by the Madras State (Alteration of Name) Act, 1968 (53 of 1968), Sec. 5.
2. Ins. by the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 (56 of 1959), Sec. 6 (w. e. f. 1st April, 1960).
3. Subs. by *ibid.*
4. Ins. by Bombay Re-organization Act, 1960.
5. Entries 8-14 re-numbered as 9-15, *ibid.*
6. Ins. by the Andhra Pradesh and Mysore (Transfer of Territories) Act, 1968 (36 of 1968).
7. Added by the Acquired Territories (Merger) Act, 1960.
8. Added by the Constitution (Ninth Amendment) Act, 1960.
9. Added by PunjabR e-organization Act, 31 of 1966.
10. Ins. by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.

[1][15.] **Jammu and Kashmir.**—The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.

[2][**16. Nagaland.**—The territories specified in sub-section (1) of Sec. 3 of the State of Nagaland Act, 1962.]

[3][**17. Haryana.**—The territories specified in sub-section (1) of Sec. 3 of the State of Punjab Re-organization Act, 1966.]

[4][**18. Himachal Pradesh.**—The territories which immediately before the commencement of this Constitution were being administered as if they were Chief Commissioner's Provinces under the names of Himachal Pradesh and Bilaspur and the territories specified in sub-section (1) of Sec. 5 of the Punjab Reorganization Act, 1966.]

[5][**19. Manipur.**—The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur.

20. Tripura.—The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.

21. Meghalaya.—The territories specified in Sec. 5 of the North-Eastern Areas (Reorganization) Act, 1978.]

II. THE UNION TERRITORIES

1. Delhi.—The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of Delhi.

2. The Andaman and Nicobar Islands.—The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Islands.

3, The Laccadive, Minicoy and Amindivi Islands.—The territory specified in Sec. 6 of the States Re-organization Act, 1956.

[6][**4. Dadra and Nagar Haveli.**—The territory which immediately before the eleventh day of August, 1961, was comprised in Free Dadra and Nagar Haveli.]

[7][**5. Goa, Daman and Diu.**—The territories which immediately before the twentieth day of December, 1961, were comprised in Goa, Daman and Diu.]

[8][**6. Pondicherry.**—The territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karaikal, Mahe and Yanam.]

[9][**7. Chandigarh.**—The territories specified in Sec. 4 of the Punjab Reorganization Act, 1966.]

[10][**8. Mizoram.**—The territories specified in Sec. 6 of the North-Eastern Area (Reorganization) Act, 1971.]

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1. Entries 8-14 re-numbered as 9-15 by the Bombay Re-organization Act, 1960.
2. Ins. by the State of Nagaland Act, 1962.
3. Ins. by Punjab Re-organization Act, 31 of 1966.
4. Ins. by the State of Himachal Pradesh Act, 1970 (53 of 1970), Sec. 4.
5. Ins. by the North-Eastern Areas (Reorganization) Act, 1971 (81 of 1971), Sec. 9.
6. Ins. by Constitution (Tenth Amendment) Act, 1961.
7. Ins. by Constitution (Twelfth Amendment) Act, 1962.
8. Ins. by Constitution (Fourteenth Amendment) Act, 1962.
9. Added by Punjab Re-organization Act, 31 of 1966.
10. Ins. by the North-Eastern Areas (Reorganization) Act, 1971 (81 of 1971), Sec. 9.

9. Arunachal Pradesh.—The territories specified in Sec. 7 of the North-Eastern Areas (Reorganization) Act, 1971.]

6. Commencement and operation.—The Specific Relief Act, 1877, was enforced on 1st day of May, 1877. The new Specific Relief Act, 1963, received the assent of the President on 13th December, 1963. It has been published in the *Gazette of India, Extraordinary*, Pt, II. Sec. 1, dated the 16th December, 1963. The Specific Relief Act, 1963, came into force on 1st March, 1964, vide *Gazette of India*, Pt. II, Sec. 3 (*ii*) No. 3, dated the 18th January, 1964.

7. Not an exhaustive enactment.—The Specific Relief Act, 1963, is not an exhaustive enactment. It does not consolidate the whole law on the subject. As the preamble would indicate, it is an Act "to define and amend the law relating to certain kinds of specific relief". It does not purport to lay down the law relating to specific relief in all its ramifications. In *Ramdas Khatau & Co.* v. *Atlas Mills Co. Ltd.*,[1] it was held that the Specific Relief Act, 1877, was not exhaustive. In *Rahmathunnissa Begum* v. *Shimoga Co-operative Bank Ltd.*,[2] the Court said that the Specific Relief Act, is founded on English equity jurisprudence and that it is permissible to refer to English law on the subject wherever the Act did not deal specifically with any topic.[3] Although a matter on which the Act defines the law it might generally be exhaustive, the Act as a whole cannot be considered as exhaustive of the whole branch of the law of specific performance.[4]

New	Old
2. Definitions.—In this Act, unless the context otherwise requires,—	3. **Interpretation clause.**—In this Act, unless there be something repugnant in the subject or context,—
(*a*) "obligation" includes every duty enforceable by law ;	"obligation" includes every duty enforceable by law ;
(*b*) "settlement" means an instrument (other than a will or codicil as defined by the Indian Succession Act, 1925, (39 of 1925), whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of ;	"settlement" means any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of, or is agreed to be disposed of ;

1. A. I. R. 1931 Bom. 151.
2. A. I. R. 1951 Mys. 58.
3. *See* also Firm Kishore Chand Shiva Charan Lal v. Budaun Electric Supply Co. Ltd., A. I. R. 1944 All. 66a t p. 77.
4. Hungerford Investment Trust Limited *v.* Haridas Mundhra, (1972) 1 S. C. W. R. 846 at p. 858.

New	Old
(*c*) "trust" has the same meaning as in Sec. 3 of the Indian Trust Act, 1882 (2 of 1882), and includes an obligation in the nature of a trust within the meaning of Chapter IX of that Act ;	"trust" includes every species of express, implied or constructive fiduciary ownership ;
(*d*) "trustee" includes every person holding property in trust :	"trustee" includes every person holding expressly, by implication, or constructively a fiduciary character.
(*e*) all other words and expressions used herein but not defined and defined in the Indian Contract Act, 1872 (9 of 1872), have the meanings respectively assigned to them in that Act.	**Words defined in Contract Act.**—And all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

Illustrations

(*a*) Z *bequeaths land to* A "*not doubting that he will pay thereout annuity of Rs.* 1,000 *to* B *for his life*". A *accepts the bequest.* A *is a trustee, within the meaning of this Act, for* B, *to the extent of the annuity.*

(*b*) A *is the legal, medical or spiritual adviser of* B. *By availing himself of his situation as such adviser,* A *gains some pecuniary advantage which might otherwise have accrued to* B. A *is a trustee for* B, *within the meaning of this Act, of such advantage.*

(*c*) A, *being* B's *banker, discloses for his own purpose the state of* B's *account.* A *is a trustee within the meaning of this Act for* B, *of the benefit gained by him by means of such disclosure.*

(*d*) A, *the mortgagee of certain leaseholds, renews the lease in his own name.* A *is a trustee within the meaning of this Act of the renewed lease, for those interested in the original lease.*

(*e*) A, *of several partners, is employed to purchase goods for the firm.* A *unknown to his co-partners supplies them, at the market price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit.* A *is a trustee for his co-partners within the meaning of this Act, of the profit so made.*

(*f*) A, *the manager of* B*'s indigo factory becomes agent for* C, *a vendor of indigo seed, and receives without* B*'s assent commission on the seed purchased from C for the factory.* A *is a trustee, within the meaning of this Act, for* B, *of the commission so received.*

(*g*) A *buys certain land with notice that* B *has already contracted to buy it.* A *is a trustee, within the meaning of this Act, for* B, *of the land so bought.*

(*h*) A *buys land from* B *having notice that* C *is in occupation of the land.* A *omits to make any enquiry as to the nature of* C*'s interest therein.* A *is a trustee, within the meaning of this Act, for* C, *to the extent of that interest.*

SYNOPSIS

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1. Legislative changes.—The old Sec. 3 has been re-numbered as Sec. 2. Under the marginal note the words "interpretation clause" have been substituted by the words "definitions". In the beginning of the section the word "unless there be something repugnant in the subject or context" have been substituted by the words "unless the context otherwise requires". Under Cl. (*a*) the definition of obligation has been reproduced verbatim.

In Cl. (*b*) of Sec. 3 of the present Act, the definition of the term "settlement" has been reproduced from the given in Sec. 3 of the repealed Act with the two minor alterations, namely, instead of the word "any" the word "an" has been substituted and the figure "1925" has been introduced after the word "The Indian Succession Act".

In Cls. (*c*) and (*d*) of this section, the definition of the words "trust" and "trustee" have been completely changed. The term "trust" has been defined in the present Act as not only to include the definition of "trust" as given in Sec. 3 of the Indian Trusts Act of 1882, but also to include the obligation in the nature of a trust, within the meaning of Chapter IX of that Act. Similarly, the word "trustee" has been defined to include every person

holding property in trust as defined in Cl. (*c*) of the present Sec. 2 of the Act. These definitions have been adopted for the purpose of bringing them in line with the connotation of the terms given and understood in the Indian Trusts Act, 1882. Illustrations (*a*) to (*h*) given at the end of the definitions of the terms "trust" and "trustee" in Sec. 3 of the repealed Act have been omitted.

In Cl. (*c*) of Sec. 2 of the present Act, it has been expressly stated that the words and expressions used in this Act and not defined in the Act but defined in the Indian Contract Act, 1872 , will have the same meaning, while interpreting those expressions under this Act.

2. Reasons for the change.—The Law Commission of India says:

> "The definition of 'trust' in Sec. 3 of the Act is not satisfactory inasmuch as it refers to 'express', 'implied' and 'constructivc' fiduciary ownership, without explaining those terms. Since a definition of 'trust' has subsequently been enacted in the Trusts Act (II of 1882) it is desirable that there should be parity between the provisions of the two enactments. We, therefore, recommend that the existing definition be replaced by one which would comprise a trust as defined in Sec. 3 of the Trusts Act, as well as all obligations in the nature of the trusts which are included in Chapter IX of that Act. Consequential changes in the definition of 'trustee' have also been suggested."[1]

3. Unless context otherwise requires.—The words of a statute when there is a doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. It is not because the words of a statute, or the words of any document, read in one sense will cover the case, that that is the right sense. Grammatically, they may cover it; but, whenever a statute or document is to be construed, it must be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which renders it necessary to read them in a sense which is not their ordinary sense in the English language as so applied.[2]

"Contract" means that which proceeds and follows a word or passage as throwing light on its meaning. It is a well-established rule of construction common to law and literature, and applicable alike to statutes and all other writings, that the meaning of a word employed is to be determined not by taking the word in isolation but by taking it with its context, i.e. as a component part of the compound expressions which make up the clause, or even the whole document to be interpreted.[3] The modern statutory definition generally provide for the interpretation of specified terms in a particular way, "unless the context otherwise requires", or "unless a contrary intention appears". Context is not limited to the context of the particular section in which the definition occurs, but means the context of the whole Act.[4]

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1. *Vide* Sec. 2 (*d*), App. I, Law Commission of India Ninth Report (Specific Relief Act, 1877), p. 4.
2. Maxwell on *Interpretation of Statutes*, 9th Ed., p. 55.
3. Colquhoun *v.* Brooks, (1889) 14 App. Cas. 493.
4. *In re* Evans, (1891) 1 Q. B. 144.

4. Obligation.—The word "includes" has an extending force[1] and is intended to be enumerative and not exhaustive. It does not limit the meaning of the term defined to the substance of the definition.[2] The term "obligation" has been used in this Act; by the Indian Legislature in its wider juristic sense covering duties arising either *ex contractu* or *ex delictu*.[3] In English law, on the other hand, the term is used in the restricted sense and covers only duties *ex contractu*.[4] An obligation is a tie of law by which we are so constrained that of necessity we must render something according to the laws of our State.[5]

The definition of the word "obligation" excludes moral, social or religious duties not enforceable at law. Obligation may be said to be a bond or tie which constrains a person to do or suffer something; it implies a right to another person to which it is co-related and it restricts the freedom of the obligee with reference to definite acts and forbearances; but in order that it may be enforced by a court it must be a legal obligation and not merely moral, social, or religious one.[6] It includes every duty enforceable by law so that when a legal duty is imposed on the person in respect to another that the other is invested with corresponding legal right.[7]

The definition of "obligation" in Sec. 2, Specific Relief Act, 1963, is sufficiently wide to cover obligations which arise under a statute.[8] The term "obligation" as popularly used is a mere equivalent of duty. All duties are conceived and spoken of as obligations, but every duty is not obligation in the legal sense. When it is imposed by the law upon persons, in general, instead of being a special burden imposed upon a particular individual by reason of some special relation in which he stands towards him to whom the duty is owing, it is not "obligation" in the strict legal sense. In other words, when the duty corresponds, not to a right *in personam* but to a right *in rem* it is not obligation, for example, when the duty imposed upon all men not to trespass upon the property of others, or not to publish libels, or not to commit perjury. The duty of a man not to appropriate his neighbour's horse is not obligation but *officium* for it corresponds to a right *in rem* and lies on all men equally; but his duty to pay his debt to his neighbour is an obligation, for it corresponds to a right *in personam*, having its source in a special relationship existing exclusively between these two persons.[9]

5. Doctrine of fundamental obligations.—Every contract contains certain basic obligations or fundamental duties. The nature of the basic obligations determine the very nature and character of the contract. When there occurs a breach of a contract, the party aggrieved comes out with the allegations that the other party has by his act or omission destroyed the component parts of the entire contract and can no longer rely on one or more of its component parts in the defence. The courts have therefore from time to time ruled that no exempting clause, however wide, in a contract may protect a party who has broken the basic duties created by the very nature and character of the contract. Judges have used a variety of languages to describe this overriding consideration, such as, fundamental terms, basic objections and the like. The doctrine

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1. Nasibun *v.* Preosunker Ghose, I. L. R. 8 Cal. 534 at p. 536.
2. E. *v.* Raman Jiyya, I.L.R. 2 Mad. 5; *see* also Mangal Das *v.* Jiwan Ram, I.L.R. 23 Bom. 673.
3. Austin.
4. Foster *v.* Wheeler, (1887) 36 Ch D. 695.
5. Just. Inst. B. III, T. XVII.
6. Bhudeb *v.* Kala Chand, 34 C. L. J. 315,
7. Ram Kissan *v.* Pooranmull, A. I. R. 1920 Cal. 239 at p. 240 : I. L. R. 47 Cal. 733 : 56 I. C. 571 : 31 C. L. J. 259.
8. Kishore Chand *v.* Budaun Electric Supply Co., A. I. R. 1944 All. 66 at p. 77.
9. Salmond and Williams on *Con*·· 2nd Ed., p. 2.

so evolved as a result of judicial pronouncements is appropriately called "the Doctrine of Fundamental Obligations". The primary source of "the Doctrine of Fundamental Obligation" is to be found in cases of carriage of goods by sea and sale of goods. In *Thorley* v. *Orchis S. S. Co. Ltd.*,[1] which was a case of a deviation from its appointed course by a ship-carrying goods by sea, Fletcher Moulton, J., at page 669 said : " The cases show that for a long series of years, the courts have held that a deviation is such a serious matter and changes the character of the contemplated voyage so essentially that a ship owner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract but something fundamentally different and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading". The sale of goods cases furnish another illustration of the nature and type of contracts attracting more frequently than not, the application of the "doctrine of fundamental obligations" by courts. In *Alexander* v. *Railway Excutive*,[2] the facts were these: The plaintiff was a stage performer. Together with an assistant *X* he had been on a Cornish tour and he now deposited in the Parcels Office at Lanceston Railway Station three steel trunks containing properties for what he called an "escape illusion". He paid *5d.* for each trunk, obtained for each a ticket and said he would later send instructions for their despatch. Within the next five weeks and before such instructions were sent, *X* pursuaded the parcels clerk by telling a series of lies to allow him to open the trunks and remove several articles. *X* was subsequently prosecuted for larceny and pleaded guilty. The plaintiff now sued the defendant for breach of contract and the defendant pleaded the following term, "Not liable for loss, misdelivery or damage, to any articles which exceed the value of £ 5 unless at the time of deposit the true value and nature thereof have been declared by the depositor 'and a charge paid'." There had been no such declaration or payment. Develin, J., who gave the judgment for the plaintiff in *Alexander* v. *Railway Executive*,[3] stated: "After all, most people nowadays know that railway companies have conditions subject to which they take articles into their cloak rooms. The plaintiff concedes that he knew that..... and I think that sufficient notice was given if he cared to enquire or to read for himself what those conditions are". But the term relied on by the defendants did not cover the facts of the case. The relevant word "misdelivery" was not apt to describe a case of deliberate delivery to the wrong person. Therefore they were held guilty of the "fundamental breach of contract", in allowing *X* to open the trunks and remove their contents. This is what Develin, J., at page 889 of the above report states: "The importance to be attached to unauthorized persons not being given access to articles deposited in a cloak room can hardly be over-emphasized. The view that the executive themselves take of it is shown by the specific provision in their contract that not even the depositor himself is entitled to have access to the articles. Still more must it be that no third party should be entitled to have access to them". The same learned Judge felt considerable difficulty in defining "fundamental breach of obligation" and therefore he attempted to describe it as "something which underlies the whole contract, so that if it is not complied with the performance becomes totally different from what the contract contemplated".[4] In *Sparling* v. *Bradshaw*,[5] the facts were that the defendant had dealt for many years

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1. (1907) K. B. 660.
2. (1951) 2 K. B. 882 : (1951) 2 All E. R. 442.
3. (1951) 2 K. B. 882 at p. 886.
4. Soneaton Hanscomb *v.* Sassoon Setty, (1953) 2 All E. R. 1471 at p. 1473.
5. (1956) 1 W. L. R. 461 : (1956) 2 All E. L. R. 121.

with the plaintiffs, who were warehousemen, he delivered to them for storage eight barrels of orange juice. A few days later he received from them a document acknowledging the receipt of the barrels & referring on its face two clauses printed on the back. One such clause exempted the plaintiff "from any loss or damage occasioned by the negligence, wrongful act or default of themselves or their servant". When ultimately the defendant came to collect the barrels they were found to be empty. The defendant having refused to pay the storage charges, the plaintiff sued him. The defendant put forward his counter-claims for negligence and the plaintiffs, in answer to his counter-claim, pleaded for exemption under the exempting clause. The defendant then attempted to argue that as the document containing it was sent to him only after the collusion of the contract, it was too late to affect his rights. The defendant admitted that in his previous dealings he used to receive similar documents, but he never bothered to read them, it was held that the defendant was bound by the document. In appeal the Court of Appeal stated and accepted the doctrine of fundamental obligation. Parker, L. J., who spoke for the Court of Appeal in the case thus observed: "I have seldom seen a wider clause and it is, I think, impossible to think of any circumstances in which loss might occur which are not covered, provided and provided always...that there has been no breach of a fundamental term akin to deviation". The Court of Appeal on facts thought that there had been no such radical breach but only a negligent way of performing the contract. The result would have been different had the warehouseman consumed or destroyed the goods or had sold or delivered them without authority to a third party. *Karsales* (*Harrow*) *Ltd.* v. *Wallis*[1] presents another striking illustration of the application by the courts of the "doctrine of fundamental obligation" to particular facts. In this case the defendant inspected a Buick car belonging to *X*. He found it in good order and agreed to take it if hire-purchase terms could be arranged. *X* therefore sold it to the plaintiff, who in turn sold it to a hire-purchase company. The defendant made a contract with the company and the contract contained a term that "no condition or warranty that the vehicle is road worthy, or as to its age, condition or fitness for any purpose is given by the owner or implied person". One night a car was left outside the defendant's premises, when next day he inspected it, it appeared to be the Buick car in question. But it was a mere shell, the cylinder head was off, all the valves were burnt, two of the pistons were broken and it was incapable of self-propulsion. The defendant refused to accept it or to pay the hire-purchase instalments. The hire-purchase company assigned their rights to the plaintiff, who sued for the instalments, and in reply to the defendant's plea as to the state of the car, relied on the exemption clause. The Court of Appeal held that the clause did not enable the plaintiffs to escape their basic duty to deliver the subject-matter of the contract; they, therefore, gave the judgment for the defendant. Denning, L.J., who delivered the judgment of the Court of Appeal observed:"Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects .....The principle is sometimes said to be that the party cannot rely on exempting clause when he delivers something 'different in kind' from that contracted for or has broken a 'fundamental term' or a fundamental contractual obligation. However, I think that these are all comprehended by the general principle that a breach which goes to the root of the contract disentitled the party from relying on the exempting clause." The doctrine of fundamental obligation also received approval from the judicial

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1. (1956) 2 All E. R. 868 at p. 868 : (1956) 1 W. R. 956

Committee of the Privy Council in *Soe Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.*[1] In this case the Cycle Company contracted with ship-owner to carry goods from London to Singapore. By their contract the ship-owner undertook to deliver the goods only on the production of the bill of lading and only to the person entitled under it. In fact, they delivered the goods without production of the bill of lading and to a person not entitled to receive them. They thus *prima facie* broke the contract and committed an act of tort of conversion. They pleaded an exemption clause which could be hardly more comprehensive. But the Judicial Committee did not permit them to escape under the cover of the exemption clause. They therefore ruled, that however widely drafted the exemption clause, it could be of no avail against a fundamental breach of contract. The ship-owner had done an act which ran counter to the main object and "intent of the contract" and which evinced "a deliberate disregard of their bounden obligations". From the resume of the authorities referred to above, it will be seen that the "doctrine of fundamental obligations" received approval and support not only from the jurists and writers of eminence but also acceptance from the Judges and courts alike. It has, therefore, come to stay and is being frequently used by them to prevent a person from taking shelter behind an exemption clause, when he by his own conduct has destroyed the very contract into which the exemption clause has been inserted.

"*Will*" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.[2]

"*Codicil*" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will.[3]

6. Destination or devolution.—The distinction between destination and devolution seems to be that the latter term implies succession to or respresentation of another, which the former does not.[4] In ordinary legal phraseology destination means the purpose to which it is intended a fund shall be applied, and devolution the passing of an estate from one person to another by operation of law.[5]

7. Settlement.—In view of the fact that a will or codicil is excluded from the definition of the term devolution, it follows that a "settlement" is a document transferring property *inter vivos*. The transfer is in favour of two or more persons who take successive and not concurrent estates and the transfer takes effect in the lifetime of the transferor.[6]

The question as to whether a particular instrument is a deed of gift or will or settlement, depends not only upon the form of the document, phraseology employed, words used, but upon the actual intention of the parties, gathered from surrounding circumstances, the condition precedent and subsequent to the execution of the document. Various tests have been laid down by courts

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1. (1959) 3 All E. R. 182 : (1959) 3 W. L. R. 214.
2. Succession Act, XXXIX of 1925, Sec. 2 (*h*).
3. *Ibid*, Sec. 2 (*b*)
4. Collet, p. 57; *Law of Specific Relief in India* by Banerji, *Tagore Law Lectures*, App. C, p. 30.
5. 14 Cye, 231, 285; *Law of Specific Relief in India*, by Banerji, *Tagore Law Lectures*, p. 24.
6. *Law of Specific Relief in India* by Banerji, *Tagore Law Lectures*, App,C , p. 30.

for determining as to whether the instrument in question is deed of gift or a will. The name by which the instrument has been named, the fact of registration, the reservation of a life estate, the reservation of the power of revocation and the use of present or future tense and other surrounding factors are all circumstances which are to be considered in coming to the conclusion as to whether the document in question is will or not. These are all the indications which help in determining the true nature of the document and the true intention of the parties. The fact that the executant of the instrument has merely reserved the life estate to himself does not necessarily indicate that the document is a testamentary instrument and that therefore the agreement is revocable. Nor does the fact that the executant of the instrument after a few days of the execution revoked it, necessarily point to the fact that the executor intended to make a will and not a deed of settlement. In construing an instrument conduct of the parties subsequent to the date of the execution would not be taken into consideration, where there is no ambiguity, uncertainty or vagueness about the terms and expressions used in the document, where in a case a document was named as a deed of settlement, and was registered as such, the donor conferred immediate title on the donee through that instrument, to the property, subject to a condition that the donor will enjoy the property during his lifetime but would not be competent to make sale or gift or mortgage of the same, and the donor has also not reserved to himself the right of revocation, it was held that the fact that the donor had by means of the instrument deprived himself of all the rights of absolute ownership, i.e. sale, gift or mortgage had not reserved to himself the right of revocation, showed the clear and unequivocal intention of the party to transfer the interest in the property and not to postpone it for future subject to the enjoyment of the property during his lifetime, that the document clearly spoke that from the date at which it was written and not from a future date when the donor died, it was to take effect. It was immaterial that the immediate possession of the property remained with the donor, the document clearly purported to transfer the property immediately to the donee, under the circumstances the instrument was a deed of settlement and not a will.[1]

8. Executed and executory settlements.—The settlement is said to be executed where the property is disposed of by it, and executory when the property is agreed to be disposed of. It may or may not be supported by consideration. If it is supported by consideration (e.g. a marriage settlement) it stands on the same footing as a contract. In case it is not supported by consideration it is called a voluntary settlement and a Court of Equity will not enforce it unless the same is in favour of a charity or the property is transferred to a trustee.[2]

9. Trust and trustee—The term "trust" had been defined by the Indian Trusts Act, in the following words:

> "A trust is an obligation annexed to the ownership of the property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. The person who accepts the confidence is the trustee. Under the Specific Relief Act, 1963, Sec. 2 (*c*) defines the term 'trust' as having the meaning of the term as given in Sec. 3 of the Indian Trusts Act, 1882, and also includes an obligation in the nature of a trust within the meaning of that Act. In Sec. 2 (*d*) trustee had been defined as a person including one holding the property in trust."

1. **Mallappa** *v.* **Kogara Venkalappa, 1958 Andh. L. T. 570.**
2. Ellison *v.* Ellison, 1 W. & T. 273.

10. Beneficiary.—The person for whose benefit the trust is created is called the beneficiary.[1]

Under Sec. 3, Indian Trusts Act, a trust is defined as —

> "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner."

The person accepting the confidence is called the trustee. Reading the two parts together, a trustee, shortly put, is a person who accepts a confidence which gives rise to an obligation annexed to the ownership of property. A trust is thus annexed to the ownership of property. It may be an express trust by reason of the act and intention of the parties, or it may arise by operation of law irrespective of the declared or supposed wishes of the parties, in which case it is called a constructive trust, corresponding to what is called an obligation in the nature of a trust under Chapter IX, Trusts Act. It is this ownership, however, which gives control to the trustee over the trust property.

Under the English law, it is called the legal estate which a trustee usually has, unless the property that is settled on trust is itself an equitable interest, e.g. an equity of redemption in a property mortgaged to a third party. In India, there is no distinction between legal and equitable estates in the sense in which it is understood in England, as was pointed out by the Privy Council in *Chhatra Kumari Devi* v. *Mohan Bikram Shah.*[2] But it is necessary that the trust property should effectually vest in the trustee property so called, for he holds the legal ownership; and under Sec. 12, Trusts Act, it is incumbent upon him to obtain, where necessary, a transfer of the trust property to himself. As a general rule, a transfer of property to the trustee is one of the conditions necessary for a valid trust.

A trustee in the legal sense of the word is one in whom the trust property is absolutely vested.[3] It was also pointed out in an earlier Privy Council case, *Ramanathan* v. *Murugappa,*[4] that the manager of properties attached to a temple is in the position of a trustee. It does not say that he is a trustee in the restricted and technical sense known to the law. The use, therefore, of the word "trustee" cannot make the defendants trustees in the legal sense, unless they can show that they have got the legal ownership of the immoveable properties. Without a transfer, their title is inchoate. A trust is not complete until the trust property is vested in trustees for the benefit of the *cestui que trust*. Management of property does not necessarily make the manager a trustee in law. Trustees are managers because they have to control and manage the trust property, but all managers are not necessarily trustees, though they may be answerable in the general sense of the word for maladministration. For instance an administration of the estate of an intestate has also got to manage it, but he is not a trustee within the meaning of Sec. 3, Trusts Act.[5]

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1. Section 3, Indian Trusts Act, 1882.
2. 58 I. A. 279 at p. 297: A. I. R. 1931 P. C. 196 : 133 I. C. 705.
3. *See* Peary Mohan Mukerji *v.* Manohar Mukherji, A. I. R. 1922 P. C. 235 : 62 I. C. 76 : 48 I. A. 258: I. L. R. 48 Cal. 1019 (P. C.) in which it was pointed out by Lord Buckmaster at page 265 that the word "trustee" is a compendious word which covers a very large number of relationships involving different obligations: *see* also Vidya Varuthi Thirtha *v.* Balusami Ayyar, 48 I. A. 302 at p. 309: I.L.R. 44 Mad. 831 (P. C.) : A. I. R. 1922 P. C. 123: 65 I. C. 161.
4. I. L. R. 29 Mad. 283 : 33 I. A. 139 : 8 Bom. L. R. 498.
5. Ardeshir *v.* Manchershaw, (1909) 12 Bom. L. R. 53 at p. 70 : 5 I. C. 633; Shivramdas *v.* B. V. Nerukar, A. I. R. 1937 Bom. 374 at pp. 376 to 379 : I.L.R. (1937) Bom. 843.

A trustee in the legal sense of the word is one in whom the trust property is absolutely vested. The word trustee is compendious word which covers a very large number of relationships involving different obligations.[1] The manager of properties attached to a temple is in the position of a trustee but he is not a trustee in the restricted and technical sense known to the law.[2] Without the title the trust is inchoate. A trust is not complete until the trust property is vested in trustee for the benefit of the *cestui que trust*. Management of the property does not make the manager a trustee in law. Trustees are managers because they have to control and manage the trust property but all managers are not necessarily trustees, though they may be answerable in the general sense of the word for maladministration. For instance, an administrator of the estate of an intestate has also got to manage it; but he is not a trustee within the meaning of Sec. 3, Trusts Act.[3]

11. Benificiaries and policy-holders.—Policy-holders of an insurance company are not the beneficiaries. Their right to intervene arises only if the company wastes the property. The construction of a building is not waste. It is a substantial investment. In *C. Durai Swami Iyengar* v. *United India Life Assurance Co. Ltd., Madras*,[4] Ram Swami Gounder, J., while dealing with trust *vis-a-vis* insurance companies quotes the following passage from Macgilliv-ray's *Insurance Law*, 3rd Ed., p. 690, with approval:

> "It may be accepted on the authority of the above case that an insu-rance company cannot now be deemed to be a trustee of the policy monies even where the form of the policy is a charge upon the funds of the company without any direct promise to pay. An insurance company is in the position of an ordinary debtor and must be treated accordingly."

He then observes:

> "It, therefore, seems to us to be clear on the authorities that apart from the trust deed, it is not open to the policy-holders to take advantage of anything contained in the articles of association of the company as giving them any beneficial interest or other claim to the trust fund nor is it open to them to contend that the company is in the position of a trustee so far as the fund is concerned."

12. Kinds of trusts.—A trust may be a public or a private trust. A private trust may owe its existence to an act of a party or may arise by operation of law. Trusts arising from the act of a party may be classified under two sub-heads, namely, express and implied trusts. Thus a private trust may be express or implied or constructive trust.

13. Express trust.—An express trust is one which is clearly expressed by the author thereof, whether verbally or by writing,[5] in other words, it is created by the actual terms of some instrument or oral declaration.[6] An express trust may be either executed or executory. It is an executed trust when no further act is needed to constitute it; or in other words when the grantor has expressed for himself the limitations of the interests he grants. In case of executory trusts some further act is needed by the author of the trust or the trustees to give effect to it. Such trusts generally arise out of wills or marriage settlements.

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1. *In re* Sabnis, Gorrgaonker & Senjit Shivram Das *v.* Nerurkar, A. I. R. 1937 Bom. 374 at p. 378 : I. L. R. (1937) Bom. 843 : 171 I. C. 49 : 39 Bom. L. R. 639.
2. *Ibid.*
3. *Ibid.*
4. A. I. R. 1956 Mad. 316 at p. 320 (D. B.).
5. Snell's *Equity*.
6. Sadasook *v.* Ram Chandra, I. L. R. 17 CaL. 620.

14. Implied trust.—An implied trust is one which is founded on an unexpressed but presumed intention of the party creating it. When a trust is implied in favour of the party creating it, it is called a resulting trust. There are two varieties of resulting trusts: (*a*) where a purchase is made *benami* the *benamidar* becomes a trustee for the person who has advanced the purchase money;[1] (*b*) when there is an unexhausted residue of property left after execution of trust or by reason of its failure.[2] It must be remembered that in Indian law implied trusts are not known as such but have been described as obligations in the nature of trusts, and have been dealt with under Chapter IX of the Trusts Act, 1882.

15. Constructive trust.—A constructive trust is one which the Court elicits by a construction put upon certain acts of the parties. There is no reference to any intention of the parties whether express or presumed, for the matter of that, the parties may not have intended any trust. But a court of equity will raise such a trust whenever a person clothed with a fiduciary character gains some personal advantage by availing himself of the situation as such. The party may have acted fraudulently or may have gained an unfair advantage or there may be only an equitable lien.[3] A constructive or implied trust arises when property not impressed for the time being with an express trust, is acquired or held by a person in the circumstances which render it obligatory upon him to hold it for the benefit of some other person as beneficiary.[4] Constructive trusts are also dealt with under Chapter IX, Trusts Act, 1882, as obligations in the nature of trusts.

Precatory trust is one created by precatory words such as expressions of confidence, requests or desire that the property will or shall be applied for the benefit of certain named individuals.[5] The authorities are divided as to whether they are to be classed as express or implied trusts.[6]

16. Words defined in contract.—According to Cl. (*e*) of this section words occurring in this Act which are defined in the Indian Contract Act, 1872, are to have meanings respectively assigned to them in that Act.

The following words which are defined in the Contract Act are also employed in the Specific Relief Act, 1877:

Words	*Contract Act*
Agent.[7]	Secs. 182, 238
Agreement.[8]	Sec. 2 (*e*)

1. *See* Sec. 82, Trusts Act ; Ameeroonissa *v.* Ashrufoonissa, 14 M. I. A. 433.
2. *See* Sec. 83, Trusts Act ; Lalubhai *v.* Mankunarbai, I. L. R. 2 Bom. 388.
3. *Law of Specific Relief in India* by S. C. Banerji, *Tagore Law Lectures*, App. C; Agnies, *Trusts*, p 107; Lewing, *Trusts*, p. 196; Story's *Equity*, Secs. 186-9, Sec. 258.
4. Sora *v.* Ashwel, (1893) 2 Q. B. 393 at p. 396.
5. *See* Pollock and Mulla's *Indian Specific Relief Act*, 7th Ed., p. 648.
6. *Law of Specific Relief in India* by S. C. Banerji, *Tagore Law Lectures*, App. C, p. 27.
7. "Agent" and "principal" defined. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented is called the "principal" (Sec. 182, Contract Act).
8. "Agreement" defined. Every promise and every set of promises, forming the consideration for each other, is an agreement [Sec. 2 (*e*), Contract Act].

Contract Words

Sec. (2) Consideration.

Sec. (2) Direct.

Sec. 17 Fraud.

Sec. 18 Misrepresentation.

Mistake.

Sec. 19 Principal.

Sec. 57 (now Sec. 187 (2)

56, 58, Sale of Goods Act, 1930 (Act IV of 1930)

[illegible] the Indian Contract Act, 1872 (9 of 1872) and the Sale of Goods Act, 1930 (3 of 1930), [illegible] the provisions of the said Acts shall prevail. This [illegible] Indian Contract Act, 1872 (9 of 1872) and the Sale of Goods Act, 1930 (3 of 1930), [illegible] the provisions of the said Acts shall prevail. This [illegible] Indian Contract Act, 1872 (9 of 1872) and the Sale of Goods Act, 1930 (3 of 1930), [illegible] the provisions of the said Acts shall prevail. This [illegible]

Words	*Contract Act*
Void.[1]	Sec. 2 (*g*), (*j*), Secs- 20, 23, 30, 39, 65
Voidable.	Sec. 2 (1), Secs. 19, 19-A, 21, Sec. 35 (*a*), Secs. 39, 64, 101 Ex. 3 (now Sec. 29, Sale of Goods Act)

17. Consideration.—The word "consideration" has been defined in Sec. 2 (*d*) of the Indian Contract Act. It lays down that where at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain for doing something, such act or abstinence, or promise is called "consideration" for the promise. Sir Fredrick Pollock has summarized the meaning of "consideration" in the following words: "An act or forbearance of one party or the promise thereof is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."[2] This approach of consideration as the price of the promise bought and sold is also stressed by Williston on *Contracts*.[3] The doctrine of consideration in the Law of Contract is neither artificial nor irrational. It is important link in the law of bargain.

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property of the value of the hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. *See* Sec. 54, Transfer of Property Act.

Contract for sale. A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charges on such property (Sec. 54, Transfer of Property Act). Sale and agreement to sell. Section 4 of the Sale of Goods Act, 1930, defines sale and agreement to sell as follows :

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale, when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

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1. *Void.* An agreement not enforceable by law is said to be void (Sec. 2 (*g*)].
2. Pollock on *Contracts*, 13th Ed., p. 133; Dunlop *v.* Selfridge, (1915) A. C. 847 at p. 885.
3. Paragraph 100, Williston's *Treatise on the Law of Contract*, 1938 Ed.; *American Restatement of Contract*, para. 75; Salmond and Williams, *Law of Contract*, p. 101 and 15 Mad. Law. Rev., p. 1, *per* Denning, L. J.

Consideration has been classified into two categories: Executory and Executed. Consideration is called Executory when the defendant promises in return for a counter-promise from the plaintiff. Executed, when it is made in return for the performance of an act. An engagement to marry and an agreement for the sale of goods for future delivery on credits are example of the former. At the time when the agreement is made, nothing has yet been done to fulful the mutual promises of which the bargain is composed. The whole transaction remains in future. Of the latter the best example is the offer of a reward for an act. If *A* offers £5 to any one who shall return his lost dog, the return of the lost dog by *B* is at once the acceptance of the offer and the performance of the act constituting the required consideration. *B* has earned the reward by his services only and only the offerer' spromises remain outstanding. But whether the plaintiff relies upon an executory or an executed consideration he must be able to prove that his promise or act together with the defendant's promise constitutes one single transaction. If the defendant makes a further promise subsequent to and independent of the transaction, it must be regarded as a mere expression of gratitude for past favours or as a designated gift, and no contract will arise. It is irrelevant that he may have been induced to give the new promise because of the previous bargain. In such a case the promise is declared in traditional language, to be made upon past consideration or more accurately, to be made without consideration at all. Two illustrations may be offered, one from a classical and one from a modern case. In *Roscorla* v. *Thomas*,[1] the declaration stated that "in consideration that the plaintiff at the request of the defendant had bought of the defendant a certain horse at and for a certain price, the defendant promised the plaintiff that the said horse was sound and free from vice. The plaintiff sued for breach of this promise. The Court held (1) that the fact of the sale did not itself imply a warranty that the horse was sound and free from vice, and (2) that the express promise was made after the sale was over and was unsupported by fresh consideration. The plaintiff could show nothing but a 'past' consideration and must fail."

In *Re M. C. Ardle*,[2] a number of children by their father's will were entitled to a house after their mother's death. During the mother's life, one of the children and his wife lived with her in the house. The wife made various improvements to the house, and at a later date all the children signed a document addressed to her, stating that, "in consideration of your carrying out certain alterations and improvements to the property, wehere by agree that the executors shall repay to you from the estate, when distributed, the sum of £488 in settlement of the amount spent on such improvements." The Court of Appeal held that all the work on the house had in fact been completed before the document was signed, this was a case of past consideration and that the document could not be supported as a binding contract.[3] In *Re Casey's Patents, Stewarts* v. *Casey*[4], the facts were these: *A* and *B*, the joint owners of certain patent rights, wrote to *C* as follows: "In consideration of your services as the practical manager in working both patents, we hereby agree to give you one-third share of the patents." *C* sued upon this agreement. On behalf of the defendant it was argued that the promise was made only in return for *C*'s past services as manager and that there was therefore no consideration to support. Bowen, L. J., refused to accept this argument and said: "The fact of a past service raises an implication that at the time it wasr endered it was to be paid for, and, if it was a service which was to be paid for, when you get

1. (1842) 3 Q. B. 234.
2. (1951) Ch. 669: (1951) 1 All E. R. 905.
3. *The Law of Contract*, 5th Ed., by Cheshire and Fifoot, pp. 62 and 63.
4. (1892) 1 Ch. 104.

in the subsequent document, a promise to pay that promise may be treated as an admission which evidences, or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which service was originally rendered so that here for past services there is ample justification for the promise to give the third share." From the resume of the authorities referred to above it will be seen how the courts in England have been attempting to resolve difficulties arising out of the distinction between executed and past consideration which could be easily stated in the abstract but difficult to apply in actual practice.

Consideration may either be "sufficient" or "insufficient", "adequate" or "inadequate". In the popular parlance, "sufficient" and "adequate", "insufficient" and "inadequate" are regarded synonymous and the Judges usually employ the terminology with a view to express the validity or otherwise of particular acts or promises. Whether a consideration is adequate or not is for the courts to enquire and judge and it is not possible to lay down a precise and infallible test, whereby to judge the sufficiency or otherwise of consideration. As a matter of fact it is difficult to measure and weigh the worth and value of the defendant's promise and of the act of promise given by the plaintiff in exchange of it. Still the Judges have adopted extrinsic tests to determine whether the consideration for an act or promise is in consonance with the actual expectations of the parties. Chief Justice Holt in *Thorp* v. *Thorp*[1] says: "Where the doing a thing will be a good consideration a promise to do that thing will be so too". Leake in his book on *Contracts* (1st Ed., p. 314) says: "It may be observed that whatever matter, if executed is sufficient to form a good consideration if promised, is sufficient to form a good executory consideration." Fredrick Pollock on *Contracts*[2] has declared that in certain cases, a promise may while an actual performance may not afford a consideration to support a counter-promise. Williston on *Contracts* takes a middle course. According to him executed consideration consists of "a detriment incurred by the promisee or a benefit received by the promisor at the request of promisor". Executory consideration consists of "mutual promises, in each of which the promisor undertakes some act or forbearance that will be, or apparently may be detrimental to the promisor or beneficial to the promisee".[3]

The courts on their part without indulging in vague generalizations, have been adopting and applying various individual rules to a particular set of facts and circumstances in individual cases. The rules may be classified under two heads : (*a*) Those rules which forbid the courts to upset a bargain because the act or promise supplied by the plaintiff is an inadequate recompense for the defendant's promisee. (*b*) Those rules which expressly declare that certain acts or promises do not constitute consideration.[4]

New	Old
3. Savings—Except as otherwise provided herein nothing in this Act shall be deemed—	**4. Savings.**—Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—
(*a*) to deprive any person on any right to relief, other	(*b*) to deprive any person of any right to relief, other

1. (1701) 12 Mod. Rep. 455.
2. 13th Ed., pp. 147-50.
3. Williamson on *Contract*, pp. 102, 103-F.
4. For fuller discussion, *see* pp. 69 to 98 of the *Law of Contract* by Cheshire and Fifoot, 5th Ed.

New	Old
than specific performance, which he may have under any contract; or	than specific performance, which he may have under any contract; or
(*b*) to affect the operation of the Indian Registration Act, 1908 (16 of 1908), on documents.	(*c*) to affect the operation of the Indian Registration Act XVI of 1908, on documents.

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1. Legislative changes.—Old Sec. 4 has been renumbered as Sec. 3 under the new Act. The words "where it is herein otherwise expressly enacted" have been substituted by the words "as otherwise provided therein". Clause (*a*) in the old Sec. 4 has been omitted and Cls. (*b*) and (*c*) have been re-numbered as Cls. (*a*) and (*b*) under the new section. In the present sub-section (*b*) of Sec. 3 of the present Act the figures "1908" have been added after the words "Indian Registration Act".

2. Reasons for the change.—Clause (*a*) of Sec. 4 of the Act of 1887 has been omitted as unnecessary. According to the definition clause, words occurring in this Act, which are defined in the Indian Contract Act, 1872, are to have the meanings respectively assigned to them in that Act. Under Sec. 2 (*h*) of the Contract Act, only "an agreement enforceable by law is a contract". A mere agreement is not enforceable in law. There is, therefore, no question of any specific relief being granted in respect of a mere agreement which is not a contract.[1]

3. Scope of the section.—In this section it has been stated that the provisions of the Specific Relief Act, 1963, subject to the express provision of law, to the contrary, would not take away the right of a person to reliefs, other than the relief of specific performance of a contract, which he might be entitled to under the contract. It is also provided that the operation of the Indian Registration Act, 1908, would not be affected by the provisions of the Specific Relief Act, so far as the documents are concerned. Sub-sections (*a*) and (*b*) of this section reproduce the language of sub-sections (*b*) and (*c*) of the repealed Sec. 4 of the old Act. This section expressly limits and narrows down the scope and operation of other provisions of the Specific Relief Act and pens them down and their legal effects to specific reliefs and other allied matters.

4. Relief other than specific performance.—Clause (a).—Section 73 of the Contract Act provides the usual remedy of the party aggrieved in a case of breach of the contract, that is compensation for loss or damage caused by breach of contract. It runs as follows :

> "*Section 73. Compensation for loss or damage caused by breach of contract.*—When a contract has been broken, the party who suffers by

1. Law Commission of India, Ninth Report on Specific Relief Act, 1877, pp. 4-5

such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirec loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person has contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations—(*a*) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price, to be paid on delivery. *A* breaks his promise. B is entitled to receive from *A*, by way of compensation, the sum, if any by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

* * * *"

The Specific Relief Act provides an additional remedy of specific performance without in any way affecting the general remedy provided by Sec. 73, Contract Act. Consequently present Sec. 21 of the Specific Relief Act, 1963 (corresponding to Sec. 19 of the old Act) enacts that "In a suit for specific performance of a contract the plaintiff may also claim compensation for its breach either in addition to, or in substitution of such performance". The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not deprive the plaintiff of his right to sue for other reliefs, which he may be entitled to, by reason of such breach of the contract (Sec. 24, Specific Relief Act, 1963.)

5. Contract.—Under Sec. 2 (*h*) of the Contract Act only "an agreement enforceable by law is a contract". A mere agreement is not enforceable in law. There is, therefore, no question of any specific relief being granted in respect of a mere agreement which is not a contract.

6. Agreement and contract.—Every promise and every set of promises, forming the consideration for each other is an agreement.[1] An agreement enforceable by law is a contract.[2] All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void under the Contract Act.[3] The subject as to legality or otherwise of the contract is dealt with by Secs. 11 to 30 of the Contract Act. Thus while every contract is an agreement, every agreement is not a contract. The object of the present section is to exclude agreements which are not enforceable by law, e. g.

Object of Cl. (*a*).

Kinds of agreement which are not enforceable at law.

1. Contract Act, Sec. 2 (*e*).
2. Contract Act, Sec. 2 (*h*).
3. Contract Act, Sec. 10.

(1) agreements which are void.[1]
(2) agreements which do not create a jural relation and give rise to obligations other than jural, such as, moral, religious or social.[2]

(3) agreements which are incomplete by reason, e. g. of the terms not having been finally settled and accepted or the contract having been left contingent on the sanction of a third party which is never obtained.[3]

7. Contract by a minor or by his guardian on his behalf.—A contract by a minor is void and not merely voidable,[4] and cannot therefore be enforced specifically. It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case the contract can be enforced specifically by or against the minor if the contract is one which a guardian is competent to make and is for the benefit of the minor. But if either of these conditions is wanting the contract is not capable of specific enforcement.[5] A contract between a certificated guardian and a person for the sale of a property of the minor of that guardian is contingent upon the permission of the Court, but when the contingency happens then by virtue of the sanction the contract becomes complete and after the sanction is accorded it is not necessary for the certificated guardian to solemnly enter upon another contract with the proposed purchaser.[6]

8. Contract to be specifically enforceable must be mutual.—A contract to be specifically enforceable must be mutual, which means that in the time of the contract it must be enforceable by either of the parties against the other.[7] Thus if on account of certain circumstances existing at the time of the contract, as for example personal incapacity of one of the parties or the nature of the contract itself it was incapable in law of being enforced against one party, that party should not be given the right to enforce it against the other. But a contract is not wanting in mutuality merely because it gives as part of the contract itself an option to one of the parties to refuse to be bound by it if he so chooses.[8] During the minority of the plaintiff certain property belonging to his adoptive father was sold by his natural father as his guardian to the defendant. The sale-deed provided that if the defendant or his heir were to sell the property they should sell it to the plaintiff for the amount for which it was originally sold and also for such price as may be determined by arbitrators in respect of any building that may thereafter be constructed. The

1. For void contracts, *see* Secs. 24 to 30, Contract Act.
2. Collet, 107 ; *see* also Bhudeb *v.* Kale Chand, 34 C. L. J. 315.
3. Koylash *v.* Taring, I.L.R.10 Cal. 588; Narain *v.* Aukhoy, I. L. R. 12 Cal. 152; *see* also ILR 46 Cal. 771 : 87 P. W. R. 1913 : 18 I. C. 911 : 67 I. C. 433; Simon Reuben *v.* Haji Shaikh Mahomed Shustary, A. I. R. 1922 Bom. 404 : 50 I. C. 403 : 21 Bom. L. R. 302; 11 C. W. N. 946 (P. C.) : 65 I. C. 594; 23 C. W. N. 563; 169 P. W. R. 1913 : 20 I. C. 282 : ILR3 Pat. 968; Rudra Das Chakravarti *v.* Kamakhya Narayn Singh, Ismail Khan Mir Azam Khan *v.* Officil Receiver, A. I. R. 1925 Pat, 259; Ismail Khan Mir Azam Khan *v.* Official Receiver, I.L.R.33 Cal. 1065 : A. I. R. 1928 Sind 63 : 22 S. L. R. 396 : 20 C. W. N. 929 : 23 C. L. J. 606.
4. Mohri Bibi *v.* Dharmodas Ghose, I. L. R. 30 Cal. 539 (P. C.) : L. R. 30 I. A. 114.
5. Babu Ram *v.* Saidunnissa, I. L. R. 35 All. 499 : 20 I. C. 916; Chhital Mal *v.* Jagan Nath, I. L. R. 29 All. 213; Etwaria *v.* Chandra Nath, 10 C. W. N. 763.
6. Gobardhan Lal *v.* Sheonarayan Sahu, A. I. R. 1929 Pat. 202 at p. 204 : I.L.R. 8 Pat. 226 : 117 I. C. 161 :
7. Zebunnissa Begum *v.* Mrs. Danagher, A. I. R. 1936 Mad. 564 at p. 567 : I. L. R.59 Mad. 942 : 163I. C. 384 : 43 L. W. 592 : 1936 M. W. N. 379 : 70 M. L. J. 477; Debendra Nath *v.* Lalit Krishna, 42 C. W. N. 1090.
8. Debendra Nath *v.* Lalit Krishna, *supra.*

defendant in violation of the contract sold the land to another : *held* that the contract in question was void for want of mutuality and was therefore unenforceable at the instance of either party. It is not within the competence of a manager of a minor's estate or within the competence of a guardian or a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property; and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract.[1]

9. Voidable agreements are not excluded from the operation of the Act.—This clause hits the void agreement absolutely but not the voidable agreements which being enforceable at the option of one or more of the parties thereto are contracts in respect of which specific performance can be claimed.[2] It is competent to a person emerging from a state of disability to take up and carry on a transaction commenced while he was under disability in such a way as to bind himself as to the whole. He may be bound by a contract of which the terms are to be ascertained by what passed whilst he was disabled from contracting.[3]

10. Unilateral assent in contract.[4]—"Every contract is a kind of agreement; that it necessarily involves and requires the consent of both of the contracting parties; that it is necessarily based on concurrence of their two minds in accepting the terms of the contract as determining their mutual rights and obligations. Nevertheless there is no logical reason why the declared will of only the party to be detrimentally affected by any legal efficacy allowed to that will should not be equally as effective here as it is in the cases of conveyance, grant and surrender. And, as in the case of other acts in the law in which unilateral assent of itself is operative the will must be declared in the form of a deed. Thus in *Hall* v. *Palmer*,[5] a man executed a bond conditioned for the payment of an annuity after his death to a woman with whom he had cohabited. After his death the bond was found in the possession of his solicitor. It was held that the bond created a legal obligation in favour of the woman on whose behalf it was made, and was enforceable by her against the executor of him who made it, although it had not been delivered to her in his lifetime and there was no evidence that she had then any knowlege of its existence. So in *Fletcher* v. *Fletcher*,[6] the father of two illegitimate children executed a voluntary bond whereby he covenanted with trustees that his executors would pay those trustees the sum of £60,000 within twelve months after his death on trust for those children. He retained the deed in his own possession, and its existence was not known either to the trustees or to his children in his lifetime. It was held, nevertheless, that the deed constituted a good contract between him and the trustees, and that they were entitled to recover the stipulated sum from the executors of his estate.[7]

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1. Venkatachalam Pillai *v.* Sethuram Rao, A. I. R. 1933 Mad. 322 at p. 324 : I. L. R. 56 Mad. 433 : 1939 M. W. N. 315 (39 Cal. 232 foll).
2. Gregson *v.* Udoy, I. L. R. 17 Cal. 223 (P. C.) : 16 I. A. 221.
3. *Ibid.*
4. Salmond and Williams on *Contracts*, 1945 Ed., p. 16.
5. (1844) 3 Hare 532 : 67 E. R. 491.
6. (1844) 4 Hare 67 : 67 E. R. 564.
7. *See* also Xenos *v.* Wickham, (1867) L. R. 2 H. L. 296; Doe d Garnons *v.* Knight, (1826) 5 B. & C. 671 : 108 E. R. 350; *cf. Re* Pryce, (1917) 1 Ch. 234; *Re* Kay's Settlement, (1939) Ch. 329.

11. Effect of the operation of the Indian Registration Act—Sub-section (b).—The relevant provisions of the Registration Act are Secs. 17 and 49.

Section 17 of the Indian Registration Act reads as under :

"17. (1) The following documents shall be registered, if the property to which they relate is situated in a district in which and if they have been executed on or after the date of which Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely—

(*a*) instruments of gift of immoveable property;

(*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immoveable property;

(*c*) non-testamentary instruments which acknowledges the receipt of payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

(*d*) leases of immoveable property from year to year for any term exceeding one year or reserving a yearly rent; and

(*e*) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property:

Provided that the Provincial Government may, by order published in the official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(2) Nothing in Cls. (*b*) and (*e*) of sub-section (1) applies to—

(*i*) any composition deed; or

(*ii*) any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consists in whole or in part of immoveable property; or

(*iii*) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(*iv*) any endorsement upon or transfer of any debenture issued by any such company; or

(*v*) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred and upwards to or in immoveable property but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(*vi*) any decree or order of a court except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceeding; or

(*vii*) any grant of immoveable property by the Crown; or

(*viii*) any instrument of partition made by a Revenue Officer; or

(*ix*) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(*x*) any order granting a loan under the Agriculturists Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

(*xi*) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(*xii*) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Officer.

Explanation.—A document purporting or operating to effect a contract for the sale of immoveable property shall not be deemed to require or ever to have required registration by reason only if the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

(3) Authorities to adopt a son, executed after the first day of January, 1872 and not conferred by a will shall also be registered."

Section 49 of the Indian Registration Act runs as follows :

"49. No document required by Sec. 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

(*a*) affect any immoveable property comprised therein, or

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any ransaction affecting such property or conferring such power, unless it thas been registered :

Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part-performance of a contract for the purpose of Sec. 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

The former sets out the documents of which the registration is compulsory while the latter provides the penalty for non-registration by enacting that an unregistered document of which registration is compulsory cannot affect any immoveable property comprised therein or be received in evidence of any transaction affecting such property. The object of this clause is to prevent any relief being given in a case of specific performance which will have the effect of nullifying the provisions of Secs. 17 and 49 of the Registration Act. But then an unregistered document though inadmissible in evidence as creating an interest in immoveable property or as evidence of the transaction concerning such property is admissible for the purpose of obtaining specific performance of the agreement. Whatever may have been the state of law previously the matter has been set at rest by the enactment of proviso to Sec. 49, Registration Act, 1908, by Act XXI of 1929. The said proviso runs as follows :

> "Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (now 1963) or as evidence of part-performance of contract for the purposes of Sec. 53-A of the Transfer of Property Act, 1882, or as the evidence of any collateral transaction not required to be effected by registered document."

New	Old
4. Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws.—Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law.	7. **Relief not granted to enforce penal law.**—Specific relief cannot be granted for the mere purpose of enforcing a penal law.

SYNOPSIS

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1. Legislative changes.—This section corresponds to the old Sec. 7. The sectional heading as well as the body of the section have been entirely changed and substituted. In the sectional heading the words "Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws" have been substituted for the words "Relief not granted to enforce penol" law", occurring in sectional heading of Sec. 7 of the repealed Act.

The language of the repealed Sec. 7 has been deleted and in its place the present language of the new Sec. 4 has been inserted, with the result that while formerly Sec. 7 of the repealed Act was negative in its terms the present Sec. 4 is positive and prohibitive in its effect. The present section covers not only the cases of the enforcement of individual civil rights but also prohibits and excludes the grant of specific reliefs for the mere enforcement of penal laws.

2. Object of the section.—The object of granting specific reliefs under this Act is that the individual civil rights of an individual be enforced. Its purpose is not the mere enforcement of penal laws.

This section corresponds to Sec. 7 of the repealed Specific Relief Act, 1877, with this modification that while the repealed section was negative in form, the present section is a positive enactment which defines the object and purpose of the Specific Relief Act, namely, the enforcement of the individual civil rights of an individual. It is not aimed at the enforcement of a penal law of the land. The form of Sec. 7 of the repealed Act was criticized by Pollock and Mulla (*Introduction to Specific Relief Act in the Anglo-Indian Codes*, Vol.I, p. 939) in the following words :

> "Section 7 (of the Act of 1877) is a negative statement of the principle more clearly expressed by saying that specific relief being a civil remedy, the plaintiff must show some individual right to it in every case claiming either performance of which is due to him or repression of wrong commited or threatened against him. The Law Commission, therefore, recommended for the alteration in the language of the Sec. 7 (of the Act of 1877)."

The present form of this new Sec. 4 is thus the result of the acceptance of the recommendations of the Law Commission in this regard.

3. "Only".—The word shows that the sole object of the grant of specific reliefs under this Act is the enforcement of the individual civil right and not any other object. Thus the enforcement of a penal law is beyond the purview of this Act and the provisions of this Act cannot be resorted to for that purpose.

Thus where application for the certified copies of the deposition of the witnesses in criminal case is made, it cannot be said that application to the Magistrate to grant copies of depositions and orders was made for the mere purpose of enforcing a penal law. Copies may be required for many purposes. *In the matter of the Empress on the Prosecution of the Bank of Bengal* v. *Danonath Roy*,[1] a Division Bench of the Calcutta High Court had occasion to consider this question and the Court issued a rule directing the Magistrate to give copies applied for to Mr. Macnar, attorney of the prosecutors.

From what has been said above, it may be stated as a safe rule that specific reliefs will not be granted where the sole purpose of moving the legal machinery is to enforce a penal law, but where there are objects, other than that the relief will be granted and the provisions of the Specific Relief Act will be attracted.

4. Right to collect toll.—A mere right to collect toll could not confer any interest in an immoveable property and could not be a lease of immoveable property, because toll is a tax levied for the use of public roads or ferries and is imposed on persons, animals or vehicles using the road or ferry.[2]

In the above-noted case the right of the plaintiff was not limited to collection of toll only but included the duty of maintaining the ferry and carrying passengers across the river. It was held that it was right in the immoveable property and was thus a lease of immoveable property. The so-called lease if neither signed nor registered could not amount to a valid lease and could not be enforced by the lessor. Any sum payable under the so-called lease which was neither duly

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1. I. L. R. 8 Cal. 166.
2. Anterim Zila Parishad, Etawah *v.* Mohan Singh, 1969 A. W. R. (H. C.) 232 at p. 237.

executed nor registered could not be recovered as land revenue under Sec. 9 of the Northern India Ferries Act.

The suit of the plaintiffs for an injunction restraining the defendant from realizing the amount as lease money under Sec. 9 of the Northern India Ferries Act was rightly decreed by the Lower Court.

PART II
SPECIFIC RELIEF
CHAPTER I
RECOVERING POSSESSION OF PROPERTY

New

5. Recovery of specific immoveable property.—A person entitled to the possession of specific immoveable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

PART II
OF SPECIFIC RELIEF
CHAPTER I
OF RECOVERING POSSESSION OF PROPERTY

(*a*) *Possession of Immoveable Property*

Old

8. Recovery of specific immoveable property.—A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

SYNOPSIS

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1. Legislative changes.—This section corresponds to the old Sec. 8 with the substitution of the word "provided" for the word "prescribed" and the figures "1908" at the end of the enacted Sec. 5. This is a mere verbal change with no substantial change in the legal effect.

2. Scope of the section.—This section provides that to suits for the recovery of specific immoveable property by a person entitled, the provisions of the Code of Civil Procedure would be applicable. This is a procedural section and lays down that the procedure for the specified suits would be that laid down in the Civil Procedure Code.

After the period of six months is over a suit based on prior possession alone, is not possible. Section 5 of the Specific Relief Act, 1963, does not limit the kinds of suit but only lays down that the procedure laid down by the Code of Civil Procedure must be followed. This is very different from saying that a suit based on possession alone is incompetent after the expiry of six months. Under Sec. 9 of the Code of Civil Procedure itself all suits of a civil nature are triable excepting suits of which their cognizance is either expressly or impliedly barred. No prohibition expressly barring a suit based on possession alone

has been brought to our notice hence the added attempt to show an implied prohibition by reason of Sec. 5 (Sec. 7 of the Travancore Act) of the Specific Relief Act, 1963. There is, however, good authority for the contrary proposition. In *Mustapha Sahib* v. *Santha Pillai*,[1] Subramania Aiyyar, J., observes:

> ". . . . that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title."

> "The rule in question is so firmly established as to render a lengthened discussion about it quite superfluous. *Asher* v. *Whitlock*[2] and the rulings of the Judicial Committee in *Mst. Sundar* v. *Mst. Parbati*,[3] and *Ismail Ariff* v. *Mahomed Ghous*,[4] not to mention numerous other decisions here and in England to the same effect, are clear authorities in support of the view stated above. Section 9 of the Specific Relief Act cannot possibly be held to take away any remedy available with reference to the well-recognized doctrine expressed in Pollock and Wright on *Possession* thus: Possession in law is substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title (page 19)."

In the same case O'Farell, J., points out that—

> "all the dictum of the Privy Council in *Wise* v. *Ameerunissa Khatoon*,[5] appears to amount to is this, that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having good title, he can only do so under the provisions of Sec. 9 of the Specific Relief Act and not otherwise".

It not necessary to refer to the other authorities some of which are already referred to in the judgment under appeal and in the judgment of the same Court reported in *Kuttan Narayanan* v. *Thamman Mathai*.[6] Their Lordships entirely agree with the statement of the law in the Madras case from which we have extracted the observations of the learned Judges. The other cases on the subject are collected by Sarkar on *Evidence* under Sec. 110.

The Limitation Act, before its recent amendment provided a period of twelve years as limitation to recover possession of immoveable property when the plaintiff while in possession of the property was dispossessed or had discontinued possession and the period was calculated from the date of dispossession or discontinuance. The uniform view of the courts is that if Sec. 6 of the Specific Relief Act, 1963, is utilized the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of six months has passed question of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only is a suit under Sec. 6 of the Specific Relief Act, 1963, but that does not bar a suit on prior possession within 12 years and the title need not be proved unless the defendant can prove one. The present amended Arts. 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immoveable property

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1. I. L. R. 23 Mad. 179.
2. (1865) 1 Q. B. 1.
3. (1888-89) 16 I. A. 186 (P. C.).
4. (1893) 20 I. A. 99 (P. C.).
5. (1879-80) 7 I. A. 73 (P. C.).
6. 1966 Ker. L. T. 1 : A. I. R. 1966 Ker. 179.

based on possession and not on title, when the plaintiff while in possession of the property has been dispossesed. Article 65 is for possession of immoveable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. *Held* that the suit was competent.

Therefore, the plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him. The action of the society was a violent invasion of his possession and in the law as it stands in India the plaintiff could maintain a possessor suit under provisions of the Specific Relief Act in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. As this was a suit of latter kind title could be examined. But whose title ? Admittedly neither side could establish title. The plaintiff at least pleaded the statute of limitation and asserted that he had perfected his title by adverse possession. But as he did not join the State in his suit to get a declaration, he may be said to have not rested his case on an acquired title. His suit was thus limited to recovering possession from one who had trespassed against him.

The cases of the Judicial Committee are not binding on their Lordships but they approve of the dictum in *Perry* v. *Clissold*.[1] No doubt a great controversy exists over the two cases of *Doe d Charter* v. *Barnard*,[2] and *Asher* v. *Whitlock*[3] but it must be taken to be finally resolved by *Perry* v. *Clissold*.[4] A similar view has been consistently taken in India and the amendment of the Indian Limitation Act has given approval to the proposition accepted in *Perry* v. *Clissold*,[5] and may be taken to be declaratory of the law in India. *Held* that the suit was maintainable.[6]

3. Status.—The question of the status of the person dispossessing or the title of the plaintiff is not involved in the suit.[7]

4. "Person".—This word has not been defined in the Specific Relief Act. It has been defined in Sec. 3 (42) of the General Clauses Act (X of 1897) on the following terms. :

> "Persons" shall include any company or association or body of individuals whether incorporated or not."

Thus it will be seen that the term includes not only the natural born persons, but also juristic persons, corporate bodies and other legal personalities, but this definition could only be adopted when there is nothing in the context which is contrary or repugnant to the adoption of this definition where a term is defined in an enactment in a particular manner which is different from that given in the General Clauses Act, the rule is that the meaning of the word given in that enactment should be adopted. In *Perumal Koundan* v. *Tirumalraya Puram Jananu Koola Dhanasakhara Sanka Nidhi Ltd.*,[8] the Court held that a company registered under the Indian Companies Act, 1913, was a "person" within the meaning of Order XXXIII, rule 1, C.P.C., and could sue as a pauper. But the definition of the word "person" as given in the General Clauses Act, 1897, was not adopted and applied to a guardian, under the Guardians and Wards Act. Mukerji, J., in *Smt.*

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1. (1907) A. C. 73.
2. (1849) 13 Q. B. 945.
3. (1865) 1 Q. B. 1.
4. (1907) A. C. 73.
5. *Ibid.*
6. Nair Service Society Ltd. *v.* K. C. Alexander, A.I.R. 1968 S.C. 1165 at pp. 1172-75.
7. Atmaram Panduji Tidke *v.* Prabhawatibai Dattatraya Pakode, A. I. R. 1971 Bom. 148 at p. 150 : 73 Bom. L. R. 470.
8. A. I. R. 1918 Mad. 362 at p. 363 : I. L. R. 41 Mad. 624.

Assalata v. *Society for the Protection of Children of India*,[1] said: "On the question as to whether the word 'person' as used in the definition of 'guardian' in Sec. 4, Cl. (2), Guardians and Wards Act, is to be read in the light of the meaning given to it by Sec. 3, Cl. (39), General Clauses Act, I am decidedly of opinion in the negative. This meaning woud be inapposite so far as some of the provisions of the Act are concerned, e.g. Sec. 43, sub-section (4), Sec. 35, etc." In *Girraj Kishore* v. *State*,[2] the Court held that the word "person" used in Sec. 4 of the High Denomination Bank Notes Demonetization Ordinance (3 of 1946) was used in the widest sense. Rejecting the argument that though under the definition of the word "person" given in the General Clauses Act (X of 1897), a banking company might be included, a government treasury would not be a "person", the Court said:"If the word 'person' was not intended to include a bank or government treasury in Sec. 4 of Ordinance 3 of 1946 then it was not necessary to make this exception in Sec. 6 of the Ordinance. The definitions in the General Clauses Act are to apply unless there is anything repugnant in the subject or context. Regarding Secs. 4, 5 and 6 of the Ordinance 3 of 1946 together, it appears to us that Sec. 4 was intended to include all cases of transfers of high denomination notes contrary to the provisions of the Oridinance and Secs. 5 and 6 of the Ordinance are to be read as exceptions to Sec. 4."

5. "Entitled to the possession".—The words "entitled to the possession" mean having a legal right to title to possession on the basis of ownership, whether that person claiming such right was or was not in possession was dispossessed. In order to succeed, the plaintiff has to show that he is a person entitled to get possession, hence he must show he had possession before the alleged trespassers got possession.[3] In *Ismail Ariff* v. *Muhammad Ghouse*,[4] Sir R. Couch speaking on behalf of the Judicial Committee of the Privy Council said: "It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant by Sec. 9 of the Specific Relief Act (Act I of 1877) (corresponding to Sec. 6 of the present Act) if the plaintiff had been dispossessed otherwise than in due course of law he could by a suit instituted within six months from the date of the dispossession, have recovered possession notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and as injunction to restrain the wrongdoer from interfering with his possession. The Appellate Court, in accordance with the judgment above quoted, has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly and illegally interfere with the plaintiff's possession, as the learned Judges say he has done, and the plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed, and that the plaintiff was entitled in it to a declaration of his title to the land."

In *Kartar Singh* v. *Dayal Das*,[5] Mr. Jayakar, delivering the judgment of the Privy Council said : "It is clear from the evidence that the plaintiff was out of possession at the date of the suit and had been so for many years previously. He was suing persons who were in possession of the property. The plaintiff therefore could succeed only on the strength of his own title and not on the weakness of his opponents."

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1. A. I. R. 1930 Cal. 397 at p. 402.
2. A. I. R. 1954 All. 421 at p. 422.
3. Debi Singh *v.* Bhim Singh, A. I. R. 1971 Delhi 316 at p. 316.
4. ILR 20 Cal. 834 (842).
5. A. I. R. 1939 P. C. 201 at p. 207.

In *Haider Khan* v. *Secretary of State for India in Council*,[1] the plaintiff claimed two-fold title: Firstly, a title derived from permanent settlement, and secondly a title by adverse possession for 60 years. He failed to prove title by adverse possession by 60 years but the evidence of possession and enjoyment was relied upon as proof of title. Their Lordships of the Privy Council allowed the appeal and granted the appellant the declaration asked for.

A person who enters into peaceful possession of land claiming it as his own although he might not have any title to the land, can sue another person who has forcibly ousted him of possession and who has no better tiltle to the land, because the first person, although he might not have any legal title, had at least possessory title and has commenced to prescribed for a legal title. Peaceful entry is the very essence of possessory title.

It would be unusual to find the law allowing a man to deal with property as his own, recognizing his transfers and upholding his heirs, and yet refusing to assist him against those who wrongfully oust him, unless of course they have better rights. Not only is this not so, but in India the law goes to the extreme length of allowing a person who has had possession without even a vestige of title to recover possession even against the true owner, if he proceeds under Sec. 9 (new Sec. 6), Specific Relief Act. If he can thus recover possession in special circumstances even against the true owner, it would be anomolous to hold that he cannot proceed in the ordinary way against a person who is a rank trespasser and who, as against him, has no rights whatever. Their Lordships of the Privy Council decided this in *Perry* v. *Clissold*[2]:

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the statute of limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."

This was again recognized by their Lordships in *Ismail Ariff* v. *Mahomed Ghouse*,[3] and has always been the view in these Provinces[4] and *Ganaji* v. *Dhansingh*.[5] It is certainly the English law.[6] This does not conflict with the rules so often enunciated by the Privy Council that a plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's ; that a defendant in possession can set up a *jus tertii*. With respect to the first rule, it is to be observed that it says nothing about the nature of the title which must be shown. As between a trespasser who enters peaceably and another who wrongfully dispossesses him, the title of the former is superior on two grounds : *first* because it is prior in point of time and *next* because it is a peaceful title as opposed to a forcible one in sense that it involves a wrongful dispossession of the previous occupier. For, as Cockburn, C.J., says in *Asher* v. *Whitlock*,[7] "all trespass implies force in the eye of the law". As regards the second

1. I. L. R. 36 Cal. 1.
2. (1907) A. C. 73 : 76 L. J. P. C. 19 : 95 L. T. 890 : 23 T. L. R. 232.
3. I. L. R. 20 Cal. 834: 20 I. A. 99: 6 Sar. 305.
4. Nand Ram Patel *v.* Narbad Patel, (1899) 12 C. P. L. R. 59.
5. A. I. R. 1915 Nag. 111: 27 I. C. 977: 11 N. L. R. 31.
6. Asher *v.* Whitlock, (1866) 1 Q. B. 1: 35 L. J. Q. B. 17: 11 Jur. (N. S.) 925 : 13 L. T. 254: 14 W. R. 26; Pollock and Wright on *Possession*, pp. 91, 147 and 148.
7. (1866) 1 Q.B. 1: 35 L. J.Q.B. 17: 111 Jur. (N. S.) 925: 13 L. T. 254: 14 W. R. 26.

rule it applies when the plaintiff has never been in actual possession or having had possession has been peaceably dispossessed or dispossessed by lawful process, or when the defendant has been placed in possession by the rightful owner either under a good or an imperfect title.

What do the words "better title" mean? They indicate beyond doubt that titles other than the abstract legal title which can only reside in one person, or set of persons, at a time may also have to be considered when a suitable occasion arises.

In Sec. 9 (old), Specific Relief Act, there is a special additional remedy which is available in certain circumstances but that it in no way precludes the successful assertion of a possessory title in the ordinary way in a proper case, even though the suit is brought beyond the six months contemplated by that section.[1]

Even independently of Sec. 6 (new) a person who has been ousted by a trespasser from the possession of immoveable property to which he had merely a possessory title is not debarred from bringing a suit in ejectment on the basis of his possessory title even after the lapse of six months from the date of his possession.[2]

In suits under Sec. 9 (old), Specific Relief Act, question of title are irrelevant, for, like the old assize of novel disseizin in Plantagenet times, Sec. 9 (old) was enacted to afford a summary remedy against persons who had taken the law into their own hands and had ejected those in possession of land otherwise than through process of law.[3]

From the above discussion it is clear that whoever, whether he is a plaintiff or a defendant, proves better title (ownership or possessory) will be "entitled to possession". As a plaintiff he will recover possession and as a defendant he will be entitled to retain possession. If a plaintiff brings a suit on the basis of title though also alleging possession and dispossession within six months he cannot get a decree under first paragraph of Sec. 6 (new) of the Specific Relief Act. Of course his previous possession may afford evidence of title. Where the defendant is a trespasser and the plaintiff has been in continuous and peaceful possession he would be entitled to retain such possession. But where it is found that the plaintiff has no title and that the principal defendants are entitled to the property, the plaintiff cannot obtain a decree for possession.

If a suit under Sec. 5 (new) is based on possessory title but not under Sec. 9 (old) possessory title is good against all but the true owner. A distinction is to be drawn in cases under Sec. 6 (new) and in cases falling under Sec. 5 (new) title is no defence to a suit under Sec. 6 (new) but affords a conclusive defence in other suits.[4]

6. Suit for possession.--In *Devi Singh* v. *Bhim Singh*,[5] the plaintiff and his father were joint owners of the land in dispute. The defendants came into possession of the land at the instance of the father of the plaintiff. Their case was that they advanced a sum of Rs. 2,000 and came into possession of the land as mort-

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1. Pannalal Bhagirath Marwadi *v.* Bhaiyalal Bindraban Pardeshi Teli, A. I. R. 1937 Nag. 281 at pp. 283-84 : 173 I. C. 680; *see* also Nand Ram Patel *v.* Narbad Patel, (1899) 12 C. P. L. R. 59 and Ganaji *v.* Dhansingh, A. I. R. 1915 Nag. 111: 27 I. C. 977 : 11 N. L. R. 31.
2. Phakkar *v.* Pragi, A. I. R. 1935 Oudh 268 at p. 269: I.L.R 10 Luck. 659; *see* also Adhari Chandra Pals, *v.* Dilbakan Bhuyan, I.L.R 41 Cal. 394: 7 I. A. 73 (P. C.).
3. Satish Chandra De *v.* Madan Mohan Jati, A. I. R. 1931 Cal. 483 (2) at p. 484.
4. Ganesh Das *v.* Dasso, A. I. R. 1927 All. 663 at pp. 670-71.
5. A.I.R 1971 Delhi 316 at p. 318.

gagees-in-possession. This document of title was not registered. It was held that the land could not be interpreted in such a manner as to allow the son to defeat the mortgage made by the father. The son was not entitled to get possesssion from the transferees of his father on the footing that they were trespassers. If in relation to the father who was the co-owner and in joint possession, the transferees or mortgagees were not trespassers, they could not be trespassers *qua* the son. In the circumstances the son could not succeed in the suit for possession because defendants are not trespassers.

7. In the manner provided by the Code of Civil Procedure.—These words point out that the procedure prescribed for recovering possession of a specific immoveable property by a person entitled, is the same as is provided by the Code of Civil Procedure, 1908. The provisions of the Code of Civil Procedure prescribes the institution of suit and the execution of the decree in accordance with the provisions of Order XXI, rule 35 or rule 36, C.P.C., as the procedure under the law for recovering specific immoveable property under the law.

8. Contract coupled with an agreement of the recoveyance—Enforceability of.— Where in a case in which there was an agreement to reconvey as a counter-part to a transaction of sale, the person in whose favour the right to obtain a reconveyance was granted assigned the right to a third party and the assignee filed a suit to enforce that agreement by way of specific performance. The question that arose for consideration was whether the suit for specific performance was maintainable, or, in other words, whether the right in favour of the vender to obtain a reconveyance was assignable as a contract or not; *held* that it was a completed contract capable of assignment. The question of mutuality as such was no doubt not considered apparently becaus eit was not raised. As such, a contract is capable of specific performance.[1]

9. Ejectment of person in possession who has right to enforce a demand for specific performance.—If a person entitled to obtain possession by a suit for specific performance is already in possession of the property and is sought to be ejected by the other party to the covenant which is suggested to be specifically enforceable, it may not be fair to direct the person in possession to file a suit for enforcing his rights and denying him the liberty of claiming to continue in possession as a defence in a suit for ejectment in exercise of the same right.[2]

New	Old
6. Suit by person dispossessed of immoveable property—	**9. Suit by person dispossessed of immoveable property.—**
(1) If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit, re-	If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by

1. P. R. Kanakasabapathi *v.* P. V. Govindarajulu Naidu, A.I.R 1964 Mad. 219 at p. 222.

2. Swami Jai Ram Chela Sarju Das *v.* Hari Singh, A. I. R. 1967 Punj. 159 at p. 162.

New	Old
cover possession thereof notwithstanding any other title that may be set up in such suit.	suit recover possession thereof, notwithstanding any other title that may be set up in such suit.
(2) No suit under this section shall be brought—	
(*a*) after the expiry of six months from the date of dispossession; or	
(*b*) against the Government.	No suit under this section shall be brought against the [Central Government or any State Government].
(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.	No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.
(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.	Nothing in this section shall bar any person from suing to establish his title to such property, and to recover possession thereof.

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1. Legislative changes.—That present Sec. 6 corresponds to the old Sec. 9 of the Specific Relief Act, 1877. Section 6 (1) of the present Act reproduces verbatim the language of the first clause of Sec. 9 (old) of the repealed Act. Sub-sections (3) and (4) of Sec. 6 reproduce verbatim the language of Cls. (4) and (2), respectively of the repealed Sec. 9, while sub-section (2) (*b*) of the new Sec. 6 corresponds to the third clause of the old Sec. 9 with this modification that the words "Central or any State Government" in old section have been deleted from the third clause of Sec. 9. Sub-section (2) (*a*) has been newly inserted.

2. Reasons for the change.—The Law Commission of India, in their Report on Specific Relief Act, 1877, make the following statement :

> "As suggested in our earlier Report on the Limitation Act, Sec. 9 (under the previous Act) should be omitted.[1] The object of this section, which corresponds to Sec. 15 of the Limitation Act, 1859,[2] was to discourage people from taking the law into their own hands, however good their title. It provides a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another leaving the parties to fight out the question of their respective titles in a regular suit.

"But the section has not served its purpose. The remedy has not been speedy because the evidence which is generally led to establish possession is

1. *Vide* para. 145 of the Third Report of the Commission (Limitation Act, 1908).
2. Pollock and Mulla, *Specific Relief Act* 8th Ed., p. 749.

nearly the same as would be necessary in a title suit. It has been felt that the question of possession cannot be determined without going into the question of title to some extent. A decree under Sec. 9 of the Act of 1877 does not determine title, and it is generally followed by a suit for recovery of possession based on title. The result has been a multiplicity of proceedings."[1]

But the Joint Committee of Lok Sabha and Rajya Sabha disagreed with recommendations of the Law Commission and insisted upon its restoration of the statute for the following reasons :

In the opinion of the Committee, Sec. 9 of the Specific Relief Act, 1877, provides a summary, cheap and useful remedy to a person dispossessed of immoveable property otherwise than in due course of law and has not given rise to any difficulty in its working so far. It has the effect of discouraging people from taking the law into their hands. Consequently, after giving anxious consideration to the recommendation of the Law Commission for its omission, the Committee have come to the conclusion that Sec. 9 should be restored. The new Cl. 6 (now Sec. 6) seeks to reintroduce with drafting changes Sec. 9 of Act of 1877. At the same time the provision as to limitation contained in Art. 3 of the Limitation Act, 1908, has been suitably incorporated in this new clause.[2]

3. Suit—Meaning of.—It is by now well settled that the term "suit" in Sec. 6 of the Specific Relief Act would include an objection under Sec. 47 of the Code of Civil Procedure filed against the execution of the decree passed in such a suit.[3]

4. Object.—There is no doubt that in all the under noted judgments[4] the courts have held that a person in joint possession, if dispossessed otherwise than in due course of law, can maintain a suit under Sec. 9, Sec. 6, new.) of the Act. The footing on which the aforesaid judgment proceed is that Sec. 9 (Sec. 6, new) of the Act does not make a distinction between a joint possession and an exclusive possession. Act cording to these authorities a person in joint possession of immoveable property is as much in physical possession of the property as a person in exclusive possession. For the sake of precision regarding the reasoning adopted by the aforesaid courts it would be useful to quote the following para from the judgment of the Calcutta High Court in *Mst. Ajiman Bibi* v. *Reasat Sheikh* :[5]

> "The object of Sec. 9 (new Sec. 6) of the Specific Relief Act, is to provide a speedy remedy for that class of cases where person in physical possession of property is forcibly dispossessed from it against his will and consent.[6] The main question for determination therefore in a case under the section is whether the plaintiff while in the physical possession of property has been dispossessed of the same in the manner and within the time specified in the section. if he was in physical possession he can be restored to such possession under the decree of the Court.

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1. Law Commission of India, Ninth Report (Specific Relief Act, 1877), pp. 5-6.
2. Lok Sabha—the Specific Relief Bill, 1962—Report of the Joint Committee, November, 1962.
3. Achaibar Singh *v*. Ram murat, A. I. R. 1973 A 11. 261 at P. 263 : 1972 A. L. J.
4. Mst. Ajiman Bibi *v*. Reasat Sheikh, A. I. R. 1916 Cal. 562; Ballabh Dass *v*. Gaur Dass, A. I. R. 1940 All. 216; Ghooti v. Sitku, A. I. R. 1917 Nag. 31 and Ram-Chandra Fate *v*. Shridhar, A. I. R. 1922 Nag. 115
5. A.I.R. 1916 Cal. 562.
6. Tarani Mohan Majumdar *v*. Ganga Prasad Chakwraborty, 1862 I.L.R. 14 Cal. 649.

> A man in joint possession of immoveable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole and such joint possession can as well be physically restored in respect of his share as the possession of the whole can be restored to the entire body of co-sharers."

Similarly the Allahabad High Court in *Ballabh Dass* v. *Gaur Dass*,[1] observed as under :

> "The words of Sec. 9 (new Sec. 6) do not refer only to exclusive possession. A person in joint possession of immoveable property is as much in possession of that property as a person who is in exclusive possession and if the person who was in joint possession is dispossessed, there is no reason why he should not be entitled to bring a suit under the section to be restored to that possession which he enjoyed before he was dispossessed."

The reasoning in the Nagpur authorities cited above is almost on the same lines.

It appears that the view taken by the Calcutta and Allahabad High Courts and the Judicial Commissioner's Court at Nagpur in regard to the true scope of Sec. 9, (Sec. 6, new) of the Act does not fit in with the purpose, the object and the idea underlying that section. There can be no two opinions that Sec. 9 (Sec. 6, new) of the Act was intended to provide a summary remedy to a person aggrieved of his dispossession from the property otherwise than in due course of law. So long therefore as a decree passed under Sec. 9 (Sec. 6, new) of the old Act does not succeed in serving the purpose which provided a basis for the provision a resort to Sec. 9 (Sec. 6, new) would not only be an exercise an illusion but an absolute dissipation of time, energy and expense of the parties and the Court. A decree for joint possession whether passed on the basis of title or under Sec. 9 (Sec. 6, new) of the Act has been made executable under Order XXI, rule 35 (2) of the Code of Civil Procedure. Such a decree is declaratory in character and declares only the title of the decree-holder to remain in possession, and the only effective remedy available to the decree-holder would be a suit for partition. In the suit for partition which becomes an indispensable remedy for the holder of a decree for joint possession the question of title is again to be gone into as it could not be deemed to have been settled in the suit under Sec. 9 (Sec. 6, new) of the Act, such a question being wholly extraneous to such a suit. Where then is the benefit, which possibly can be said to have accrued to the holder of a decree for joint possession? None as such a decree could not operate as *res judicata* in a subsequent suit for partition based or resisted on the ground of title.

Such an absurdity has ther efore to be avoided by placing an interpretation on Sec. 9 (new Sec. 6) of the Act which would further rather than negative the purpose of the section. A decree for joint possession could not therefore fall within the purview of Sec. 9 of the Act. The right of a plaintiff in a suit under Sec. 9 (new Sec. 6) of the Act to recover possession of the property does not stand vindicated by a decree for joint possession. The purpose of the section to restore a dispossessed plaintiff to the position which obtained before the date of his dispossession is not and cannot be served by a decree for joint possession. The words "may by suit recover possession thereof notwithstanding

1. A. I. R 1940 All. 261.

any other title that may be set up in such suit", occurring in Sec. 9 (new Sec. 6) of the Act refer to the recovery of exclusive possession and not of joint possession and where it is not possible to get such a possession the suit itself shall not be maintainable.[1]

The object of the section which corresponds to Sec. 15 of the Limitation Act, 1859, is to discourage people from taking the law into their own hands, however good their title may be.[2]

"It is to 'prevent a person after taking forcible possession to smack his fingers at the man from whom he acquired forcible possession and say, 'you had better file a suit to establish your title', ordinarily in such cases question of ownership is not relevant, plaintiff has merely to prove his possession. A distinction has to be drawn between a suit based upon possessory title and a suit under Sec. 9 (now Sec. 6) of the Specific Relief Act. In the one case the plaintiff would be entitled to a decree only, where plaintiff's possession was sufficient proof of his title while in the other case, viz. in the latter case the Court has merely to see whether the plaintiff was in possession within six months prior to the date of suit."[3]

In *Yar Mohammed* v. *Lakshmi Das*,[4] the objects and purposes of Sec. 9 (now Sec. 6) have been detailed. It has been stated therein that, "The obvious objects for the attainment of which the section was enacted appear to be these :

'(1) Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a Judge in his own cause.

'(2) In the interest of public order self-help is not permitted so far as possession over immoveable property is concerned. The section is, therefore, intended to discourage and prevent proceedings which might lead to serious breaches of the peace. It does not allow a person who has acted high-handedly by wrongfully dispossessing a person in possession from deriving any advantage of his own unjustified act. It prevents all attempts to shift the burden of proof by illegal dispossession. As Phear, J., put it in *Kalee Chandra Sein* v. *Adoo Sukh*,[5] a person turned out of possession by stranger and in invoking the assistance of court of law would go into a court seeking to eject one who has possession and, therefore, by the general rules of procedure the burden would be placed upon him to prove a *prima facie* title before the defendant would be called upon, whereas had it not been for the high-handed act of violence which had turned the plaintiff out of possession, the defendant could not have obtained the land in question except upon some conclusion, viz. of discharging the onus of showing a *prima facie* title and we imagine that the Legislature considered it adviseable to do away with opportunity by thus laying open to powerful persons of shifting by wrongful act the burden of proving from their shoulders to those of persons less able to support it."

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1. Munshi *v.* Mangoo, A. I. R. 1975 J. & K. 47 at pp. 49, 50 : 1974 Kash. L. J. 210.
2. Lok Sabha—the Specific Relief Bill, 1962—Report of the Joint Committee, November 1962.
3. Rudruppa *v.* Narsingrao, I. L. R. 29 Bom. 213 : 8 Bom. L. R. 12; Krishnarao *v.* Vasudev, I.L.R. 8 Bom. 371 at p. 375; Lachman *v.* Sambhu Narain, I. L. R. 33 All. 174 : 7 I. C. 495 : 7 A. L. J. 1078; *see* also Wali Ahmad Khan *v.* Ayodhya Kundu, I. L. R. 13 All. 537.
4. A. I. R. 1959 All. 1 at pp. 5-6 (F. B.) : 1959 A. W. R. (H. C.) 703 : 1958 A. L. J. 628.
5. (1868) 9 W. R. 603.

The settled law is that when a plaintiff brings for recovery of possession a suit based on possession, he will be entitled to get a decree for possession against a defendant under Sec. 6 (new) of the Specific Relief Act, without proving his title, unless the defendant proves one. In other words, if the plaintiff can prove that before the defendant wrongfully dispossessed him, he (plaintiff) was in possession and the suit is not barred under Article 64 of the Limitation Act 1963, the plaintiff will be entitled to a decree for possession.[1]

5. Scope of the section.—Section 6 (corresponding to Sec. 9 of the old Act) enables a person dispossessed of immoveable property otherwise than in due course of law to recover possession thereof. Dealing with the scope of the corresponding provision in Sec. 9 of the old Act it has been held by a Bench of the Madras High Court in *B. Venkayya* v. *K. Satteya*,[2] that the expiration of the lease did not necessarily imply the expiration of the lessee's right of possession and that the lessee was entitled to a decree for possession as against the persons who dispossessed him. In *Rudrappa* v. *Narasing Rao*,[3] a tenant holding over after the expiry of the period of tenancy was dispossessed without his consent by the landlord. The tenant then brought a suit for possession against the landlord under Sec. 9 (Sec. 6, new) of the Specific Relief Act. It was held that the plaintiff was not liable to be evicted by the landlord *proprio motu* and that he was entitled to a decree for possession. In *K. K. Verma* v. *Union of India*,[4] Chagla, C.J., speaking for the Bench expressed :

> "Under the Indian law, the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical and that possession is protected by statute. Under Sec. 9 of the Specific Relief Act, a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to court under Sec. 9 and claim possession against the true owner."

A slightly different note has been struck in *Rahmatullah* v. *Md. Hussain*,[5] Iqbal Ahmad, J., has said that where a tenant after the termination of the lease continues in possession of the lease-hold premises without the consent of the landlord, his position is no better than that of a mere trespasser and he can be turned out of the same at any time without any notice to quit. The preponderance of judicial opinion is that the possession of a tenant of the demised properties even after the expiry of the lease period is entitled to protection and if he is dispossessed without due process of law, Sec. 9 (old) can be invoked by such a tenant to recover possession even if the person who dispossessed him is the landlord. But where in the above-noted case, the suit was not one for possession based on Sec. 6 (Sec. 9, old) of the Specific Relief Act and it was only for a declaration that he was a cultivating tenant and for an injunction. It was held that it was not possible to invoke the said section and to grant relief of possession to the plaintiff in the suit.[6]

In a suit for declaration of title and recovery of possession, even, if the plaintiff fails to prove his title but proves his prior possession and that the defendant

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1. R. Ramson *v.* P. Luison, A. I. R. 1974 Gau. 66 at p. 68 : 1973 Assam L. R. 297.
2. I. L. R. 37 Mad. 281 : A. I. R. 1914 Mad. 296.
3. I. L. R. 29 Bom. 213.
4. A. I. R 1954 Bom. 358.
5. A. I. R.1950 All. 444.
6. Subbaiah Nader *v.* Nallaperumal Pillai, A. I. R. 1973 Mad. 432 at p. 437 : (1973) 1 M. L. J. 459.

in the suit is a trespasser, the plaintiff will be given a decree for recovery of possession as against the defendant who is a trespasser pure and simple.[1]

In *Sahodra Kuer* v. *Gobardhan Tewari*,[2] it was laid down by Chamier, C.J., and Sharfuddin, J., that a suit for possession can be brought beyond six months and Sec. 9 (Sec. 6, new) of the Specific Relief Act was no bar to the maintainability of the suit. Their Lordships also held that a person having possession over a piece of land even though short of statutory period is entitled to recover possession from a trespasser who has come in possession by ousting him from possession. Similar view was expressed by another Bench of the Patna High Court in *Akal Ahir* v. *Baijnath Das*,[3] and it was laid down that if a person was in possession of the land even without title thereto he could not be successfully turned out by another person who also had no title and if such a thing should happen the person first in possession was entitled to be put again in possession even if he failed to prove that he had a title to the land. Dawson Miller, C.J., who agreed to the main judgment which was delivered by Mullick, J., laid down the proposition of law in the following guiding lines :

> "There is abundant authority for the proposition that if a person is in possession of land even without title thereto he cannot be successfuly turned out by another person who also had no title, and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should fail to prove that he had a title to the land."[4]

In *Yar Mohammed* v. *Lakshmi Das*,[5] the question referred to the Full Bench was whether the jurisdiction of the Civil Court is barred by

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Sec. 242 of the Tenancy Act (17 of 1939) in respect of suits filed under Sec. 9 of the Specific Relief Act, 1877 (now Sec. 6) for obtaining possession over agricultural land from which the plaintiff alleged his illegal dispossession within six months of the date of the suit. Justice Srivastava, who gave the decision of the Bench while discussing the relative scope of Sec. 9 of the Specific Relief Act, 1877 (now Sec. 6) and that of Secs. 242, 180 and 183 of the U.P. Tenancy Act (17 of1939) observed that Sec. 242 of the U.P. Tenancy Act (17 of 1939) confers exclusive jurisdiction on the Revenue Courts and at the same time takes away the jurisdiction of the Civil Court only in respect of two kinds of actions :

> "(1) Suits or applications of the nature specified in the Fourth Schedule of the Act, and
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> (2) Suits or application passed on a cause of action in respect of which any relief can be obtained by means of a suit or application specified in that Schedule. Before Sec. 242 can be attracted, therefore, the action must fall under either of these two categories. If it does not, the jurisdiction of the Civil Court will not be ousted and the Revenue Court will have no jurisdiction to entertain the action. Then again, while dealing with the relative scope of Secs. 180 and 183 of the U.P. Tenancy Act (17 of 1939) and that of Sec. 9, Specific Relief Act, 1877 (which corresponds to Sec. 6 of the present Act) the same learned Judge in para. 15 of his judgment observes, 'suits under Secs. 180 and 183 of the U.P. Tenancy Act appear to be of an entirely different nature. They are no suits based on possession and dispossession alone. It is not possible to exclude considerations of title from such suit. In fact

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1. Mst. Koki *v.* Chetwa Chamar, A. I. R. 1972 Pat. 241 at p. 242 : 1972 B. L. J. R. 541.
2. A. I. R. 1917 Pat. 546.
3. A. I. R. 1924 Pat. 709.
4. Mst. Koki v. Chetwa Chamar, A. I. R. 1972 Pat. 241 at p. 242: 1972 B.L.J.R. 541.
5. A. I. R. 1959 All. 1 at pp. 5-6 (F. B.) : 1959 A. W. R. (H. C.) 703 ; 1958 A. L. J. 628.

the very opening words of Sec. 183 make it quite clear that before a person can maintain a suit under that section he must be a tenant. Even if he is in possession and has not been dispossessed, he cannot succeed without proving that he was in possession as a tenant'.

"The suit can only be defeated if the defendant proves that the plaintiff was not a tenant and that the person who dispossessed was neither the landholder nor a person claiming to have a right to eject him as a landholder. In a way therefore the question of title of the plaintiff as well as the defendant must necessarily arise in such suit. While dealing with the question of trespasser he says in para. 17, 'no doubt a trespasser can claim certain right. If however he files a suit under Sec. 180 his claim will be based not on possession or dispossession alone but on the rights which he can claim on the basis of his possession. It is this feature which essentially distinguishes a suit under Sec. 180 of the Tenancy Act from a suit under Sec. 9 of the Specific Relief Act'.

"In a suit of the latter kind no question of rights arise at all. The only thing to be seen is whether the plaintiff was in possession and had been dispossessed within a certain time otherwise than in accordance with law. A suit of the kind is not contemplated by either Sec. 180 or 183 or in fact any other section of the Tenancy Act, and could not therefore be excluded from the jurisdiction of the Civil Court by Sec. 242 of the Act."

This section provides for a summary and quick remedy for a person who is in possession but is illegally ousted therefrom without his consent. As this remedy is a summary one and is intended to restore the *status quo ante*, all questions of title whether of the plaintiff or the defendant are out of place in it, and cannot on that account be allowed either to be raised or to be considered. This seems to be a peculiar feature of this kind of suits and distinguishes it from suits of other kinds.[1]

A suit instituted under Sec. 9 of the Specific Relief Act, 1877 (corresponds to Sec. 6 of the present Act) which is in the nature of a summary suit for possession of property as contemplated by section itself. It is well known that the basis for such a suit is wrongful dispossession of the plaintiff by the opposite party. The scope of such a suit is limited. It is to be brought within six months from the date of dispossession and any question of title would be wholly extraneous to such a summary suit. There is no authority for the proposition that in such a suit the question relating to title or ownership can be raised, and determined. There is difference between a suit on the basis of possessory right as contemplated by Sec. 9 (Sec. 6, new) of the Specific Relief Act and a suit based on possessory title. In *Wali Ahmed Khan* v. *Ayodhya Kundu*,[2] a Full Bench of the Allahabad High Court ruled that Sec. 9 (Sec. 6, new) of the Specific Relief Act is intended to provide a special remedy for a person who, being, whatever his title in possession of immoveable property, is ousted therefrom. It is useful to reproduce some of the observations made in the aforesaid judgment. Straight, J., observed as under:

"What is Sec. 9 (new Sec. 6) of the Specific Relief Act. It only reproduces the rule which says that a person having a right to which wrong has been inflicted is entitled to come into court and assert that right.

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1. Yar Muhammad *v.* Lakshmi Das, (H. C.) 703. A. I, R. 1959 All. 1 at p. 5 : 1959 A. W. R. 2. I. L. R. 13 All, 537,

If my brother Mahmood, J.'s reading of Sec. 9 (new Sec. 6) of the Specific Relief Act is correct, then it would be practically precluding the suit contemplated by Art. 142 of the Limitation Act. What Sec. 9 (Sec. 6, new) of the Specific Relief Act intended to do, and in my opinion does, is to provide a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another leaving them to fight out the question of their respective titles if they are so advised. This Sec. 9 (new Sec. 6) is no more than a reproduction of a provision of the Roman law by which a praetor was entitled to restore possession to a person who had been forcibly dispossessed of property. It was thought and wisely thought that if power was not given to the Civil Courts to afford this speedy remedy most high handed and intolerable cases of dispossession might occur, with the result that the intruder, having forced himself into possession, might snap his fingers and say 'here I am in possession: prove your title and do your worst'. It would neither be justice, equity, good conscience, nor common sense to recognize or tolerate any such doctrine, and I for one decline to do so."

A Division Bench of the Allahabad High Court in *Ganga Din* v. *Gokul Prasad*,[1] held that in a suit under Sec. 9 (new Sec. 6) the only allegations that are relevant are those of the plaintiff's previous possession and his dispossession by the defendant. The title of the parties is not relevant and indeed it is specifically provided that the section does not bar any person from recovering possession of the property on the basis of his title. The result of this provision in Sec. 9 (new Sec. 6) is that if the defendant has a better title than the plaintiff he could not resist the plaintiff's suit for recovery of possession if the plaintiff proves the allegation made by him.

A similar question came up for consideration before their Lordships of the Supreme Court reported in *Lallu Yaswant Singh* v. *Rao Jagdish Singh*.[2] The case-law on the subject was reviewed. Their Lordships quoted with approval the following observations made by Chagla, C. J., in *K.K Verma* v. *Narain Das C. Malkani*,[3] and also the observations of the Full Bench of the Allahabad High Court in *Yar Mohammad* v. *Lakshmi Das*.[4]

In *K.K.Verma* v. *Narain Das C. Malkani*,[5] Chagla, C.J., had observed as under:

"Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under Sec. 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to court under Sec. 9 and claim possession against the true owner."

Again in *Yar Muhammad* v. *Lakshmi Das*,[6] it has been held:

"No question of title either of the plaintiff or of the defendant can be raised or gone into in that case (under old Sec. 9 of the Specific Relief Act). The plaintiff will be entitled to succeed without proving any title

1. A. I. R. 1950 All 407.
2. A. I. R. 1968 S. C. 620.
3. A. I. R. 1954 Bom. 358 at p. 360.
4. A. I. R. 1959 All. 1 at p. 4.
5. A. I. R. 1954 Bom. 358.
6. A. I. R. 1959 All. 1 at p. 4.

on which he can fall back upon and the defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is, however, always subject to a regular title suit and the person who has the real title or even the better title cannot therefore be prejudiced in any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession."

The High Court further observed:

"Law respects possession even if there is no title to support it. I twill not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause. As observed by Edge, C.J., in *Wali Ahmad Khan* v. *Ayodhya Kundu*[1]:

'The object of the section was to drive that person who wanted to eject a person into the proper court and to prevent them from going with a high hand and ejecting such persons'."

After reviewing the case-law enunciated by several High Courts the Supreme Court ruled that the law on this point had been correctly stated by the Privy Council, by Chagla, C.J. and by the Full Bench of the Allahabad High Court in the cases mentioned above.

In *Mst. Saraswati Devi* v. *Shri Bindraban*,[2] the Court below had found that the plaintiff was not a trespasser but he was holding the suit property on the basis of an agreement to sell in his favour and that he had been in possession of the property for a number of years before the act of dispossession. The defendants had forcibly dispossessed him by taking law in their own hands and by asserting their title over the property which they could not do. The suit had been found to have been brought within the statutory period as provided by Sec. 9 (new Sec. 6) of the Specific Relief Act. It was held that the Trial Court rightly decreed the suit.

In a decree passed by the Court under Sec. 6 of the Specific Relief Act, 1963, no provision can be made for future mesne profits. It is beyond the power of the Court to decree future mesne profits in a suit for possession under Sec. 6 of the present Act.[3]

It is not permissible to convert a title suit into a suit under Sec. 6 of the Specific Relief Act, 1963, on the failure of the plaintiff to establish his title nor should the Court in such a case grant a decree for possession under the first paragraph of Sec. 6 of the present Act.[4]

The rule enunciated by the Full Bench of the Allahabad High Court in *Lachman* v. *Shambhu Narain*[5] should not be confused with the power of Court to grant possession on plaintiff's failure to prove ownership, for previous possession in some instances may afford evidence of title and where the defendant is a trespasser and the plaintiff was in continuous and peaceful possession he would be entitled to retain such possession.

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1. I. L. R. 13 All. 537 at p. 556.
2. A. I. R. 1973 J. &. K. 68.
3. Yar Muhammad *v.* Lakshmi Das, A.I.R. 1959 All. 1 at p. 5: 1959 A.W.R. (H.C.)703.
4. *See* Lachman *v.* Sambhu Narain, I. L. R. 33 All. 174 (F. B.) : 7 L. L. J. 1078; Anant Kumar Sarkar *v.* Meghu Kurmi, 66 C. W. N. 347.
5. I. L. R. 33 All. 174 (F. B.) : 7 I. C. 495 : 7 A. L. J. 1078.

In *Phakkar* v. *Paragi*,[1] his Lordship observed that another point taken before the Court was that the plaintiff having based his suit on title, it should not have been decreed on the basis of possession especially when it was not brought within six months of the alleged dispossession. This point is also concluded by authority. It has been held by the Allahabad High Court that even independently of Sec. 9-A [which corresponds to Sec. 6 (1) of the present Act] person who has been ousted by a trespasser from possession of the immoveable property to which he had merely a possessory title is not debarred from bringing a suit in ejectment on the basis of possessory title even after the lapse of six months from the date of dispossession.[2]

Possession within the prescribed period and dispossession without the consent of the plaintiff and otherwise than in due course of law are the only issues for determining in a suit under Sec. 6 of the Specific Relief Act.[3]

The plaintiff is entitled to succeed only if he proves his case to recover possession on the basis of some right and unless he establishes such right the Court should give no recognition to his claim of re-entry more particularly when the party interested in title is not impleaded in the suit or proceedings. It is immaterial if, even if the defendant be a trespasser, once the plaintiff can succeed on the strength of his title and not on the defects of the title of the defendant as it is also an established principle of law.[4]

In *Hajisa Imamsa Kiral* v. *Kalyanrao Anantrao Kulkarni*,[5] the Court after disscussing a number of authorities ruled that a trespasser with possession is entitled to maintain a suit for injunction and possession against another trespasser with no possession on the basis of his possessory title. The Bench followed the Sarkar decisions of the Madras High Court reported in *Kondappa Rajan Naidu* v. *Dwarkonda Suryanarayana*,[6] which ruled that a trespasser in enjoyment of land for less than statutory period is entitled to be maintained in possession against all persons except the true owner.

Possession in this country is protected and relief is available under Sec. 6 (old) of the Specific Relief Act to protect possession against illegal dispossession made even by the true owner. The Legislature has, however, specifically excluded relief under Sec. 6 (old) of the Act against the State Government. Therefore, when possession is taken by the State Government grievance cannot be madeby the petitioner until it has established its better title to the property and, therefore, becomes entitled to possesssion.

If a true owner dispossesses the person in possession peacefully and without the intervention of the Court, the latter cannot, on the basis of mere possessory title, come to the Court against the true owner though he could do so against all other persons who have no title in property.[7]

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1. I. L. R. 10 Luck. at p. 659.
2. Ganesh *v.* Dasso, A. I. R. 1927 All. 669 at p. 670 : 2 I. C. 599.
3. Tanuzuddin *v.* Ashrat Ali, I. L. R. 31 Cal. 647 : 8 C. W. N. 446.
4. Mohammed Hanif Mia *v.* Haldhar Lakhar, A. I. R. 1959 Assam 236 at p. 237, following Nisa Chand Gaita *v.* Kanchiram Bengani, I. L. R. 26 Cal. 579 : 3 C. W. N. 568.
5. A. I. R. 1961 Mys. 86 at pp. 87-88.
6. I. L. R. 34 Mad. 173.
7. Anant Bahadur Singh *v.* Asthbhuja Bux Singh, A. I. R. 1960 All. 227 at p. 228: 1957 A. L. I. 55 : 1957 A. W. R. (H. C.) 141. In this case reliance was placed on Bijay Gopal Mukerji *v.* Krishna Mahishi Debi I. L. R. 24 Cal. 329, (P. C.) for the above proposition while distinguishing Kandhya *v.* Mst. Raj Kunwar, A. I. R. 1923 All. 367 (2) and Bahadur Singh *v.* N. S. Sultan Husain Khan, A. I. R. 1922 Oudh 171.

It has been laid down in *M.C. Batra* v. *Lakshmi Insuarance Co.*[1] that a suit cannot be maintained under Sec. 9 of the Specific Relief Act, 1877 (which corresponds to Sec. 6 of the present Act) by a person who is manifestly a trespasser and whose possession was of very short duration as was the case in *Amiruddin* v. *Mohammad Jamil.*[2]

A person who has contracted a usufructuary mortgage over an occupancy holding in contravention of the provisions of the law will not receive the assistance of the Court in a suit for the recovery of possession based on title which title is exhypothesis invalid. He can, however, undoubtedly sue to be put back in possession under Sec. 6 of the Specific Relief Act, 1963, without pleading title at all.[3]

It is incorrect to say that a possessed tenant has an alternative right to be put in possession by taking proceedings in a revenue court within six months of the date of his dispossession, because Sec. 85 of the Tenancy Act does not contain any such clause. A dispossessed tenant ceases to be a tenant as defined in the Tenancy Act and has, therefore, no right to be re-instated under the Act. That is why such a tenant gets a right to be re-instated under the general law, that is to say, by instituting a suit in a Civil Court.[4]

In *Messrs. Bhowra Kankanee* v. *Sunil Kumar Roy*,[5] the business, carried on by the defendant, is exclusively in the nature of manufacturing business and the plaintiff is only a supplier of new materials to defendant No. 1 and such a transaction cannot come within the purview of mining operation and the lease in favour of defendant No. 1 cannot be regarded as a mining lease. In the result, therefore, Secs. 4 (*a*) and 10-A of the Bihar Land Reforms Act, even on this ground, cannot be held to be a bar to the plaintiff's right to institute the suit inasmuch as its right as a lessee is not in any way invalidated on account of the Bihar Land Reforms Act.

6. Phrase "and to recover possession thereof".— Sub-section (1) of Sec. 6 of the Specific Relief Act, 1963 (which corresponds to Sec. 9 of the Specific Relief Act, 1877) provides that if any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit. Such proceedings are summary and are intended merely to adjudicate the question as to which party was in possession on the relevant date and whether the plaintiff was dispossessed without his consent. Questions of title are outside the purview of such a suit. It is specifically provided in sub-section (4) of Sec. 6 (old) which says that a decree under sub-section (1) shall not preclude him "from suing to establish his title to such property and to recover possession thereof". Section 5 (new)further provides that a person entitled to the possession of specific immoveable property may recover it in the manner provided in the Code of Civil Procedure, 1908.

These provisions contemplate the institution of a title suit in spite of the decision of a suit under Sec. 6. (new) Since the decree under Sec. 6 (new) grants possession to the dispossessed plaintiff sub-section (4) thereof specifically makes it clear that such a decree cannot bar a fresh suit for recovery of possession. The phrase "and to recover possession thereof" occurring in Sec. 6 (new)does not preclude or

1. A. I. R. 1956 All. 709 at p. 710.
2. I. L. R. 15 Bom. 685.
3. Sheo Zoor Koeri *v.* Mst. Kausilia, A.I.R. 1923 All. 81 at p. 81: 20 A. L. J. 972.
4. Nasib Singh *v.* Bajo Ram, A. I. R. 1969 J. & K. 9 at p. 12.
5. 1968 P. L. J. R. 486 at pp. 492-93.

bar a suit for title in which a consequential relief other than the relief for recovery of possession may be taken. It will depend upon the factual position. In a case where the plaintiff is dissatisfied with a decree under Sec. 6 (new) he can immediately institute a suit for a declaration of his title. He can claim the available consequential relief. If on the date of the suit the plaintiff finds himself in possession of the property, he cannot legitimately ask for recovery of possession. All that he can pray for is that the *status quo* be maintained and an injunction be issued restraining the defendant from dispossessing him. The consequential relief naturally follows from his claim on title coupled with the reality and the situation. There is nothing in Secs. 5 and 6 (Secs. 8 and 9, old) of the Specific Relief Act to debar the plaintiff from claiming an appropriate consequential relief.

In *Permanand* v. *Smt. Chhimmawati*,[1] it was held that permitting a person to sue to obtain an injunction restraining the other side from executing the decree would defeat the object of Sec. 9 (new). That may be so. It may also be urged that a suit *simpliciter* for such a relief, namely, to restrain the respondent from executing the decree, may be barred by Secs. 41 (*a*) and 41 (b) [Secs. 56 (*a*) and 56 (*b*), new] of the Specific Relief Act. But the position will not be the same in a suit for declaration of title and consequential relief for preservation of plaintiff's possession. In *Chunni* v. *Sullahar*,[2] the relief sought was for a declaration and for an injunction restraining the defendant from interfering with the peaceful possession of the plaintiff either by executing the decree or through any other means or ways. It was held that this, strictly speaking, was not a suit either to restrain the defendant from prosecuting a judicial proceeding or from instituting the execution application within meaning of Cls. (*a*) and (*b*) of Sec. 41 (new). The relief was to restrain the defendant from interfering with the plaintiff's possession and not for a direction to prevent him from instituting or prosecuting the execution proceedings. From this point of view this case was slightly distinguishable from the facts of *Permanand's* case.[3]

7. "Tenant holding over".—Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of tenancy his possession is juridical and that possession is protected by statute. Under Sec. 6 of the Specific Relief Act, 1963, a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law. But a trespasser who has been thrown out of possession cannot go to Court under Sec. 6 (new) and claim possession against the true owner.[4] There is short distinction between a trespasser and an erstwhile tenant. Whereas the trespasser's possession is never juridical and never protected by law, the possession of the erstwhile tenant is juridical and is protected by law. An erstwhile tenant is never a trespasser and the landlord can only eject the erstwhile tenant by recourse to law and by obtaining a decree for ejectment.[5]

Persons who are trustees, can acquire possessory title but such title is held by them in trust for which they had been made trustees. Hence they can institute a suit under Sec. 6 (new) if the conditions therein are fulfilled.[6]

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1. A. I. R. 1955 All. 64.
2. A. I. R. 1972 All. 418.
3. A. I. R. 1955 All. 64 ; Chunni *v.* Sullahar, A. I. R. 1972 All. 418 at p. 419.
4. K. L. Verma *v.* Union of India, A. I. R. 1954 Bom. 358 at p. 360.
5. *See* K. L. Verma *v.* Union of India, *supra* at p. 360.
6. Croet *v.* Attorney-General, (1956) 2 All E. R. 881.

It is plain enough that the section is entitled to discourage proceedings calculated to lead to serious breaches of the peace and to provide against the person who has taken the law into his own hands, deriving any benefit from the process.[1] The section has been enacted to prevent persons from ousting a man from possession except by the due course of law. It is a section the object of which is to drive persons who wanted to eject a person into the proper Court and prevent them from going with a high hand and ejecting such persons.[2] It appears, however, that the real object of the Legislature in engrafting this section into the Specific Relief Act is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent.[3] It provides a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised.[4] "It was thought and wisely thought that if power was not given to Civil Courts to afford this speedy remedy most high-handed and intolerable cases of dispossession might occur with the result that the intruder having forced himself into possession might snap his fingers and say 'here, I am in possession, prove your title and do your worst'. Such a thing is neither just nor tolerable."[5] The section is more than a reproduction of the provisions of the Roman law by which the Praetor was entitled to restore possession to a person forcibly dispossessed.[6] If a suit is brought within the limitation prescribed by the section even the rightful owner of the property is precluded from showing his title.[7] The remedy provided by this section is, however, an additional remedy. The section is not intended to abridge any rights possessed by a plaintiff but to give him to right if dispossessed otherwise than by due course of law to have his possession restored without reference to the title on which he holds and that which the dispossessor asserts.[8] This remedy does not in any way preclude the successful assertion of a possessory title in the ordinary way in a proper case even though the suit is brought beyond the six months.[9] In suits under this section questions of title are irrelevant, for the section was enacted to afford a summary remedy against persons who had taken the law into their own hands and had ejected those in possession of land otherwise than through process of law.[10]

8. Scope of Secs. 5 and 6.—Section 5 of this Act provides that a person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure, that is to say, by a suit for ejectment on the basis of title. Section 6 of the present Act gives a summary remedy to a person who has without his consent been dispossessed of immoveable

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1. Kunhi Karupan *v.* Changarachan Ambu, 2 M. H. C. R. 313; *see* also 17 C. P. L. R. 52.
2. Wali Ahmad Khan *v.* Ayodhya Kundu, I. L. R. 13 All. 537 : 11 A. W. N. 196 (F B).
3. Tarinimohan *v.* Ganga Prashad, I. L. R. 14 Cal. 652; *see* also Wali Ahmad Khan *v.* Ayodhya Kundu, I. L. R. 13 All. 537 : (1891) A. W. N. 196; Kunhi Karupan *v.* Changarachan Ambu, 2 M. H. C. R. 313 : 68 I. C. 490; Dola Khetaji Vahivatdar *v.* Balya Kanno Patel, A. I. R. 1922 Bom. 29 : 24 Bom. L. R. 236 : 9 W. R. 602: I.L.R. 28 Cal. 709; Pannalal *v.* Bhaiyalal, 173 I. C. 680 : A. I. R. 1937 Nag. 281; *see* also 9 A. W. N. 89.
4. Mari *v.* Santaya Ram Krishna, A I. R. 1922 Bom. 216 at p. 216, *per* Coyjee, J.
5. Wali Ahmad Khan *v.* Ayodhya Kundu. I. L. R. 13 All. 537 at p. 562, *per* Straight, J.
6. *Ibid.*
7. Khojah Enaetoolah *v.* Kshen Soondar, 8 W. R. 386.
8. Kunhi Karupan *v.* Changarachan Ambu, 2 M. H. C. R. 313.
9. Pannalal *v.* Bhaiyalal, A. I. R. 1937 Nag. 281 at p. 284 : 173 I. C. 68.
10. Satishchandra *v.* Madan Mohan, A. I. R. 1931 Cal. 483 at p. 484: I. L. R. 58 Cal. 29 : 132 I C. 936; Appana *v.* Krishnama, 153 I. C. 132 : A I. R. 1935 Mad. 134 : 40 L. W. 922 : 1934 M. W. N. 1375; Badridass *v.* Dhanni, A. I. R. 1934 All. 541 at p. 542 : 1934 A. L. J. 611.

property otherwise than in due course of law, for recovery of possession without establishing title provided that his suit is brought within six months of the date of possession. Sub-section (4) of this section provides that the person against whom a decree may be passed under sub-section (1) of this section may, notwithstanding such decree, sue to establish his title and to recover possession. The two sections give alternative remedies and are mutually exclusive. If a suit is brought under Sec. 6 of the Specific Relief Act, 1963, for recovery of possession no question of title can be raised or determined in that suit or in working out judgment. The object of the section is clearly to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely proving previous possession and wrongful dispossession without proving title, but that is not his only remedy. He may, if he so chooses, bring a suit for possession on the basis of his title. But he cannot combine both the remedies in the same suit and cannot get a decree for possession even if he fails to prove title.[1] In a suit under this section a claim for damages cannot be combined with that for possession nor can the defendant be allowed to plead title in such a suit. Where, therefore, the plaintiff claimed damages and the defendant was allowed to set up his title and the case was tried in the ordinary manner as contemplated by Sec. 5 of the present Act and not in a summary manner as required by Sec. 6 of the present Act and there was an appeal and a second appeal, it was held that it was not a claim under present Sec. 6 of the Specific Relef Act, 1963.[2] Where a suit which is really based on title is dealt with by the Court of first instance as a suit under this section and an appeal is preferred from the decree, the Appellate Court should send the suit back to the Court of first instance to be dealt with as a suit based upon title under the present section.[3] It follows that where the prayer in the suit is for injunction and there is no prayer for possession Sec. 6 (new) of the Act cannot be invoked.[4]

There is nothing in the language of the section to take away the remedies available to a person in possession of property as of right, and entitled to remain in possession. Of course it goes without saying that when there is valid decree for possession against a plaintiff, he will not be granted an injunction from executing that decree.

In *R. Gopala Krishna Pillai* v. *P. S. Venkatesam Pillai*,[5] the plaintiff has not only asked for declaration of his title but he has also prayed in the alternative for possession. As it happened in this case, in the interlocutory proceedings for injunction the matter went up in appeal and the Appellate Court refused interim relief of injunction. It is noticed by the learned District Judge that the present plaintiff was willing to permit the defendant to take possession of the suit property. Only he wanted a condition imposed that the compound wall which was erected by him during his possession pending the suit under Sec. 6, Specific Relief Act, 1963, should not be demolished by the defendant. The plaintiff has allowed the defendant to take possession, and has claimed with

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1. Lachman *v.* Sambhu Narain, I. L. R. 33 All. 174 (F. B.) : 7 A. L. J. 1078 : 7 I. C. 490 at p. 495; Iragala Kottaya *v.* Udauti Subayya, 120 I. C. 384: A.I.R. 1929 Mad. 784; Ganesh *v.* Dasso, 103 I. C. 428 : A. I. R. 1927 All. 669 : 5 A. L. J. 857; Munna Singh *v.* Ausan Singh, I. L. R. 41 All. 108 : 48 I. C. 492; Ganesh *v.* Bhusi, I. L. R. 46 All. 903: 82 I. C. 324 : A. I. R. 1925 All. 69; Abdul Jabbar *v.* Ganesh, 1933 A. M. L. J. 54; Halim Yasin *v.* Mustakim Alaf Din, A. I. R. 1942 Pesh. 8; Mg Lu Mg *v.* Ashurb, I. L. R. 31 Cal. 647 : 8 C. W. N. 446 (overruling Bhagabati *v.* Luton, 7 C. W. N. 218).
2. Bhopal Singh *v.* Madho Singh, 1939 Marwar L. R. 221 (11) I. C. 38; 29 I. C. 210, foll.).
3. Narain Das *v.* Het Singh, I. L. R. 40 All. 637 : 46 I. C. 925 : 16 A. L. J. 611.
4. Eswara Pillai *v.* Krishna Prabhu, A. I. R. 1963 T. C. 353 at p. 355,
5. (1967) 1 M. L. J. 346,

declaration, possession as consequential relief. As pointedout by a Division Bench of the Madras High Court in *Narasaya* v. *Subaya*,[1] a person without title in possession of property is only a trespasser. The learned Judges observed :

> "The appellants were in possession as trespassers and the fact that they succeeded in the suit under Sec. 9 of the Specific Relief Act did not make their trespass any the less. They remain trespassers in spite of their decree."

The object of the title suit is in substance to have the summary order for possession set aside on the basis of title and right to present possession. In such a suit if the plaintiff in possession has claimed declaration of his title it may properly be followed by the consequential relief of injunction.[2] Section (new) 41 of the Specific Relief Act, 1963, will be no ban.[3]

Section 6 of the Specific Relief Act provides a special summary and speedy remedy for a person in possession of immoveable property, whatever his title may be thereto, to recover such possession from another who had illegally and without his consent and will, ousted him therefrom. What this section contemplates is that where there is an important question of law or custom involved and such question requires further consideration this Court may make such order as it thinks fit in terms of this section.[4]

The remedy of suit for obtaining possession of an agricultural land is not available to a *bhumiswami* who has been dispossessed from that land; that such a *bhumiswami*, if he wishes to have the land restored to him in a speedy manner and after a summary enquiry, must resort to the remedy given by Sec. 250 of the Code and held that a dispossessed *bhumiswami* cannot file a suit under Sec. 6 (new) of the Specific Relief Act is correct.[5]

It is settled that question of title is irrelevant in a suit under this section.[6]

The law, however, recognizes possessory right as a substantive right or interest which exists and has certain legal incidents attached to it and it recognizes certain advantages as flowing from it. Such rights can be independent of the right of ownership. A person in possession is entitled, for example, to maintain his possession against the entire world except the true owner. Long adverse possession confers title on the person in possession of the property. Further, a person who continues in possession of the property after the expiration of the tenancy, cannot be regarded as a mere trespasser, for his entry was lawful. Such possession would both on principle and authority be entitled to protection under Sec. 9 (old). A tenant, therefore, even if he be one in possesion of the property by sufferance cannot be dispossessed without his consent by the landlord without taking appropriate proceedings under the law. To accept a contrary view would be to decide contrary to the policy underlying Sec. 6 of the Specific Relief Act, 1963.

The section postulates the existence in the plaintiff on the date of eviction at least possessory title. That means that he should have juridical possession

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1. I. L. R. (1943) Mad. 122 : (1942) 2 M. L. J. 266.
2. *See* Mari *v.* Santaya, Ram Krishna A. I. R. 1922 Bom. 216.
3. R. Gopalakrishna Pillai *v.* P. S. Venkatesam Pillai, (1967) 1 M. L. J. 346 at pp. 347-48.
4. Gajanan Ragunath Neugui *v.* Joao Santano Gomes, A. I. R. 1967 Goa 151 at p. 152; *see* also Ramanata Camotin Bambolcar *v.* Judge of Comarca Court of Ilhas, Panjib, A. I. R. 1966 Goa, Daman and Diu 1.
5. Nathu *v.* Dilbande Hussain, A. I. R. 1967 M. P. 14 at p. 17.
6. Lallu Yeswant Singh *v.* Rao Jagdish Singh, A. I. R. 1968 S. C. 620 at p. 622.

and should not be a mere trespasser squatting on the property. Juridical possession in one (although it might not depend on the legal title to possess as in the case of an owner), is actual possession with an intention of maintaining himself in possession.

In *Neyveli Lignite Corporation Ltd.* v. *K. S. Narayana Iyer*,[1] the respondent has failed to show that he was in juridical possession of the property at the time when he was actually dispossessed. He was apathetic. In one sense it can even be said that though he did not consent to give up possession he was not unwilling, if the owner were to take it. He cannot therefore complain of dispossession and claim relief under Sec. 6 (new) of the Specific Relief Act, as there was no dispossession of a person intending to hold on to possession.

9. Suit for possession under Sec. 5—No decree for possession under Sec. 6 can be granted.—Where a plaintiff sues for possession on the basis of title under Sec. 5 of the Specific Relief Act, 1963 and fails to establish his title he cannot be granted a decree for possession under sub-section (2) of Sec. 6 of the Specific Relief Act, 1963, even if he has been dispossessed within six months of the date of the suit.[2]

Section 5 of the present Act provides that a person entitled to possession of specific immoveable property may recover in the manner prescribed by the Civil Procedure Code, that is to say, by a suit for ejectment on the basis of title. Present Sec. 6 gives a summary remedy to a person who had without his consent been dispossessed of immoveable property otherwise than in due course of law, for recovery of possession without establishing his title, provided that a suit is brought within six months of the date of dispossession. Sub-section (4) of the section provides that the person against whom a decree may be passed under the first paragraph may, notwithstanding such decree sue to establish his title and to recover possession. The two sections give alternative remedies and are mutually exclusive. If a suit is brought under Sec. 6 (new) for recovery of possession, no question of title can be raised or determined. The object of the section is clearly to discourage forcible dispossession to and to enable the person dispossessed to recover possession by merely proving previous possession and wrongful dispossession without proving title, but that is not the only remedy. He may if he so chooses bring a suit for possession on the basis of his title. He cannot combine both remedies in the same suit and then get a decree for possession even if he fails to prove title. A suit based on title can be brought even after the dismissal of a suit under Sec. 6 of the present Act. If a claim for establishment of title can be combined under Sec. 6 of the Specific Relief Act, 1963, the Court will have to grant a decree for possession on dispossession being proved, in spite of its finding that the plaintiff had no title and that title was in the defendant. Thus the relief of possession under Sec. 6 of the present Act and alternatively under Sec. 5 of the present Act or *vice versa* cannot be successfully joined in one suit. The further question arises whether a plaint brought under Sec. 5 of the Specific Relief Act, 1963, can be allowed to be amended also as to convert it into a suit under Sec. 6 of the Specific Relief Act, 1963. On principle such an amendment should not be allowed as it will entirely change

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1. A. I. R. 1965 Mad. 122 at pp. 124, 126, 127 : 77 M. L. W. 387 : I. L. R. (1964) 1 Mad. 676; *see* also Nasib Singh *v.* Bajo Ram, A. I. R. 1969 J. & K. 9 at p. 11.
2. Halim Yasin *v.* Mustakim Alaf Din, A. I. R. 1942 Pesh, 8 at p. 8 : 198 I. C. 290; Lachman *v.* Shambhunarain, I. L. R. 33 All. 174; *see* also Abdul Jabbar *v.* Ganesh, 1938 A. M. L. J. 54 and Ramaswami *v.* Paranaman, I. L. R. 25 Mad. 448.

the nature of suit and cause of action based on title is quite different from a cause of action based on possession and dispossession irrespectively of the title of the plaintiff.

10. Section 6 no bar to a suit under Sec. 5.—In sub-section (1) of Sec. 6 of the present Act, the word "may" is used. So that it is optional for the dispossessed plaintiff to bring a suit either under present Sec. 6 on allegation of possession and dispossession pure and simple or under present Sec. 5 on the basis of legal possessory title. The first suit had to be brought within six months while the suit under present Sec. 5 may be brought at any time within 12 years of the date of dispossession. Sub-section (4) of this section states that this section will not be a bar to any person suing to establish his title to such property and to recover possession thereof. The question arises whether the sub-section (4) of this section contemplates the remedy of a regular suit on the basis of title as merely an alternative remedy or can a plaintiff or a defendant feeling aggrieved from the decision of a suit under present Sec. 6 still maintain a suit under present Sec. 5 so as to negative the decree granted under Sec. 6 (new) of the Specific Relief Act. The section is very widely worded and contemplates the remedy of present Sec. 5 in addition to the remedy under present Sec. 6 of the Act. Therefore, a plaintiff or a defendant failing under present Sec. 6 can bring a suit to establish his title to such property and to recover possession thereof. In *Mari* v. *Santaya Ram Krishna*,[1] it was the defendant who brought a suit contesting the right of the plaintiff to get a decree for dispossession. An injunction was also claimed restraining the decree-holder from executing the decree granted in his favour under Sec. 9 (which corresponds to Sec. 6, new). The remedy provided under the present Sec. 6 is of a summary nature and an order or decree passed under that section is not open to appeal or to review at the instance of the defeated party. It is therefore, open to any of the aggrieved parties to institute a regular suit under Sec. 5 of the Specific Relief Act, 1963, to establish his title to the lands in dispute.

Further, the language of Sec. 5 (new) and Sec. 6 (new) clearly lead to the above result. A suit under Sec. 6 (new) can only be brought in case of dispossession otherwise than in due course of law while no such language is used under Sec. 5 (new) of the Act. A person entitled to possession can seek his remedy under Sec. 5 (new) irrespective of how he has been dispossessed. He must be entitled to possession and that is all.

11. Decree under the section does not bar fresh suit for possession—Sub-section (1) of Sec. 6 of the Specific Relief Act, 1963, which corresponds to Sec. 9 of the Specific Relief Act, 1872), provides that if any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof notwithstanding any other title that may be set up in such suit. Such proceedings are summary and are intended merely to adjudicate the question as to which party was in possession on the relevant date and whether the plaintiff was dispossessed without his consent. Questions of title are outside the purview of such a suit. It is specifically provided in sub-section (4) of Sec. 6 (new) which says that a decree under sub-section (1) shall not preclude him "from suing to establish his title to such property and to recover possession thereof". Section 6 (new) further provides that a person entitled to the possession of specific immoveable property may recover it in the manner provided in the Code of Civil Procedure, 1908.

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1. A. I. R. 1922 Bom. 216

These provisions contemplate the institution of a title suit in spite of the decision of a suit under Sec. 6 (new). Since the decree under Sec. 6 (new) grants possession to the dispossessed plaintiff, sub-section (4) thereof specifically makes it clear that such a decree cannot bar a fresh suit for recovery of possession. The phrase "and to recover possession thereof" occurring in Sec. 6 (new) does not preclude or bar a suit for title in which a consequential relief other than the relief for recovery of possession may be taken. It will depend upon the factual position. In a case where the plaintiff is dissatisfied with a decree under Sec. 6 (new) he can immediately institute a suit for a declaration of his title. He can claim the available consequential relief. If on the date of the suit the plaintiff finds himself in possession of the property, he cannot legitimately ask for recovery of possession. All that he can pray for is that the *status quo* be maintained and an injunction be issued restraining the defendant from dispossessing him. This consequential relief naturally follows from his claim on title coupled with the reality of the situation. There is nothing in Secs. 5 and 6 (new) of the Specific Relief Act to debar the plaintiff from claiming an appropriate consequential relief.[1]

12. Suit based upon possessory title and a suit under the section—Distinction—Section 9 (Sec. 6, new) of the Specific Relief Act in no way controls the operations of Sec. 110 of the Evidence Act or a suit based upon possessory title. Section 9 (old) provides a summary remedy to a person who has, without his consent been dispossessed of immoveable property otherwise than in due course of law, for recovery of possession without establishing title. A distinction has to be drawn between a suit based upon possessory title and a suit under Sec. 9 (Sec. 6, new) of the Specific Relief Act. In the former case the plaintiff would be entitled to a decree only where the plaintiff's possession was sufficient proof of his title, while in the latter case the Court has merely to see whether the plaintiff was in possession within six months prior to the date of the institution of the suit.[2]

13. Essential of suit under Sec. 6.—The plaint in a suit under Sec. 6 (new) of the Act must aver previous possession and dispossession by the defendant otherwise than in due course of law within six months of the suit being brought and should aver nothing else, and the only prayer in such a suit can be a prayer for the recovery of possession.[3] Consequently a claim for damages cannot be combined with that for possession nor can defendant be allowed to plead the title in such a suit.[4] The sole point for determination in a suit of this description is whether the plaintiffs were in possession of the disputed property within six months previous to the institution of the suit and whether they had been deprived of such possession by the defendants otherwise than in due course of law. It is immaterial if the plaintiffs were in possession, that such possession was without title.[5] Where a single person ejects another and a suit is brought to

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1. Abdul Junaid *v.* Deputy Director of Consolidation, 1972 A. L. J. 435 at pp. 438, 439.
2. Mst. Atra Devi *v.* Ramswaroop Prasad Singh, A. I. R. 1972 Pat. 186 at p. 192.
3. Daw Po *v.* U Po Hmyin, A. I. R. 1940 Rang. 91 at p. 92 : 187 I. C. 875 : 1940 Rang, L. R. 237; *see* also Jhabachan Nag Das *v.* Loch Mohan Singh, 13 I. C. 541 ; Raj Krishna *v.* Muktaram, 12 C. L.J. 605 : 7 I. C. 700; 23 I.C. 541; I. L. R. 31 Cal. 64; Ram Naresh *v.* Deo Narain, A. I. R. 1954 All. 109 at pp. 109-10; Ganga Din *v.* Gokul Parsad, A. I. R. 1950 All. 407 (foll); Beni Madho Singh *v.* Prag, A. I. R. 1949 All. 510 (ref to); Thannamma *v.* Ramaswami Pillai, A. I. R. 1953 T. C. 157 at pp. 157-58.
4. Bhopal Singh *v.* Madho Singh, 1939 Marwar L. R. 221 (Civ.).
5. Raj Krishna *v.* Muktaram 7 I. C. 700; 12 C. L. J. 605; *see* also Jhabachan Nag Das *v.* Loch Mohan Singh, 13 I. C. 541; I.L.R. 31 Cal. 64; Gabu Peda Appanna *v.* Kuligu Krishnamma, A. I. R. 1935 Mad. 134.

recover possession it cannot be contended that the intention of the Specific Relief Act, Sec. 9 (Sec. 6, new) may be frustrated by any private arrangement under which the ejector has acted or by which he may consent to hold on behalf of some other person. As between him and that person, his possession may be that of an agent, but to the former holder he is the dispossessor; possession derived from him cannot be superior to his and the (right of suit being given in general terms) is equally subject as his to the result of proceedings taken within the prescribed six months.[1] But the plaintiff will have to prove juridical possession and not mere isolated acts of trespass. He must prove that he exercised acts which amounted to acts of dominion, the nature of which must vary with the nature of property.[2] All that has to be proved is that the plaintiff was dispossessed and that the suit was brought within six months from the date of dispossession. It is not necessary that the plaintiff must have been in possession for a particular time before dispossession.[3]

14. Suit under the section—Question for determination.—The only question for determination in a suit under Sec. 6 (new) of the Specific Relief Act is whether the plaintiff was in possession within six months prior to the date of suit and whether the plaintiff has been dispossessed within that period. The question of the status of the person dispossessing or the title of the plaintiff is not involved in the suit. If the Court finds that the plaintiff was not in possession of the suit property within six months prior to the date of the suit, the plaintiff will fail. If the Court finds that the plaintiff was in possession and the defendant has dispossessed her within that period, the plaintiff will succeed. Under Sec. 145 (4) (new) of the Code of Criminal Procedure, the Magistrate dealing with proceedings under Sec. 145 has to hold an inquiry as to possession and not as to title. If he decides that one of the parties was in possession he shall under the provisions of sub-section (6) issue an order declaring such party entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of that possession until such eviction. All that Sec. 145 (6) (new) talks of is that a person who is found by the Magistrate not to be in possession must evict the person who is found to be in possession in due course of law. If the aggrieved person chooses to file a suit under Sec. 6 of the Specific Relief Act for possession and recovers possession under a decree in such a suit, it will be an eviction of the person found by the Magistrate in possession in due course of law. Sub-section (6) of Sec. 145 (new) nowhere enjoins a suit on title, nor is there any requirement that the party must seek to have the order of the learned Magistrate set aside. In fact, it will not be open to a Civil Court, without an express statutory provision to that effect, to determine whether the learned Magistrate was right or wrong. Such a question could only be determined in an appeal against the order under Sec. 145 (new) of the Code of Criminal Procedure or in revision thereafter. It would be sufficient for a Civil Court to come to the conclusion as to whether the plaintiff was or was not in possession within six months prior to the date of the suit and whether the plaintiff has or has not been dispossessed within that period. It would not be necessary for the Civil Court to go into the rights and wrongs of an order under Sec. 145 (new). The decision of the Civil Court would prevail by virtue of Sec. 145 (6) (new) of the Code of Criminal Procedure.

A suit under Sec. 6 of the Specific Relief Act is not barred by Sec. 124 of the Bombay Tenancy and Agricultural Lands (Vidarbha Reigon) Act in respect of agricultural lands.[3]

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1. *Per* West, J., Virjivandas Madhavdas *v.* M. Alikhan, I. L. R. 5 Bom. 208 at p. 214.
2. *Ibid.*
3. Jhabachan Nag Das *v.* Loch Mohan Basak, 13 I. C. 541.

15. Who can sue?—Any person who was in possession but has been dispossessed whether or not he is an owner may bring a suit under this section provided he had juridical or legal possession. Thus it has been held that a licensee or mere custodian cannot sue under this section.[2] But where the licence is coupled with grant or where the licensee has possession over the land he is entitled to sue.[3]

16. Trespasser.—The lessee of a public ferry under Sec. 8 of the Northern India Ferries Act has no right of suit under the present section as he is merely the lessee of the tolls and the possession in the ferry remains with the public authorities.[4] The Bombay High Court has held that a trespasser who has been dispossessed is not entitled to sue under this section.[5] But it is respectfully submitted the proposition is stated rather too widely.[6]

In *Ram Dayal* v. *Saraswati*,[7] a Division Bench of the Allahabad High Court held :

> "Even independently of Sec. 9 (new Sec. 6) of the Specific Relief Act a person who has been ousted by a trespasser from the possession of immoveable property to which he had merely a possessory title, is not debarred from bringing a suit in ejectment on the basis of his possessory title even after the lapse of six months from the date of dispossession and where the plaintiff was in continuous and peaceful possession for a long period, he would be entitled to retain such possession."

In *Uttaram* v. *Tabu*,[8] it was held by the Lahore High Court:

> "A trespasser who interferes with the lawful possession of another may be restrained by an injunction, even though the latter is not able to prove any title to the property of which he is in possession. Section 54 of the Specific Relief Act is no bar to the granting of such an injunction."

Similarly in *Mata Badal Singh* v. *Bhaiya Hanwant Prasad Singh*,[9] it was held by a Division Bench of this Court that a person who is in peaceful and undisturbed possession of any property though without title, has the right to continue in possession until he is evicted by the person who is the real owner of the property. His peaceful possession is by itself a title which is good against the whole world except the rightful owner.[10]

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1. Atmaram Panduji Tidke *v.* Prabhawatibai Dattatraya Pakode, 73 Bom. L. R. 470 at pp. 472, 473.
2. Manbahal Rai *v.* Ramghulam Pandey, A.I.R 1927 All. 633 at p. 634: 103 I.C. 338; Nritto *v.* Rajindra, I.L.R.22 Cal. 562; Amiruddin *v.* Mohamad, I.L.R. 15 Bom. 684; Franji *v.* Goculdas, I. L. R. 16 Bom. 338. In Ajodhya Prasad *v.* Ghasi Ram, 173 I. C. 746 : 20 N. L. J. 189 : A. I. R. 1937 Nag. 325, it has been held that the possession required by the section cannot mean merely juridical possession or possession under a valid title, includes possession that is at least excusable as for instance a transferee from an occupancy tenant under a transfer which is not in accordance with law.
3. Sita Ram *v.* Jagannath, 17 I. C. 469; 13 O. C. 317; Kanta Tewari *v.* Sheo Narain Lal, A. I. R. 1935 All. 123 at p. 125.
4. Mohd. Wahid Khan *v.* District Board, Bareilly, A. I. R. 1936 All. 856 at p. 857 : I. L. R. (1937) All. 193: 166 I. C.228 (2): 1936 A. W.R. 932 : 1936 A. L. J. 1122 : 9 R. A. 377 (2) : 1936 All. L. R. 1316.
5. Amiruddin *v.* Mohammad, I. L. R. 15 Bom. 685; Virjivan Das *v.* Mohd. Ali, I.L.R 5 Bom. 208; *see* also 7 B. H. C. 82.
6. *See* Tamiz Uddin *v.* Ashrub Ali Khan, I. L. R. 31 Cal. 674 at p. 656; *see* also Panna Lal *v.* Bhaiyalal, 173 I. C. 680 : A. I. R. 1937 Nag. 281 : I. L. R. 10 Nag. 319.
7. 25 A. L. J. 281.
8. 115 I. C. 480.
9. 1950 A. L. J. 615.
10. Pir Bux *v.* Sher Mohd, 1969 A. L. J. 169 at p. 172.

In *Srinath Singh* v. *Kali Bhawani Prasad*,[1] a Division Bench of the Patna High Court observed that if in a suit for recovery of possession both the plaintiff and the defendant have got no title to the suit property, i.e. if both are trespassers in the suit land the plaintiff who is a prior trespasser in entitled to possession against the subsequent trespasser to dispossess the former on the strength of the previous possession. The previous possession of a person in respect of property has got to be protected in course of law against the whole world except the true owner.

Again in *Srinath Berman* v. *Dr. S. P. Raju*,[2] their Lordships of the Supreme Court while deciding an appeal relating to the suit for possession expressed the view that the possession of the plaintiff is a good title against all but the true owner. The defendants who were mere trespassers could not defeat the plaintiff's lawful possession by ousting him from the suit property. Possessory title is good title against any body other than the lawful owner. Their Lordships quoted with approval the observations made in *Ismail Ariff* v. *Mahomed Ghose*,[3] where the Judicial Committee laid down the law that a person having possessory title can get a declaration that he was the owner of the land in dispute. The possession of the plaintiff was sufficient evidence of title as owner against the defendant.

In view of these settled propositions of law, it is hardly open to the defendant who is a mere trespasser having no better title than the plaintiff to defeat the possessory right of the plaintiff. A plaintiff who would be deemed to have been expropriated from the land under Sec. 4 of the Big Landed Estates Abolition Act can claim the recovery of the land on the basis of his possessory right and this possessory right is sufficient evidence of his right to recover the land as against the defendant who is a mere trespasser.[4]

17. Licensee who has become a trespasser.—A Division Bench of the Bombay High Court has, in the case of *Amiruddin* v. *Mahamad Jamal*,[5] decided as far back as the year 1891 that it is only juridical possession which could give a person the right to invoke the aid of the Court under Sec. 9 (Sec. 6, new) of the Specific Relief Act, which it may be stated. The Court was, no doubt, concerned in the said case with a trespasser *ab initio*, but the proposition as laid down is not confined to the case of a trespasser *ab initio*, but would be equally applicable to a licensee who becomes a trespasser on the revocation of his licence. Indeed, that is how the ratio of the judgment of Sir Charles Sargent, C.J., in the said case has been stated by no less a person, than Sir Dinshah Mulla in his commentry on the *Indian Contract and Specific Relief Acts* (8 th Ed. at page 750). In the case of a licensee whose licence has been revoked, therefore, the position is that even though he may have actual possession of the property in question, that possession is not juridical possession and is not protected by law, in so far as he is not entitled to avail himself of the remedy provided by Sec. 9 (Sec. 6, new) of the Specific Relief Act.[6]

It has been held by a Division Bench of the Bombay High Court in the case of *K. K. Verma* v. *Union of India*,[7] that the possession of a tenant whose tenancy has been terminated is juridical and is protected by Sec. 9 (Sec. 6, new)

1. A. I. R. 1972 Pat. 138.
2. A. I. R. 1970 S. C. 846 at p. 849.
3. (1913) 20 I. A. 99 (P. C.).
4. Badri Nath *v.* Wazir Ram Saran, A. I. R. 1973 J. & K. 62 at p. 63 : 1932 J. & K. L. R. 631.
5. I. L. R. 15 Bom. 685 at p. 687.
6. Maganlal Radia *v.* State of Maharashtra, 1971 Mah. L. J. 57 at p. 60.
7. A. I. R. 1954 Bom. 358 : (1954) 56 Bom. L. R. 308 at pp. 315-316.

of the Specific Relief Act, and he, therefore, never becomes a trespasser. That, however, will not be the legal position in the case of a licensee whose licence has been revoked. It cannot be said that a licensee whose licence has been revoked and whose possession is not juridical and is not protected by law has the right not to be dispossessed except by due process of law. If such a person is evicted by a summary procedure which, according to him, cannot be said to be "due process of law" he is not a party aggrieved and is not entitled to main tain a writ petition.

In *Maganlal Radia* v. *State of Maharashtra*,[1] what the petitioner was granted was a licence and that too of a purely temporary nature. The licence was made on the clear understanding that the petitioner would hand over possession of the land on seven days' notice without claiming any compensation. On revocation the petitioner presented a petition under Art. 221 of the Constitution for a writ of *certiorari* to quash and set aside the order whereby he had been called upon to vacate the land and to remove all structures standing thereon as well as for a writ of mandamus directing respondents to forbear from enforcing Sec. 53 of the Maharashtra Land Revenue Code, 1966, and to withdraw or cancel the said impugned notice. It was held that to entertain the petition and to permit the petitioner who had agreed to remove himself from the premises within seven days to remain in possession till the disposal of the petition would result in gross injustice and would be an abuse of the writ jurisdiction of the High Court which it should not countenance.[2]

18. Transferee from an occupancy tenant.—A transferee from an occupancy tenant under a transfer, which is not in accordance with law, can nevertheless maintain a suit under this section if he has been in undisturbed possession of the land prior to the dispossession for the simple reason as stated above that a person who has obtained possession peacefully and has remained in undisturbed possession for a reasonable time prior to the dispossession claimed is certainly entitled to come in under this section.[3] A person occupying property only in ministerial capacity cannot be said to be in possession of it within the meaning of the section and as such cannot file a suit under this section. Thus a son occupying a room in his father's house and claiming to be in possession representing his father and uncle cannot be allowed to sue under this section.[4] There cannot be any manner of doubt that when a tenant is dispossessed by a stranger, he can maintain a suit under this section.[5] There is, however, serious confilict of authority as to whether a landlord can bring a suit for possession under this section when his tenant has been dispossessed.[6] It is an established rule of law that the possession of the landlord is the possession of the tenant and

Person occupying property in ministerial capacity cannot be said to be in possession.

1. 1971 Mah. L. J. 57.
2. Maganlal Radia *v.* State of Maharashtra, 1971 Mah. L. J. 57 at p. 61.
3. Ajodhia Prasad *v.* Ghasi Ram, A. I. R. 1937 Nag. 326 at p. 327 : 173 I. C. 746 : 20 M. L. J. 189 : 10 R. N. 324.
4. Nrito Lal *v.* Rajendra, I. L. R. 22 Cal. 562.
5. Virjivan [illegible] *v.* Mohd. Ali Khan, I. L. R. 5 Bom. 208; Deobonath *v.* Ram Sundar, 19 C. W. N. 1205; Ram Chandra *v.* Ramamoni, 20 C. W. N. 777; Veeraswami Mudali *v.* Venkatachala Mudali, A.I.R. 1926 Mad. 18 at p. 18 : 92 I. C. 20 : 50 M. L. J. 102. There is no authority to the contrary.
6. *See* notes under the heading "17. *Quaere* —Whether a possessory suit lies under Sec. 6 in respect of incorporeal intangible properties, i. e. benefits arising from land".

vice versa.[1] A landlord can sue though his tenant has been dispossessed. But the tenant does not join he may be impleaded as co-defendant.[2] In a Madras case, where in a suit by a landlord the tenants did not join as plaintiffs it was held that the suit was not maintainable.[3] When a tenant is dipossessed by a third person the tenant is competent to sue.[4] But if the tenancy has terminated after the date of dispossession then it is the landlord who is entitled to sue.[5] Though a tenant may hold over after the expiry of the period of tenancy, his possession is still juridical and he is entitled to sue his landlord.[6] One of two persons who by mutual agreement is in exclusive possession of immoveable property may sue the actual dispossessor or if he is an agent his principle or both.[7] The proper persons to institute a suit under the section are those who were actually dispossessed from the property. Even if such persons were in possession on behalf of the plaintiff, till the plaintiff can only institute the suit if the persons actually dispossessed are not willing to sue.[8]

19. Joinder of plaintiffs.—All persons dispossessed need not join as plaintiffs. Those who have not joined as plaintiffs may be impleaded as deendants.[9]

20. Mortgagee.—A mortgagee if dispossessed may sue under this section.[10] A court in a suit under this section has no jurisdiction to pass a decree in favour of a plaintiff who claims an undivided share in a property from which he and his co-sharers were ousted, as such a possession is not contemplated by the section.[11] A person can sue for restoration of possession under this section even if his dispossession is partial.[12]

Person partially dispossessed.

21. Who may be sued.—It is dispossession of the plaintiff that gives him cause of action against the dispossessor. In a Calcutta case it has been held that where the plaintiff's tenants continuing in possession attorn to the defendant and refuse to pay rent to the plaintiff, it cannot be said that there is a dispossession of the plaintiff as contemplated by Sec. 9 of the Specific Relief Act (which corresponds to Sec. 6 of the present Act).[13] Again mere cutting of some grass has been held not to amount to dispossession.[14] *A* sued for possession on the allegation that *B* and *C* had dispossessed him of certain land. *B*'s defence was that the land belonged to one *D* and that he was *D*'s manager, *C*, claimed to be lessee under *D*. It was held that the suit was properly brought against *B* and *C* and that *D* was not a necessary party.[15] The following

Generally the person dispossessed has cause of action to sue his dispossessor.

Mere cutting of grass does not amount to dispossession.

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1. Ratanlal Ghelabhai *v.* Amarsingh Rupsan, A. I. R. 1929 Bom. 467 at p. 467 : I.L.R. 53 Bom. 774 : 31 Bom L. R. 1042 : 122 I. C. 54; Virjivan Das *v.* Mohd. Ali Khan, I. L. R. 5 Bom. 208.
2. Ratanlal Ghelabhai *v.* Amarsingh Rupsan, *supra*.
3. Ramamanemma *v.* Basavayya, A. I. R. 1934 Mad. 558 at p. 559 : 151 I. C. 990 : 40 L. W. 227 : 1934 M. W. N. 443.
4. Virjivan Das *v.* Mohd. Ali Khan, *supra*, *cf.* Veeraswami *v.* Venkatachala, 50 M. L. J. 102.
5. Jagannath *v.* Rama Rayer, I. L. R. 28 Mad. 238.
6. Rudrappa *v.* Narsingran, I. L. R. 29 Bom. 213; Janardan *v.* Haradan, 9 W. R. 513 (F. B.).
7. Virjivan Das *v.* Mohd. Ali Khan, *supra*.
8. Abdullah Khan *v.* Faizullah Khan, A. I. R. 1950 Pesh. 9 at p. 10.
9. Devendra *v.* Bindhubala, 13 I. C. 125; *see* also Jagannath *v.* Rama Rayer, *supra*.
10. Sayaji *v.* Ramji, I. L. R. 5 Bom. 446.
11. Vellayi Sannaya *v.* Sannayajulu Ramesham, A. I. R. 1940 Pat. 193 at pp. 193-94 : 189 I. C. 878.
12. Sabapati *v.* Sabrayya, I. L. R. 3 Mad. 250; Omar *v.* Nawab, 4 W. R. 229.
13. Tirani Mohan *v.* Ganga Prashad, I. L. R. Cal. 649.
14. Virjivan Das *v.* Mohd. Ali Khan, I. L. R. 5 Bom. 208.
15. *Ibid.*

extract from the above-noted judgment would pay perusal: "A person who has been ejected from his property, in suing to recover possession under Sec. 9 (Sec. 6, new), Specific Relief Act, may sue the actual ejector or the person under whose orders or by whose authority the actual ejector has acted or he may sue both, but the wrong-doer who has taken possession is the one from whom primarily it is to be reclaimed. If a third party desires to maintain the expulsion as an act done on his behalf, it is for him to come forward and avoid it. He may claim to be admitted as defendant, but if he had himself a right to do what his agent has done, his right and authority may be pleaded by the agent and will be an effectual answer. The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority where the authority is shown. It might, no doubt, fail even in a case of obvious wrongdoing, but for the principle that to the injury of a true possessor with right, or a colour of right, the employer could not take the law in his own hands or give any real authority to his agent. The latter taking possession illegally does not hold that possession legally for the principal who has impelled him to violence. If he (principal) is conspicuously in actual possession of the land he should be made a party defendant, as having by that very circumstance ratified the dispossession, and to prevent any repudiation of the agency with a view to defeat a decree against the agent; but the plaintiff is not to be deprived of his remedy by a shuffling about of the apparent possession from one person to another all deriving their occupation from the same defective source. The person in possession must indeed be made a defendant in order to prevent collusion between the other parties to his (former holder) detriment, but the right of action in the original possession is not thereby affected." In a suit under this section the plaintiff's case was that he was the fixed-rate tenant of a certain plot and that within six months of the institution of the suit the defendant had dispossessed him without any right. The defendant's case was that he was the tenant of the plot in question and that the plaintiff was never in possession of it. The parties agreed to abide by the sworn statement of a referee who stated on oath that the plaintiff had been in possession of the plot in suit within six months of the institution of the suit and added that the parties were co-tenants of the holding of which the plot in suit formed a part. The Trial Court held that the suit being a suit between co-tenants for possession the jurisdiction of the Civil Court was barred under Sec. 230, Agra Tenancy Act, and dismissed the suit. *Held* by the High Court that the suit as brought was cognizable by the Civil Court as the plaintiff did not admit that the defendant was a co-tenant and brought the suit against him as a pure trespasser and that when he had proved that he had been in possession within six months and had been dispossessed by the defendant, he was entitled to a decree and the Court was not called upon to go into the question of title.[1]

22. Immoveable property.— The term immoveable property has been defined neither in the Contract Act nor in the Specific Relief Act, with the result that we have to fall back upon the definition given in the General Clauses Act, 1897.[2] According to Sec. 4 (25) of the Act "unless there is anything repugnant in the subject or context immoveable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth". This definition on the face of it includes property both tangible or corporeal and intangible or incorporeal.

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1. Narain Lal *v.* Gokul Prasad, 1935 A. L. J. 813 : 1934 A. W. R. 926.
2. Gabu Peda Appanna *v.* Kuligu Krishnamma, A. I. R. 1935 Mad. 134 at p. 135 (In a suit under Sec. 9, the definition of immoveable property given in the General Clauses Act should be applied.)

23. Quaere—Whether a possessory suit lies under Sec. 6 in respect of incorporeal intangible properties, i. e. benefits arising from land.—The question has often arisen whether the possessory action contemplated by Sec. 6 (new) may be maintained in respect of incorporeal on intangible property which has been described by the Legislature as benefits arising out of land. As instances of such rights may be mentioned right of ferry, right of fishery and the like. The High Courts of Bombay[1] and Madras[2] has answered this question in the affirmative but the contrary view has been adopted by the Calcutta High Court[3] according to which the expression "immoveable property" in the section refers only to such properties of which physical possession can be given under Sec. 5 (*a*) of the Specific Relief Act, 1877. According to the Calcutta view Sec. 9 of the repealed Specific Relief Act, 1877 (which corresponds to Sec. 6 of the present Act) does not extend to incorporeal rights because they are not rights of which possession can be taken and delivered to the claimant. The Calcutta view may best be stated in the words of Pantheram, C. J., in *Fadu Ghela* v. *Gour Mohan Ghela*[4]: "I am of opinion" observed his Lordship,"that the whole of Sec. 9 (old) (which corresponds to Sec. 6 of the present Act) is repugnant to the idea that immoveable property in that section includes an incorporeal right such as a right of fishing in waters belonging to another. It is, I think, apparent from the section itself read as a whole, that the immoveable property, intended to be dealt with by it, is something of which actual possession can be given and taken, in other words, some piece of land or something permanently attached to the land, and that the words as they appear in the section cannot include an incorporeal right, which must always remain in the possession of its owner, though he may for any reason be prevented from exercising it." According to the same High Court a dispute regarding a right to fish does not amount to a dispossession of immoveable property.[5] The *ratio decidendi* of the Bombay and Madras view is that a man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which interfered with it is removed. In the Bombay and Madras High Courts emphasis has been laid on the fact that the suits relating to incorporeal rights have not been excluded by this section whereas such matters have been expressly placed out of a magistrate's jurisdiction by the introduction in Sec. 145 (new), Cr. P. C. of the expression, "tangible immoveable property" as the property over disputes, regarding the possession of which a Magistrate cannot take summary action.[6] In Allahabad case,[7] a view similar to that of the Calcutta High Court has been adopted. It has been held that the lessee of a public ferry as distinguished from a private ferry (Sec. 8, Northern India Ferries Act) is merely the lessee of the tolls of a public ferry. The public ferry remains in the possession of the public authorities and all that is let is a right to collect the tolls of that public ferry. Such a right to collect can be in no way immoveable property. The Madras ruling in *Krishna* v. *Akilanda*,[8] which took the contrary view was distinguished on the ground that in that case it was the owners

1. Bhundal *v.* Pandol, I. L. R. 12 Bom. 221; Mangal Das *v.* Jiwan Ram, I.L.R. 23 Bom. 673.
2. Krishna *v.* Akilanda, I. L. R. 13 Mad. 54; *see* also Jagannath *v.* Rama Rayer, I.L.R. 28 Mad. 238; I.L.R. 33 Mad. 455; Gabu Pada Appanna *v.* Kuligu Krishnamma, A. I. R. 1935 Mad. 134.
3. Fadu Ghela *v.* Gour Mohan Ghela, I. L. R. 19 Cal. 544 (F. B.); Fazlur Rahman *v.* Krishna Prasad, I. L. R. 29 Cal. 614; Natabar *v.* Kabir, I. L. R. 18 Cal. 80; Sital *v.* Mrs. Delanney, 20 C. W. N. 1158; *see* also 17 W. R. 70.
4. I. L. R. 19 Cal. 544 at p. 547.
5. Natabar Parne *v.* Kubir Parne, I. L. R. 18 Cal. 80 at p. 83; Fazlur Rahman *v.* Krishna Prasad, I. L. R. 29 Cal. 614.
6. Bhundal *v.* Pandol, I. L. R. 12 Bom. 221, *per* Sargent, C. J.; Krishna *v.* Akilanda, I. L. R. 13 Mad. 54; Innasi Shivaganga, 5 M. L. J. 95.
7. Mohd. Wahid Khan *v.* District Board, Bareilly, A. I. R. 1936 All. 856 at p. 857 : I. L. R. (1917) All. 193 : 166 I. C. 22 (2) : 1936 A. L. J. 1122 : 1936 A. W. R. 923.
8. I. L. R. 13 Mad. 54.

of the immoveable property who have a claim to a right of ferry and such a claim amounted to immoveable property within the meaning of Sec. 9 of the Specific Relief Act, 1877 (corresponding to Sec. 6 of the present Act).

The view expressed by the Madras and Bombay High Courts is to be preferred.

In *Sahibrakhiao* v. *Gumromal*,[1] it was held that specific portions of a survey number do not amount to immoveable property within the meaning of the section.

In *Ramchandra* v. *Sambashiv*,[2] it was held that though a landlord could not sue for the recovery of possession, on the dispossession of his tenant as it does not amount to dispossession of the landlord who was never in physical possession of the land, he could sue for possession of the right to recover rent from the trespasser if he had been dispossessed of it.

In *Ratanlal* v. *Amarsingh*,[3] it was observed : "The plaintiff as landlord is entitled to recover rent from his tenant and this right is one which comes under the definition of 'immoveable property' in Cl. 25 of Sec. 3 of the General Clauses Act".

Standing crops are moveable property and so prayer for standing crops does not amount to prayer for mesne profits.[4] A claim to a mere easement is not immoveable property within the meaning of this section.[5]

24. Dispossessed.—There is a divergence of judicial opinion as to the meaning to be given to the word "dispossessed" used in the section. Some courts give it a restricted meaning so as to connote actual physical possession while other courts take a broader view and hold it to include constructive, joint and formal possession.

The better view seems to be, it is submitted, that the section applies to constructive and joint possession also.

Where not only the rights of the plaintiffs to collect cowdung and grass from the land in dispute are disturbed but they are forcibly thrown out of the land, it amounts to their dispossession from the land in question actually and they are entitled to file a suit under Sec. 6 of the Specific Relief Act, 1963.[6]

25. Suit under Order XXI, rule 103, C. P. C.—Under rule 103, Order XXI, C. P. C., any party not being a judgment-debtor against whom an order is made under rule 101 may institute a suit "to establish the right which he claims to the present possession of the property" ; but subject to the result of such suit (if any) the order is conclusive. The order of the execution Court is conclusive against the present plaintiffs unless they can get a decree establishing their right which they claim to the present possession of the property. Their merely showing that they were in possession and had been dispossessed would not be sufficient. As a matter of fact, the finding of the Court that they were not in possession at all on that date is binding upon them. They must establish

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1. 12 I. C. 190 at p. 191 : I. L. R. 19 Cal. 544 (6 I. L. R. 23 Bom. 67 ref. to).
2. A. I. R. 1928 Nag. 313 at pp. 314 16 : 24 N. L. R. 112 : 112 I. C. 120.
3. A. I. R. 1929 Bom. 467 at p. 468 : I. L. R. 53 Bom. 773 : 31 Bom. L. R. 1042.
4. Gabu Peda Appanna *v.* Kuligu Krishnama, A. I. R. 1935 Mad. 134 at p. 135 : 1934 M. W. N. 1375 : 40 M. L. W. 922 : 153 I. C. 332.
5. Mangaldas *v.* Jiwanram, I. L. R. 23 Bom. 673.
6. Dula *v.* Moda, A.I.R. 1951 Ajm. 88 at p. 88 : 5 D. L. R. (Ajm) 13.

their right to possession on the assumption that they were not in possession on that date. The suit to establish the right to possession contemplated by Order XXI, rule 103, C. P. C., is not one under Sec. 9 (Sec. 6, new), Specific Relief Act. This is also clear from the language of Sec. 9 (Sec. 6, new), Specific Relief Act, itself. It is only where a person has been dispossessed without his consent "otherwise than in due course of law", that he can recover possession in the summary proceeding. In a case where the execution Court has put the auction-purchaser formally in possession, and has dismissed an objection raised by the rival claimant, it is not a case of dispossession otherwise than in due course of law. The delivery of possession was in fact in due course of law. This view is further strengthened by the circumstances that whereas a period of six months is prescribed under Art. 3, Limitation Act (old), for a suit under Sec. 9 (Sec. 6, new), Specific Relief Act, there is a period of one year under Art. 11 (*a*) (old) of the Act for a suit by a person to establish his right to the present possession of the property against whom an order has been passed by an execution court. Obviously the two classes of suits are of a different nature and fall in different categories.[1]

26. Possession.—In the English common law, possession has always been regarded as a good title of right against any one who cannot show a better one. As observed by Salmond, in his *Jurisprudence*, 9th Ed., page 408, "a wrongful possessor has the rights of an owner with respect of all persons except earlier possessors and except the true owner himself". This theory was adopted in Indian law and embodied in Sec. 8 of the Specific Relief Act, 1877 now succeeded by Sec. 5 of the Specific Relief Act, 1963. As distinguished from Sec. 9 of the old Specific Relief Act and Sec. 6 of the new one, suits under Sec. 8 of the old Act and Sec. 5 of the new Act could be filed on the basis of title by owners as well as non-owners. In respect of owners, this remedy could be said to be proprietary while in respect of non-owners the remedy could be viewed as possessory. In the European Civil law following the Roman law this distinction is well known and is expressed by the contrasted terms *petitiorium* (a proprietary suit) and *possessorium* (a possessory suit). This duplication of remedies was, however, avoided in the English and the Indian law by the operation of the following three rules:

(1) Prior possession is *prima facie* proof of title. In a suit for possession based on title, the plaintiff need do nothing more than prove that he had an older possession than that of the defendant. The law will then presume from this prior possession a better title in the plaintiff according to the maxim *qui prior est tempore potior est jure.*[2]

(2) A defendant is always at liberty to rebut this presumption by proving that the better title is in himself, and

(3) a defendant is not allowed to set up the defence of *jus tertii*, as it is called; that is to say, he will not be heard to allege, as against the plaintiff's claim, that neither the plaintiff nor the defendant, but some third person, is the true owner. The principle is—

"Let every man come and defend his own title. As between *A* and *B* 6—5 the right of *C* is irrelevant.[2a]"

This analysis of the legal position, is supported by the decision of the Supreme Court in *Nair Service Society Ltd.* v. *K. C. Alexander.*[3]

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1. Murlidhar *v.* Jainti Prasad, A. I. R. 1932 All. 703 at p. 704 : 1932 A. L. J. 812.
2. *Compare* Sec. 110 of the Evidence Act.
3. A. I. R. 1968 S. C. 1165.

As distinguished from the title of an owner, the title of a person which is based purely on prior possession may be called a possessory title. But possession itself is a fluid concept. Its nature varies with the nature of the remedies with which it is associated and the manner in which they are developed. Originally possession was regarded as a relation of fact between a person and the thing possessed by him. When, however, a person who had prior possession was able to sue another person who was in present possession but whose possession was subsequent to that of the plaintiff, the purely physical element of possession became less important and the right of possession was recognized to exist even apart from ownership. The concept of possession thus became more a question of right and less a matter of infra-juridical fact.[1]

Once the nature of possession as a right in itself apart from ownership is recognized it follows that such a right is capable of being inherited and transferred. This is the law according to the consensus of judicial decisions. It would be useful to refer only to one of them, namely, *Govind Dutta* v. *Jagnarain Dutta*.[2] According to Sec. 306 of the Indian Sucession Act, 1935, also the right to sue of a person survives to and against the executor or the administrator of such a person except certain personal causes of action such as those based on defamation, assault, etc. A tenant holding over has *locus standi* to sue trespasser for possession on the basis of possessory title. A possessory title is good against everyone who does not have a better one.[3]

Possession is not necessarily the same thing as occupation or actual user.[4] Possession means the physical possibility of a person dealing with a property as he likes and not physical possession,[5] in other words, not merely physical contract but the mere possibility of the person dealing with a thing exclusively constitutes possession.[6] Ownership and possession are two distinct juristic conceptions and in every transfer of ownership from one person to another by act of parties a transfer of possession is not necessary.[7] Possession implies (*i*) some actual power over the object possessed, and (*ii*) some amount of will to avail oneself of that power called in Roman law respectively *corpus* and *animus*. Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title and where a person has in his own right and not merely as representative of another such control over immoveable property as to be able to exclude others from it and has the intention of exercising such power of exclusion he can be said to be in possession of it.[8] The word "possession" has an ordinary and natural meaning and also a restricted or technical meaning. It is a word, having an ambiguous meaning, and its legal sense meaning does not coincide with its natural and popular sense. Possession is of two kinds, namely, (1) actual phy-

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1. Commissioner of Wealth Tax *v.* Mrs. Avtar Mohan Singh, W. T. Ref. 4 of 1968 (decided by a Division Bench of this Court on 19th April, 1971) : 1971 Tax L. R. 1485 (Delhi).
2. A. I.R. 1952 Pat. 314, *per* Ramaswami and Sarjoo Prosad, JJ.
3. Phiyara Lal Kapur *v.* Jia Rani, A. I. R. 1973 Delhi 186 at pp. 188 , 189 : I. L. R. (1972) 2 Delhi 206.
4. Bishambhar Nath *v.* Nisar Ali, A. I. R. 1932 Oudh 51 at p. 54 : 135 I. C. 693 : 8 O. W. N. 1281.
5. Bahadur Chand *v.* Nainamal, 14 P. R. 1915 : 25 I. C. 35 : 231 Punj. L. R. 1914 : 133 Punj. W. R. 1914.
6. Emperor *v.* Lallu Waghju, I. L. R. **43** Bom. 550: 50 I.C. 999: 20 Cr. L. J. 391 : 21 Bom. L. R. 251.
7. Mohammad Talib Hussain *v.* Inayat, Jan, I. L. R. 33 All. 683 : 11 I. C. 762 : 8 A. L. J. 746.
8. Bawa Chhatigir *v.* Matanomal, 4 I. C. 356 : 3 S. L. R. 149 (I. L. R. 23 Mad. 179 app.).

sical possession, and (2) possession in law. It may mean physical control sometimes called *de facto* possession or detention or it may mean legal possession which may exist with or without *de facto* possession and with or without a rightful origin.[1] Mere cutting of grass or similar acts of user in an area of barren land have been held not to amount to such an exclusive possession as to entitle a person to bring a possessory suit.[2] With due deference it is submitted that the above-noted proposition is stated rather too widely.

Possession in fact is manifested by the exercise of such exclusiv control as the object is capable of. It need not always be complete o[e] immediate visible control. In case of wild uncleared land payment of taxesr may be sufficient evidence of possession as being the only practicable act of domination.[3]

In *Gajadhar Prasad* v. *Mst. Dulhin Gulab Kuer*,[4] the plaintiffs would be entitled to a decree for possession, unless they have lost their remedy by lapse of time. The defendants have one advantage over the plaintiffs, in that it is admitted that they are now in possession of the land in dispute. The onus is accordingly on the plaintiffs to establish that they were in possession of the land within 12 years of suit : but in dealing with a question of this nature it is necessary to guard ourselves against the view that possession is the same thing as occupation or actual user. When land is incapable of being used in any of the recognized modes by the proprietor it cannot be said that in law he is out of possession. It may be that the land is not in the actual possession of any of the parties, and still it may be said that in law the proprietor has never lost possession of the land.

"There is", as Sir Fredrick Pollock said on one occasion, "nothing more easy or more misleading than to assume that when a thing is not in any one's physical control, it is not, or on principle ought not to be, in any one's legal possession."

The land was admittedly wholly submerged for a considerable time. While that state continued, possession must have remained in the proprietor of the land. But admittedly the lands have now come out of the water and are in the possession of the defendants. The question is whether the presumption must be in a case of this nature in favour of the title and former possession or in favour of the state of affairs as existing on the date when the plaint was filed.

The identical question was in debate before the Full Bench of the Calcutta High Court in 1883. Mr. Justice Wilson, delivering the judgment of the Full Bench of the Calcutta High Court in the case of *Mohomed Ali Khan* v. *Khaja Abdul Gunny*,[5] considered that as a general rule, where the suit was for possession and the cause of action was dispossession, the onus was on the plaintiff to prove possession and dispossession within 12 years; and he thought that as a general rule the plaintiff could not, by merely proving possession at any period before 12 years before the suit, shift the onus on the defendant. That learned and distinguished Judge, however, thought that there was an exception engrafted on the general rule, when the Court had to deal with such land as was

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1. Rahimbux Ashan Karim *v.* Central Bank of India, A. I. R. 1929 Cal. 497 at p. 504 : I. L. R. 56 Cal. 367 : 119 I. C. 23 : I. L. R. (1929) Cal. 711.
2. Bije Singh *v.* Shib Singh, A. I. R. 1936 Lah. 669 at p. 670 : 165 I. C. 191.
3. Kirby *v.* Cowderoy, (1912) A. C. 599.
4. A. I. R. 1921 Pat. 234.
5. I. L. R. 9 Cal. 744 : 12 C. L. R. 257 (F. B.).

incapable of being used in any of the ordinary modes by the proprietor. In such a case, according to the Full Bench, if the plaintiff showed his possession down to the time of the diluvion, his possession is presumed to continue as long as the land continue to be submerged. There is, therefore, no doubt at all as to the law on this point, namely, that so long as the land continues submerged, the possession in law must remain with the proprietor. But then arises a very difficult question. The plaintiff may assert that the land has come out of water within 12 years of suit, whereas the defendant may assert that it came out of water more than 12 years before suit and that he has actually been in possession for more than 12 years before suit. On whom is the onus of proof lies under such circumstances ?

Dealing with the difficulty in the plaintiff's way in having to prove when the lands became fit for cultivation, Mr. Justice Wilson said as follows :

> "When lands, which have been in such a condition as to be incapable of enjoyment in the ordinary modes, are reclaimed and brought under cultivation, the change is in very many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time, so that it may be a matter of extreme difficulty to prove as to any piece of land, the exact date at which its condition became altered. And as the plaintiff who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains unchanged, it is essential to inquire on whom the burden of proof of the date of the change lies."

And then with the full approval of the Full Bench that learned Judge laid down the "true rule" in these words:

> "That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such time, and under such circumstances that that state naturally would, and probably did continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself and in accordance with the legal principles now embodied in Sec. 114 of the Evidence Act."

Sir Richard Garth in his judgment in the same case said as follows :

> "Thus it is admitted that in the case of jungle land, or of land covered by water, the Court may, and generally should, presume, in the absence of evidence to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years."

In other words, when the plaintiff has shown that he was in possession of the land at the time of diluvion, it must be presumed that he has continued to be in possession within 12 years of the suit, unless the defendant establishes the contrary. This rule was laid down as far back as 1883, and, so far as is known, has been distinctly affirmed by the Judicial Committee in the case of *Raj Kumar Roy* v. *Gobind Chunder Roy*.[1]

That being so, in the peculiar circumstances of this case, it is for the defendants to show that they have been in actual possession of the land for twelve

1. I. L. R. 49 Cal. 660 : 19 I. A. 140 ; 6 Sar. 140 (P. C.)

years prior to suit. Courts have to consider the evidence adduced on behalf of the defendants and to see whether they have established the case that they were in possession for twelve years before suit.

The word "possession" is a legal term, and Court cannot attach any importance to the evidence of witnesses, who came and swear that the land was in possession of somebody or other. The evidence that would satisfy the Court would be evidence of acts giving rise to the inference that a party has been in possession.[1] In case of waste jungle or diluviated lands evidence of possession is not the same as in the case of a house or cultivated field.[2] Again a man may be in possession through tenants.[3]

27. Possession is good title against all but the true owner.—So far as the High Court is concerned, the matter is settled by a series of decisions that in a suit for declaration of title and recovery of possession, even if the plaintiff fails to prove his title but proves his prior possession and that the defendant in the suit is a trespasser, the plaintiff will be given a decree for recovery of possession as against the defendant who is a trespasser pure and simple.[4]

In *Sahodra Kuer* v. *Gobardhan Tiwari*,[5] it was laid down by Chamier, C.J. and Sharfuddin, J., that a suit for possession can be brought beyond six months and Sec. 9 (now Sec. 6) of the Specific Relief Act was no bar to the maintainability of the suit. Their Lordships also held that a person having possession over a piece of land even though short of statutory period is entitled to recover possession from a trespasser who has come in possession by ousting him from possession. Similar view was expressed by another Bench of the Patna High Court in *Akal Ahir* v. *Baijnath Das*,[6] and it was laid down that if a person was in possession of the land even without title thereto he could not be successfully turned out by another person who also had no title and if such a thing should happen the person first in possession was entitled to be put again in possession even if he failed to prove that he had a title to the land. Dawson Miller, C. J., who agreed to the main judgment which was delivered by Mullick, J., laid down the proposition of law in the following guiding lines:

> "There is abundant authority for the proposition that if a person is in possession of land even without title thereto he cannot be successfully turned out by another person who also had no title, and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should fail to prove that he had a title to the land."

The next case on the point is *Bodha Ganderi* v. *Ashloke Singh*.[7] To this judgment also Sir Dawson Miller, C.J., was a party and his Lordship laid down the proposition of law in the following words:

> "As between two persons who are unable to make out a valid title one is in possession and has been in possession for several years. He is suddenly dispossessed by another who has no better title than the person whom he dispossesses, in fact he has no title at all. In the circumstances it seems to me that the plaintiff is entitled to be restored to possession of this tree. The defendants has no right whatever to dispossess

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1. Gajadhar Prasad *v.* Mst. Dulhin Gulab Kuer, A. I. R. 1921 Pat. 234 at pp. 235-36.
2. Rakhal Chandra Ghosh *v.* Durga Das, A. I. R. 1922 Cal. 557 at p. 566 : 67 I. C. 673 : 26 C. W. N. 724.
3. Sheopujan *v.* Sohbat, 36 I. C. 427 : 14 A. L. J. 1066.
4. Mst. Koki *v.* Chetwa Chamar, 1972 B. L. J. R. 541 at p. 542.
5. A. I. R. 1917 Pat. 546.
6. A. I. R. 1924 Pat. 709.
7. A. I. R. 1927 Pat. 1.

him and, if they do, whatever may be his title he clearly can seek the aid of the Court to be put back in such possession as he had, before being dispossession by those who had no title."

To the similar effect is the decision in *Subodh Gopal Bose* v. *Province of Bihar.*[1] The matter was again agitated before the Patna High Court in *Govind Dutta* v. *Jagnarain Dutta,*[2] and it was laid down that possession is good title against all but the true owner and a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed.[3]

28. Possession is prima facie proof of title.—Under the Specific Relief Act, two kinds of suits for possession of immoveable property are contemplated. Section 8 (now Sec. 5) of the Act provides for a suit for possession if a person is entitled to it. If a person is entitled to a property and if he is out of possession, he is to bring a suit under the general law the procedure of which is given in the Code of Civil Procedure and appeal is also provided against the decision of the Court. The person who has got better title is entitled to succeed in an action for possession provided his remedy is not otherwise barred. Under Sec. 9 (now Sec. 6) of the Specific Relief Act a summary suit for possession is provided for. Here if the suit is brought within six months of the date of dispossession, the person so dispossessed is entitled to be restored to possession irrespective of the fact whether he has got title or not. Law recognizes that possession is the *prima facie* proof of title. Even if the defendant in that action has got title, that title cannot avail him because he has got no right to take the law in his own qand and dispossess the person in possession.

The decision of the Court in such a suit is final and no appeal or any review of such order or decree is permissible. In substance, the law allows a person in possession of an immoveable property to remain in possession unless he is evicted tfrom it through process of law by a better title. This principle has been extended o suits for possession even if the suit is brought after six months and within the statutory period of twelve years where the person is dispossessed by a person who has got no title irrespective of the fact that the person in possession so dispossessed had got absolutely no title. His possession can be only resisted by a person who is the true owner of the property. In an action for ejectment if the defendant proves better title, the suit for possession will fail. But if both the plaintiff and the defendant have got no title to the suit land, i. e. even if both are trespassers on the suit land, the plaintiff who is a prior trespasser is entitled to possession, against the subsequent trespasser who has dispossessed the former on the strength of his previous possession. If the person in possession continues in possession for more than twelve years, he acquires a title commonly known as possessory title. Possession is the notice of title of the person to the whole world under Sec. 3 of the Transfer of Property Act. Therefore, the previous possession of a person in respect of the property has got to be protected in courts of law against the whole world except the true owner unless the remedy of the true owner is barred by limitation. These propositions are well settled on the principle and on the authorities of different courts. When both the plaintiffs and defendants have got no title to the suit land but the plaintiff have proved their prior possession, they are entitled to get decree for recovery of possession as against the defendants who have no title in the suit lands.[4]

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1. A. I. R. 1950 Pat. 222.
2. A. I. R. 1952 Pat. 314.
3. Mst. Koki *v.* Chetwa Chamar, 1972 B. L. J. R. 541 at pp. 542-43.
4. Srinath Singh *v.* Kali Bhawani Prasad, A. I. R. 1972 Pat. 138 at p. 140.

29. Nature of possession contemplated.—For the purpose of Sec. 6 of the Specific Relief Act, 1963, the possession claimed by a person should be juridical, that is to say, possession founded on some right,[1] although Sec. 6 (new) itself says nothing about the nature of the possession enjoyed by the dispossessed person. What the Sec. 9 (old) does is that it provides a summary remedy to a person, who has without his consent been dispossessed of immoveable property otherwise than in due course of law to sue for recovery of possession without establishing his title, within six months of his dispossession.[2]

30. Juridical possession.—The word "juridical" does not appear to be in Stroud's *Judicial Dictionary*, but the expression "juridical possession" is the same thing as "legal possession" in a more impressive form.[3] It means possession which has been got neither by force nor by fraud.[4] Thus a possession cannot be said to be juridical where it is taken behind the defendant's back who does not acquiesce therein but seeks to evict him as soon as he discovers his dispossession.[5] A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself possession, in the legal sense of the term, against the person whom he ejects.[6]

Juridical possession.

In so far as the question of possession is concerned, it was not in dispute in *Chinna Pillai* v. *N. Govindaswami Naidu*,[7] that the respondent was actually occupying the stalls in question on the date when he was dispossessed. This has been found as a question of fact by the Trial Court and it is binding under Sec. 115, C. P. C. In fact, the process adopted by the petitioner in forcibly evicting the respondent therefrom is not in dispute either. Police assistance was also sought. But the point to be considered is whether the possession of the premises claimed by the respondent is juridical possession. English law provides a penalty by way of imprisonment in case a person secures forcible possession from a tenant. In Indian law, however, the person unlawfully dispossessed by use of force is entitled to restitution by the specific provision made for the purpose originally by Sec. 15 of the Limitation Act of 1859 and now under the provisions of Sec. 6, Specific Relief Act, 1963.

The cardinal rule, therefore, appears to be that no one can be dispossessed by another on the foot of the latter's superior title, if any, if such dispossession is against the wish of the occupant, not under the process of law and when the person dispossessed is in lawful occupation of the premises. Even the rights of re-entry ordinarily envisaged in leases are subject to the salutary principles above stated. Courts which exercise jurisdiction justly, equitably and conscientiously always relieved leases against forfeiture and provide against re-entry forcibly in spite of a covenant expressly to that effect in the lease deed. A tenant in-possession, but who is holding over cannot be terminologically equated to a squatter, wayfarer or trespasser. Such a person in possession, no doubt, should establish a possessory title which has fruitioned to his benefit prior to the date of

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1. *See* Amir Khan *v.* Mohammed Jamil, I. L. R. 15 Bom. 685.
2. M. C. Batra *v.* Lakshmi Insurance Co., A. I. R. 1956 All. 709 at p. 710.
3. Rahim Bux Ashan Karim *v.* Central Bank of India, A. I. R. 1929 Cal. 497 at p. 501 : I. L. R. 56 Cal. 367 : 119 I. C. 23.
4. Aziz-ul-Hak *v.* Mariam Bibi, 24 I. C. 45 : 17 O. C. 153 : 1 O. L. T. 225.
5. Vishundas *v.* Municipality of Hyderabad, 34 I. C. 494 : 9 S. L. R. 220 (Verijivandas *v.* Mahomed Ali Khan, I. L. R. 5 Bom. 208 ref.).
6. Browne *v.* Dawson, 113 I. R. 950 : 10 L. J. Q. 7 : (1840) 12 A. & E. 624; Emperor *v.* Bandhu Singh, A. I. R. 1928 Pat. 124 at p. 126 : I. L. R. 6 Pat. 794 : 106 I. C. 691 : 29 Cr. L. J. 99; A. I. R. *See* also Verijivandas *v.* Mahomed Ali Khan, I. L. R. 5 Bom. 208.
7. A. I. R. 1969 Mad. 191.

forcible dispossession. This is commonly referred to as juridical possession. A tenant who holds over after the expiry of the lease by efflux of time is not to be characterized as a trespasser and a person who has no possessory title in him enabling the landlord to take law into his own hands and disturb such juridical possession of the property to which such tenant holding over the demised property is entitled in law. "Juridical possession in one, although it might not depend on the legal title to possess as in the case of an owner, is actual possession with an intention of maintaining himself in possession."[1] In this case the tenant was actually running the business on the date when the petitioner, with the assistance of the police, threw him out. In fact, edibles were prepared and the stalls were doing normal business. The prepared edible and the material and stock on hand were thrown out of the premises. The servants were driven out. As already stated, the manner in which the respondent was pushed out of the premises is not seriously in dispute. One thing, therefore, clearly emerges from the facts disclosed on the date of dispossession. The respondent who was holding over did really want to maintain his possession and there could be no two opinions about his subjective intention to continue lawfully in possession of the premises. It has been found as a question of fact by the Lower Court that the defendant accepted the rent. This is another *indicia* to establish that the plaintiff was in lawful possession of the property when he was forcibly dispossessed. It has to be, therefore, necessarily concluded that the respondent was in juridical possession of the demised property on the date when he was dispossessed. As has been held by the Supreme Court in *Shivayogeswara Cotton Press* v. *Panchaksharappa*,[2] where a land is let out for building purposes without a fixed period, the presumption is that it was intended to create a permanent tenancy. Though the principle laid down by the Supreme Court is not in its entirety applicable to the facts of the instant case, but yet in the light of the findings of fact by the Lower Court that the defendant is bound to continue the plaintiff as lessee in view of the Government order allowing an implied lease for construction of such stalls.

Section 6 (new) is substantive in its scope and is indeed a shield against improper, unauthorized and high-handed action on the part of landlords to dispossess tenants under the strength of their superior title. Such title if any in the landlords have to be established in courts of law by setting in motion the normal process of law in a court of justice. Notoriety in the act of dispossession without lawful authority, is the very negation of common law rights vested in a tenant to continue in possession and it is this which is relieved against expressly by the Legislature making a substantial provision in Sec. 6 of the Specific Relief Act, 1963. It is, therefore, necessary that the elements constituting the section have to be complied with strictly and the absence of any one of the prescribed elements therein would entitle the person dispossessed to restitution. Though self-help is the best help, it is not so in the eye of law when a landlord attempts to take law into his own hands to evict his tenant without due process of law. The scope of Sec. 6 (new) has been considered in full by Ramchandra Iyer, C. J. and Anantanarayanan, J., in *N. Z. Corporation* v. *Narayana*[3] as follows :

> "The remedy given under the statute is not a substitute for an ordinary civil action based on title whether, such title be actual or possessory. It is a summary possessory process like the one provided for under Sec. 145 (new), Cr. P. C., involving the decision on the rights of the parties,

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1. N. L. Corporation *v.* Narayana, A. I. R. 1965 Mad. 122.
2. A. I. R. 1962 S. C. 413.
3. A. I. R. 1965 Mad. 122.

> except in regard to actual possession on the date of dispossession, available to a wrongful party under certain circumstances."

Being so summary in nature, it cannot be lightly resorted to.

The statute, as is normal in any enactment of a Legislature, whether it is of the State Legislature or of the Parliament, sometimes prescribes certain restrictive provisions and also requires local bodies to adopt for unanimity sake, certain forms under which they could transfer their properties by way of leases or otherwise. Once, therefore, the parties do adopt the form prescribed with such variations as required and as are agreed to, could it be said that the lease deed which is the creature of the application of either substantive or procedural law prescribed by the Legislature or Parliament, acquired the status of law by itself for the one and only reason that meticulous care has been taken in drafting the lease deed in accordance with the prescribed directives of the provisions of law? The answer should be in the negative. Once the lease deed is entered into, that is, the sheet-anchor which governs the rights and the correlative duties between the lessor and the lessee and such mutual contractual obligations are governed by the common law. By adopting the form prescribed, by following the various substantial sections under an enactment and ultimately entering into what is known as a contract of lease, such a deed cannot in any sense be understood to be as the very substitution of common law rights to which one or the other party is entitled to and such a contract cannot be immuned or free from the impact of common law or any other special law and its provisions. Once the lease deeds have been entered into, that is, the *indicia* which would govern the relative rights and obligations of parties and that deed by itself cannot be understood as being synonymous to statute law or for the matter of that "law". If that were so, every contract which has the sanction of law, will by itself be "law" as is popularly understood, notwithstanding the fact the parties to the said contract had the right to vary the prescribed form and adopt clauses, apart from the independent thereto. Anything done under such a contract may be sought to be sustained as legal, but it is not the same thing to say that it was under due process of law. Therefore, the leases being essentially in the nature of contracts, anything done, or purported to be done under them must be subjected to and scrutinized and passed by adopting the principles of the common law of the country. Once a lease, it is always a lease and it is governed by the ordinary provisions of law.

In the classical words of Batchelor, J., in *Rudrappa* v. *Narasingarao*,[1] which is as under :

> "To read the words 'due course of law' as merely equivalent to the word 'legally' is, we think, to deprive them of a force and a significance which they carry on their very face. For a thing, which is perfectly legal, may still be by no means a thing done 'in due course of law'; to enable this phrase to be predicated of it, it is essential, speaking generally, that the thing should have been submitted to the consideration and pronouncement of the law, and the 'due course of law' means, we take it, the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication."

In a case where the State of Pepsu dispossessed a person in lawful possession of immoveable property on the foot of its superior title, it was observed by a Division Bench of the Punjab High Court in *Patiala State* v. *Mohinder Singh*,[2] as follows :

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1. I. L. R. 29 Bom. 213.
2. A. I. R. 1958 Punj. 325.

"The general purpose of the law is that regardless of the actual condition of the title to, or the right of possession of the property, the party actually in peaceable and quiet possession shall not be turned out by strong hand, violence or terror. There is no provision of law which empowers a State Government by force or show of force to evict a person who is in actual possession of immoveable property. If the State Government were of the opinion that the State had the superior title or the better right to possession it is open to them to bring an appropriate action against him and to secure his eviction in accordance with the provisions of law."

While considering the scope of mining lease granted to a company by the Government under the Mineral Concession Rules, 1960, framed under the Mines and Minerals (Regulation and Development) Act, 1957, Dixit, C. J., and Pandey, J., in *United Collieries* v. *Engineer-in-Chief, South Eastern Railway*,[1] put the position in the following terms :

> "The petitioner's claim is founded solely on the lease deed and not in any statutory provision. True, the lease was granted to the company under the Mineral Concessions Rules, 1960, framed under the Mines and Minerals (Regulation and Development) Act, 1957. But that does not give to the lease deed or any of its terms the status of a statutory provision or a rule. There is no provision either in the Act or the Rules laying down that a lease granted under the rules would be read as a part of the Act or the Rules. It is, therefore, erroneous to say that the liberties, privileges and powers granted to the petitioner company by the lease are statutory warranties or rights and privileges. They are nothing more than contractual rights and privileges."

In *Al. Ar. Arunachalam Chettiar* v. *Kaleeswarar Mills Ltd*,[2] a Division Bench of the Madras High Court had to consider the legal effect and force of memorandum and articles of the association of a company, and observed as follows :

> " . . . . though having regard to Secs. 36 and 291, Companies Act, the memorandum forms the constitution of the company and the articles, the rules regulating the conduct of the affairs of the company, and such forms part of the law so far as the company is concerned, where the particular provisions in the memorandum and the articles of association are the result of a contractual arrangement entered into between the company and the petitioner with reference to their managing agency rights, and it is only those contractual rights that are put into the memorandum and articles of association, it is only because of the contractual obligations, the company would be bound to respect the rights of the petitioners and not because they are enjoined to do so by any law or statute for the time being in force . . . . In such a case the duty sought to be enforced . . . . though embodied in the memorandum and articles of the company, cannot be placed on a higher footing than a contractual obligation . . . . "

In *Kali Mohan* v. *Agartala Municipality*,[3] a case similar to that under consideration arose. There the petitioner occupied a market site belonging to the Municipality and built on it, to their knowledge, certain structures. He occupied

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1. A. I. R. 1964 M. P. 42.
2. A. I. R. 1957 Mad. 309.
3. A. I. R. 1959 Tripura 47

the premises for about five years when he was evicted by force. In the absence of any specific provision in the Tripura Municipal Act to eject the holder of the site summarily, it was held that the action of the municipality was without the authority of law and, therefore, illegal and without jurisdiction. If the petitioner had no right to continue in possession, the only course open was to eject him by having recourse to a civil suit, in which alone the question of the rights involved could be decided. Finally, Ramchandra Iyer, C.J., and Anantanarayanan, J., in *N.Z. Corporation* v. *Narayana*,[1] evolved the following two principles underlying the basis of the statutory provision, namely, Sec. 6 (new) of the Specific Relief Act, which, according to them, are of universal application :

> "Those two principles are : (1) to discourage persons from taking the law into their own hands and derive benefit by that process, the benefit being that of getting possession so secured and also incidentally depriving the other party of the benefit under the law which but for the dispossession he will have the right of retaining such possession till the person who wants to wrest it from him, proves a better title; (2) that the law and orderly administration of the country require that possession even by the owner of the property should be taken by adopting the process prescribed by law and not mere self-help."

Can the normal effects of Sec. 6 of the Specific Relief Act, 1963, be rendered otiose by a clever machination on the part of a wrong-doer ? It cannot be and it ought not to be encouraged.[2]

31. Juridical possession distinguished from a mere act of trespass.—Juridical possession though not equivalent to lawful possession is distinguishable from a mere act of trespass. "It may be difficult to frame any comprehensive formula to distinguish an act of trespass. But it may be generally observed in the first place that in order to entitle the plaintiff to succeed on the ground of possession he must prove that he exercised acts which amounted to acts of domination; the nature of these acts of domination must obviously vary with the nature of the property. A particular act which in the case of one property may be sufficient to indicate control over that property, may in the case of another property amount to nothing more than an isolated act of trespass. It may also be marked that such act of domination though exercised over a part only of the property may be evidence of the possession of the whole. This, however, must be dependent upon the character of the property and the nature of the act. The second element which may require consideration is whether the act of domination is exclusive. If each of the two persons commits what may be deemed act of trespass upon the disputed property, and it is ultimately proved that one of them has title and the other has not, the act of the rightful owner would not be an act of trespass but would amount to an act of possession whereas in the case of the wrongdoer such act would probably be deemed nothing more than an act of trespass".[3] Where a trespasser is allowed to continue on the property

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1. A. I. R. 1965 Mad. 122.
2. Chinna Pillai *v.* N. Govindaswami Naidu, A. I. R. 1969 Mad. 191 at pp. 195-96, 198-99, 200-1.
3. Rajkrishna *v.* Mukhtaram, 7 I. C. 700 : 12 C. L. J. 603 ; *See* also Amiruddin *v.* Mohd. Jamal, I. L. R. 15 Bom. 665; Dadabhai Narsidas *v.* Sub-Collector of Broach, 7 Bom. H. C. R. 82; Emperor *v.* Bandhu Singh, I. L. R. 6 Pat. 794 : 106 I. C. 691 : A. I. R. 1928 Pat. 124 : 29 Cr. L. J. 99.

and the owner sleeps upon his rights and makes no effort to remove him, he will gain a possession, wrongful though it be, and cannot be forcibly ejected.[1]

32. Evidence of possession.—It should be borne in mind that possession is not necessarily the same thing as actual user. The nature of the possession is to be looked for and the evidence of its continuance must depend upon the character and condition of the land in dispute. When the plaintiff's title is made out, it should be presumed, having regard to the nature of the property that they have all along been in possession, because the presumption of possession follows the title.[2]

Section 6—Evidence of possession.—Where a plaintiff sues for possession on the basis of previous possession under Sec. 6, mere allegations without proof of acts of actual possession do establish his anterior possession.[3]

The rule of law as pointed out by the Judicial Committee in *Rani Hemanta Kumaree Devi* v. *Maharajah Jagadindra Nath Roy*,[4] is that it is for the plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession. At the same time in this question of possession, the initial fact of plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidence.

The presumption that the Court ought to have presumed that possession went with the title can arise only where the evidence is equally strong on both sides. In *Runjeet Ram Pandey* v. *Goburdhan Ram Pandey*,[5] the Judicial Committee observed :

> "Now the ordinary presumption would be that possession went with the title. The presumption cannot of course be of any avail in the presence of clear evidence to the contrary, but where there is strong evidence of possession, as there is here, on the part of the respondents opposed by evidence apparently strong also on the part of the appellant, their Lordships think that in estimating the weight due to the evidence on both sides the presumption may, under the peculiar circumstances of the case, be regarded, and that with the aid of it, there is stronger probability that the respondents' case is truer than that of the appellant."[6]

The principle does not apply to a case where the evidence is equally unworthy of reliance on both sides.[7]

The question was discussed by a Full Bench of the Patna High Court in the case of *Raja Shiv Prasad Singh* v. *Hira Singh*,[8] where it was held that the presumption can be raised only where the evidence is equally strong on both sides

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1. Kalichurn *v.* Secretary of State, I. L. R. 6 Cal. 725 : 8 C. L. R. 90, *per* Garth, C. J.; *see* also Emperor *v.* Bandhu Singh, ILR 6 Pat. 794 : A. I. R. 1928 Pat. 124.
2. Lala Bishambhar Nath *v.* Nisar Ali, A. I. R. 1932 Oudh 51 at p. 54 : 8 O. W. N. 1281.
3. Kalulal *v.* Shri Mannalal, A. I. R. 1976 Raj. 108 at p. 112: 1975 Raj. L. W. 483.
4. 10 C. W. N. 630 : 16 M. L. J. 272 : 8 Bom. L. R. 400 (P. C.).
5. 20 W. R. 25 (P. C.).
6. *See* also Dharam Singh *v.* Har Prasad, I. L. R. 12 Cal. 38; Babu Kasturi Singh *v.* Raj Kumar Balu Bisen Prakas Narain, 8 C. W. N. 876 at p. 880 and Mirza Shamsher Bahadur *v.* Munshi Kunj Behari Lal, 12 C. W. N. 273 : 7 C. L. J. 401 (the word "unsatisfactory" at p. 280 is evidently a slip).
7. *See* Thakur Singh *v.* Bhojeraj Singh, I. L. R. 27 Cal. 25 ; Lal Singh *v.* Mir Latif Hussain, (1915) 21 C. L. J. 480 : 28 I. C. 477 and Fakira Lal Singh *v.* Munshi Ram Charan, (1916) 1 P. L. J. 146 : 35 I. C. 554 (the observations with regard to waste of jungle lands are *obiter*).
8. A. I. R. 1921 Pat. 237 : 6 Pat. L. J. 478 : 3 W. P. L. R. 81 (F. B.).

and cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. The subject-matter of dispute in that case was cultivated land.

In the order of reference, the learned Judge expressed the opinion that in cases of submerged or jungle or waste land, the continuance of possession may be presumed if antecedent title and possession are proved. The observation has reference to land of such a nature that possession cannot be expected to be proved by acts of actual user and enjoyment and the learned Chief Justice referred with approval to the observations of Wilson, J., in the judgment of the Full Bench of the Calcutta High Court in *Mahomed Ali Khan's* case[1] (with regard to jungle lands) that the plaintiff should show such acts of ownership as are natural under existing conditions, and that where this has been done prior possession may be presumed to have continued until the plaintiff is shown to have been dispossessed. The plaintiff alleged that the land was waste, but it was not the case of the plaintiff that no acts of ownership could be or were exercised upon the land. The plaintiff adduced some evidence of possession, viz. grazing of cattle upon the land prior to the excavation of the tank by the defendants. The defendants adduced evidence to show that the land was under cultivation before he excavated the tank. According to both parties, therefore, acts of possession were exercised upon the land. Now where definite evidence of acts of possession is forthcoming, there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands, the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduced evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it.[2] One may possess corporeal things whether they may be moveable or immoveable, but according to the differences of their nature the marks of the possession of them are different. Thus one may possess moveables by keeping them under lock and key or having them otherwise at one's disposal. Thus one possesses cattle either by shutting them up or by giving them to be kept; thus one possesses a house by dwelling in it, or having keys thereof or trusting it to a tenant, or by building on it; thus one possesses lands by cultivating them, reaping the fruits, going or coming through them or disposing them of at pleasure.[3] An entry in the *khewat* is at least *prima facie* evidence of possession and if there is nothing to show any alteration in the entry the legitimate presumption arises that the state of things indicated by the entry continued up to the date of the death of the person whose name appears in the *khewat* if not beyond it.[4] But an order as to

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1. I. L. R. 9 Cal. 744 : 12 C. L. J. 257.
2. Rakhal Chandra Ghose *v.* Durgadas Samanta, A. I. R. 1922 Cal. 557 at pp. 564-67 : 26 C. W. N. 724; *see* also Gajadhar *v.* Mst. Dulhin Gulab, 57 I. C. 744 : A. I. R. 1921 Pat. 234 : 2 P. L. T. 59 : 5 P. L. J. 632; Rajkrishna *v.* as Mukhtaram, 7 I. C. 700 : 12 C. L. J. 603; Kirby *v.* Cowderoy, (1912) A. C. 599.
3. Messrs. R. Watson & Co. *v.* Government of Bengal, 21 W. R. 72.
4. Gulam Sarwar Khan *v.* Mohd. Ali Khan, A. I. R. 1922 Oudh 98 at p. 99 : 65 I. C. 398 : 8 O. L. J. 609 ; Saraswati *v.* Dhanpat, I. L. R. 9 Cal. 431.

mutation of names is not sufficient evidence of the actual period of possession.[1] Again a decree in a land registration proceeding does not prove the decree-holder's possession. It proves that he had a right to possession.[2]

33. Constructive possession.—The term "constructive possession" means differently in different circumstances. Generally it means possession as distinguished from actual possession through a tenant or agent. It has also been used in connexion with property which is incapable of actual possession and is said to be in the constructive possession of the owner as waste lands or lands under water. Where however a person is the owner of a property, but does not use it for some time it cannot be said that he is in constructive possession of it. He is in actual possession so long as he has the power to bring it into use whenever he likes.[3] "If anyone possesses a thing as usufructuary pledgee, tenant, borrower or depositee or in any other capacity by virtue of which he is entitled or bound with respect to some other person to keep possession of the thing for a limited time, then that other person has possession also."[4] The possession thus fictitiously ascribed to him is called constructive possession. By "constructive possession" is generally meant possession as distinguished from actual possession, through a tenant or agent. It has also been used in connexion with property which is incapable of actual possession and is said to be in the constructive possession of the owner as waste lands or lands under water. If a person is the owner of a property but does not use it for some time, it cannot be said that he is in constructive possession of it. He is in actual possession so long as he has the power to bring it into use whenever he likes. It is evident that a suit for recovery of possession must be brought in respect of property of which the reversioners were out of possession at the death of the female and which was in the possession of another person from whom they seek to recover it.[5] Thus a landlord is constructively in possession through his tenant,[6] a principal through his agent,[7] a lunatic or infant through his guardian, a master through his servant,[8] a lessor through the lessee,[9] and a mortgagor through the mortgagee.[10] Possession of part is constructive possession of the whole which is an incident of ownership resulting from title. This doctrine does not apply where the occupant depends on the ground of possession only without proving title.[11] Not only physical but constructive possession is sufficient to sustain an action for possession under this section.[12]

Meaning of the term explained.

Instances of constructive possession.

Constructive possession is sufficient to sustain suit under Sec. 6.

34. Symbolical possession.—Where immoveable property is sold by auction in execution of a decree the possession that is delivered to the auction-

1. Amir Ali *v.* Karim Ali, 9 I. C. 454.
2. Soha Dass Jana *v.* Nirada Bala Dasi, 63 I. C. 602.
3. Mahendra Nath Begchi *v.* Tarak Chandra Sinha, A. I. R. 1932 Cal. 504 at p. 505 : 138 I. C. 349 : 36 C. W. N. 326.
4. Salmond.
5. Mahendra Nath Bagchi *v.* Tarak Chandra Sinha, A. I. R. 1932 Cal. 504 at p. 505.
6. Girish *v.* Bhagwan, 13 W. R. 191 ; *see* also Bindubasini *v.* Jahnavi, 13 C. W. N. 303; Nithuri *v.* King-Emperor, 6 A. L. J. 697; Mahendra Nath Bagchi *v.* Tarak Chandra Sinha, 138 I. C. 349.
7. Mahendra Nath Bagchi *v.* Tarak Chandra Sinha, 138 I. C. 349 : 36 C. W. N. 326.
8. 9 B. L. R. 229.
9. Krishna *v.* Hari, I. L. R. 9 Cal. 367.
10. Inayat Husen *v.* Ali Hasan, 20 All. 182; Jogeshwar *v.* Jawahir, I. L. R. 1 All. 311 (F. B.).
11. Promatha Nath *v.* Meik, A.I.R. 1920 Pat. 542 at p. 546 : 56 I. C. 184 : 1 P. L. T 360 : 5 P. L. J. 273 ; Narayan Singh *v.* Sayad Dildar, A. I. R. 1925 Pat. 210 : 6 P. L. T. 191.
12. Ghulam *v.* Sheodin, 48 I. C. 415.

purchaser by, say, beat of drum on the spot by an officer of the Court is generally spoken of as symbolical possession.[1] The expression, however, is a misnomer, for such a possession as between the decree holder and the judgment-debtor operates as actual possession.[2] A formal delivery of symbolical possession is exclusive evidence that possession was delivered but not that it continued. It is but a legal fiction in most cases and yet is valuable in that it offers a starting point for limitation.[3]

35. Servant's possession—Servant's possession being on behalf of his master is not a juridical possession but is merely a detention and custody. Therefore, a suit by a servant under this section is not competent.[4] An *archaka* of a temple is a servant within the meaning of this context and cannot bring a suit under this section.[5] But the case is different with the agent or manager of an absentee landlord and his possession is not of a ministerial character.

The possession of a deputee or appointee for the benefit and on behalf of the person deputing or appointing is not juridical possession but is really the possession of the person deputing or appointing. It is not the independent legal possession of the deputee or appointee or servant. The person in such a case though in actual occupation, being the deputee, appointee or servant holds the property for such person deputing or appointing or the master.[6]

In *Nritto Lall Mitter* v. *Rajendro Narain Deb*,[7] it has been laid down that where the plaintiff alleged that he was in possession of a certain room as representing his father and uncle who were alive but who were not parties to the suit and that he had been dispossessed from such room, within six months of the institution of the present suit, his possession not being juridical did not entitle him to maintain a suit under Sec. 9 (now Sec. 6) of the Specific Relief Act".

36. Suit for recovery of possession of land.—In a suit filed under Sec. 6 of the Specific Relief Act, 1963, for recovering of possession of the land if the defendant contends that he is in possession of the land as a tenant, the Civil Court will not be barred from entertaining the suit because the suit is for summary remedy for restoration of possession and it has nothing to do with the title in respect of the property or nature of possession. The suit being under Sec. 6 (new) of the Specific Relief Act in which question of title is not decided by the Court, the Court should not entertain the claim in respect of mesne profits.[8]

37. Tenant's dispossession.—In *Raghuber Dayal* v. *Hargobind*,[9] Sharma, J., after discussing a number of judicial decisions on the point summarizes his conclusion thus:

> "On a perusal of the wordings of Sec. 9 (now Sec. 6) of the Act, it would be found that any person who is dispossessed without his consent

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1. Banerji's *Tagore Law Lectures*, p. 41.
2. Salamat Ali *v.* Ali Akbar, 551 I. C. 646; Azim Dad *v.* Ghansham, (1904) 1 All L. J. R. 20; *see* also I.L.R. 5 Cal. 584 (F. B.);Narayan Das *v.* Lalta Prasad, I. L. R. 21 All. 269; Hrai Mohan Shaha *v.* Baburali, I. L. R. 24 Cal. 735; Mangli Prasad *v.* Debi, I. L. R. 19 All. 499; I. L. R. 27 Mad. 262.
3. Deonandan Prasad *v.* Udit Narayan Singh ,23 I. C. 298 : 18 C. W. N. 940.
4. Bawa Chatigir *v.* Matanomal 4 I. C. 359 : 3 S. L. R. 149; Venamamalaijeer Swamigal *v.* Venkataramana Chariar 68 I. C. 183 : A. I. R. 1922 Mad. 183 : 1922 M. W. N. 422 : 15 L. W. 931.
5. Venamamalaijeer Swamigal *v.* Venkataramana Chariar, *supra*.
6. Sobha *v.* Ram Phal, A. I. R. 1957 All. 394 at p. 395 : 1958 A. W. R. 365.
7. I. L. R. 22 Cal. 562.
8. Gobind Babaji Naik Araundekar *v.* Shankar Babu Naik Araundekar, A. I. R. 1971 Goa 24 at p. 25.
9. A. I. R. 1958 Raj. 287 at pp. 290-91.

of immoveable property, otherwise than in due course of law or any person claiming through him, may, by suit recover possession thereof.

"On a careful consideration of the wording of Sec. 9 of the Act (which corresponds to Sec. 6 of the present Act), I am of the opinion that the ruling in which it has been held that the suit for possession under Sec. 9 (now Sec. 6) of the Act can be brought by a landlord also even when the property is in possession of the tenant, have taken a correct view of the provisions of Sec. 9 (now Sec. 6). The words used are 'dispossessed' and 'recover possession thereof'. Section 9 (now Sec. 6) is not confined only to those cases where the plaintiff is in actual possession of the property in suit. Whatever possession the plaintiff has at the date of possession he is entitled to claim in case of dispossession. If a tenant is in possession of the property and being dispossessed therefrom does not care to bring a suit for possession of the property, the landlord cannot be shut off from bringing a suit against the trespasser.

"If the tenant has a mind to remain in possession of the property on behalf of the landlord, the landlord will put him in actual possession of the property. If, however, the tenant has no mind to stick to the land, the landlord is entitled to get actual possession of the property from the trespasser."

38. Possession of part as evidence of possession of whole.—The question whether it is permissible to infer the possession of whole of a piece of land from the possession of a part of it depends whether or not there is a title in the posse ssor. There is ample authority for the proposition that where a continuous parce of land is held under one and the same claim of title acts of control or enjoymen done in one part of it, are relevant to show possession of the whole.[1] Where it is found that a party is in possession of certain property, the Court may presume that he is in possession as regards appendage of such property though no definite acts of possession are proved as regards the appendage.[2] Again where a plaintiff has not only possession but has also a clear title to the major portion of the land and his possession is interfered with by one with no title and he has been dispossessed in part by such person he can maintain a suit to recover the whole land from the trespasser.[3]

This doctrine of constructive possession, however, cannot be extended in favour of wrong-doers.[4] In the absence of title the law will raise from definite physical control of part of land a presumption of possession of that, neither more nor less, which the possessor has shown a clear and unambiguous intention to possess.[5] Possession of a part is constructive possession of whole which is

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1. Jones *v.* Williams, (1837) 2 M. & W. 326 : 46 R. R. 611; Lord Advocate *v.* Blantyre, (1879) 4 App. Cas. 770; Iqbal Husen *v.* Nand Kishore, I.L.R.24 All. 294: Pundar Bindoo *v.* Mohesh Chandra, 22 W. R. 188; Jafar Ali Khan *v.* Qumarunnissa, A. I. R. 1938 Oudh 119 at pp. 121-22 : 171, I.C. 378; 1938 O. W. N. 454 : 1938 O. A. 346 : 1938 O. L. R. 182 : 1938 A. W. R. (C. C.) 49; Sivasubramany *v.* Secretary of State, I. L. R. 9 Mad. 285.
2. Iqbal Husen *v.* Nand Kishore, *supra*.
3. Jafar Ali Khan *v.* Qumarunnissa, *supra*.
4. Secretary of State *v.* Krishnamani, I. L. R. 29 Cal. 518 (P. C.).
5. Narayan Singh *v.* Saiyed Dildar, A. I. R. 1925 Pat. 210 at p. 216 : 6 P. L. T I. L. R. 191. 3 Pat. 915 : 80 I. C. 544.

incidental to ownership resulting from title. This doctrine does not apply where the occupant depends on grounds of possession only without proving title.[1]

39. Co-owners.—Section 6 (new) of the Specific Relief Act refers to exclusive possession and Court cannot grant joint possession so that a party entitled to half share cannot sue for possession thereof when the dispossession is as to the whole. This section is intended to provide a summary remedy for cases of dispossession of immoveable property except in the course of a law on proof of dispossession within six months; the Court will direct the restoration of possession irrespective of the title of the parties. What the trustee has done is to dismiss the plaintiffs who are only *archakars*. It has been decided that hereditary *archakrs* are only servants of the temple subject to the disciplinary jurisdiction of the trustee.[2] They have a right of suit if they are improperly prevented from performing the duties of their office or dismissed without good and proper reasons. The possession therefore of the *archakars* of the temple is only that of servants. The trustee is entitled to the possession of the trust property and an *archakar* or any other servant of the temple has possession on behalf of the trustee or by his leave or licence, implied or express. The learned Subordinate Judge has erred in thinking that he had jurisdiction to entertain a suit under Sec. 9 (now Sec. 6) of the Specific Relief Act by a servant against a master, no doubt the finding that plaintiffs are only *archakars* was arrived at after the whole of the evidence was recorded. The Subordinate Judge should have dismissed the suit on this ground alone.

It is no doubt true that the Hindu law treats hereditary *archakarship* and hereditary priesthood as immoveable property and divisible among coparceners.

In Southern India, village barbers when they effect a division in their family, divide the village into so many shares among the coparceners. Such a custom is recognized by the Hindu law. But this fact would not make hereditary *archakarship* or any other office, immoveable property under Sec. 9 (now Sec.6) of the Specific Relief Act.

Held that Sec. 9 (now Sec. 6) of the Specific Relief Act, is not applicable to a case like the present.[3]

The weight of authority, however, seems to be the other way that the words of the section do not refer to exclusive possession and that a court can pass a decree for joint possession in suit under the section.[4]

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1. Prematha Nath Malia *v.* A. J. Meike, A. I. R. 1920 Pal. 542 at p. 546 : 56 I. C. 184 : 5 Pat. L. J. 273 : 1 Pat. L. T. 360.
2. Seshadri Iyengar *v.* Ranga Bhattar, I. L. R. 35 Mad. 631 : 21 M. L. J. 580: 10 I. C. 548 : 10 M. L. T. 14.
3. Shri Venamamalaijeer Swamigal *v.* K. Peria Venkataramana Chariar, A. I. R. 1922 Mad. 183 at pp. 184-85 : 1922 M. W. N. 422; *see* also Hari Narain Das *v.* Elemjan Bibi, 23 I. C. 618 : 19 C. L. J. 117 : 19 C. W. N. 120 ; Para Koothan *v.* Parg Kullan, 31 I. C. 720: 29 M. L. J. 760 : 68 I. C. 183 : A. I. R. 1922 Mad. 183 : 16 L. W. 931: 1922 M. W. N. 422; Yellayi Sannaya *v.* Sannayajulu Ramesham, 189 I. C. 878 : A. I. R. 1940 Pat. 193 at p. 193 : 13 R. P. 140 : 6 B. R. 872 [a court in a suit under Sec. 9 (now Sec. 6) has no jurisdiction to pass a decree in favour of a plaintiff who claims an undivided share in a property from which he and his co-sharers were ousted].
4. Ballabh Das *v.* Gurdas, A. I. R. 1940 All. 261 at p. 262 : 1940 A. L. J. 174 : 1940 A. W. R. (H. C.) 126 : I. L. R. (1940) All. 225 : 189 I. C. 92 : 13 R. A. 79 : 1940 R. D. 75; *see* also Ramchandra *v.* Shridhar, 65 I. C. 361 : A. I. R. 1922 1922 Nag. 115 : 18 N. L. R. 71 : 5 N. L. J. 151; Ghori *v.* Sithu, 44 I. C. 557; Mehra *v.* Faqira, 8 N. L. J. 182; Mal *v.* Ibrahim, 104 P. R. 1919 : 53 I. C. 569 : 108 F. R. 1889 (13 P. R. 1910 foll.)

40. Calcutta view.—In *Hari Narain Das* v. *Elemjan Bibi*,[1] three plaintiffs brought a suit under this section claiming possession of property. During the pendency of the suit, plaintiff No. 3 withdrew from it leaving plaintiffs Nos. 1 and 2 entitled according to their case to possession of 8 annas share of the property. The Lower Court holding the defendants to be trespassers and being disposed to think that plaintiff No. 3 had withdrawn from the suit in collusion with the defendants decreed the suit in favour of plaintiffs Nos. 1 and 2 in respect of the whole property. The High Court in revision set aside the judgment on the ground that Sec. 9 (old) referred to exclusive possessions and that a court in a suit under the section had no jurisdiction to grant joint possession to the plaintiff. But the remarks of learned Judges towards the close of the judgment showed that they intended to confine their judgment to the particular facts of the case as they stated that they treated the case as being one where a party sought possession of his share only of property from which he himself and his co-sharers had been dispossessed and it was incompetent to a court to give possession of the whole of the property in such a case. In a later case,[2] to which one of the Judges in the earlier case was a party, it was held that where a co-owner in physical possession of property jointly with other co-owners is dispossessed by the latter he can maintain an action under this section on the ground that a man in joint possession of immoveable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole and such joint possession can as well be physically restored in respect of his share as the possession of the whole can be restored to the entire body of co-sharers. The earlier case was distinguished on the ground that "there the dispossession was of the whole and possession was claimed in respect of the part so that the Court was called upon to restore quite a different state of things from that which had been disturbed, but in the latter dispossession was of a part only and possession was claimed of that part as it was a suit by one co-owner against all the others who had ousted him from his share".

41. Nagpur view.—The earlier ruling of the Calcutta High Court and the distinction drawn in the later case have both come in for a comment in a case decided by the Nagpur Court[3] and since it appears that the criticism is not without force the opportunity is taken to reproduce it *in extenso*. "The facts in *Hari Narain Das* v. *Elemjan Bibi*,[4] are exactly similar to those of the present case except that the co-owner with the plaintiffs in that case was not a party to the suit at all and the co-owner with them here is a co-defendant with the trespasser. I find myself with the greatest respect unable to follow this ruling. Reading the words of Sec. 9 (now Sec. 6) of the Specific Relief Act with anxious care, I have failed to find anything in them that would suggest that they are not meant to provide for one co-owner wrongfully ousted from possession by a stranger obtaining redress unless the co-owners who have been ousted along with him joined in the suit. The others may not wish to claim possession for a variety of reasons but that ought not to deprive the one who does of his remedy. A stranger might hold a decree against one of two co-owners for possession of his half share in certain property. If he took forcible possession of the whole property otherwise than in due course of law, it would not be worth the while of the person against whom he held the decree to join in a suit for restoration of possession under Sec. 9 (now Sec. 6) of the Specific Relief Act, but the interpretation

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1. 23 I. C. 618 : 19 C. L. J. 117 : 19 C. W. N. 120.
2. Ateman Bibi *v.* Roasat Sheikh, 28 I. C. 570 : 19 C. W. N. 1117.
3. Ramchandra *v.* Shridhar, A. I. R. 1922 Nag. 115 at p. 116 : 65 I. C. 151 : 18 N. L. R. 71 : 5 N. L. J. 151.
4. 23 I. C. 618 : 19 C. L. J. 117 : 19 C. W. N. 120.

put upon that section by the Calcutta High Court would deprive his co-owner of that remedy against an obvious wrong which it seems to me, the section was specially designed to provide. I fail also, if I may say so with due respect, to follow the distinction drawn between two cases. In effect it seems to me to come to this, that if one of the several co-owners is ousted from possession of his share of property by a person who thereby gets the whole property into his possession, he can only claim to be restored to possession of his own share under Sec. 9 (now Sec. 6) if the other person has a good title to the remainder; that section will not help him if the other person is a trespasser on the remainder as well as his share." The latter view is correct, it is submitted.

42. Divergence of opinion as to whether a co-owner can sue a trespasser in respect of his own share or in respect of entire property.—The question has sometimes arisen whether a co-owner can sue a trespasser in respect of his own share or in respect of entire property. *Sunder* v. *Parbati*[1] is sometimes cited as an authority for the proposition that a co-sharer of joint property can maintain possession of the whole of the joint property as against a trespasser. But this is not correct. That case is no authority for that proposition of the law. That case has been distinguished in *Naresh Chandra Basu* v. *Hyder Sheikh Khan*,[2] wherein it has been laid down on the authority of *Doe* v. *King*,[3] that a co-sharer is not entitled to recover possession of the whole of the joint property from a trespasser but can recover only to the extent of his share. The remarks of Mitter, J.,in *Naresh Chandra Basu* v. *Hyder Sheikh Khan*[4] are for the benefit of the reader quoted *in extenso*. "In respect of the second ground", observed his Lordship, "reliance has been placed on the decision of the Judicial Committee of the Privy Council in the case of *Sunder* v. *Parbati*,[5] and it is argued on the authority of that decision that the plaintiff being a co-sharer to the extent of 57-80th share is entitled to evict the defendants who are mere trespassers. An examination of the case before the Judicial Committee will, however, show that in that case the widows were in lawful possession of the property of their deceased husband and it was held that they had an estate of interest therein in respect of their possession notwithstanding that under an adoption or will by the deceased husband a preferable title thereto might exist. It was said by their Lordships that they (the widows) were entitled to maintain their possession against all newcomers except the only person who could plead a preferable title but as the possible claimants were not in the field each of the widows could divide the joint estate between them. This case is no authority for the possession that where a plaintiff brings a suit in ejectment he can get a decree for possession of the whole of the lands from which he seeks ejectment although he may be entitled to a lesser share in the said lands. All that the case decides is that a co-sharer of joint property can maintain possession of the whole of the joint property as against a trespasser. Reference has also been made to Art. 343 of Freeman on *Tenancy and Partition* in which the author states that a co-sharer of the joint property can recover possession of the whole of the joint property from a trespasser and not merely to the extent of his share therein. But the same learned author points out that there is a respectable body of authority even in America the opposite way and it is held in some of the States that a co-sharer can only recover of joint possession even as against the trespasser

1. I.L.R. 12 All. 51 (P. C.) : 16 I. A. 186 : 5 P. C. J. 448.
2. A.I.R. 1929 Cal 28 at p p. 30-31 : 115 I. C. 18 : 49 C.L.J. 83.
3. (1851) 6 Ex. 791 ; 20 L. J. Ex. 301 ; 15 E.R. 765.
4. A.I.R. 1929 Cal. 28 at pp. 30-31 : 15 I.C. 180 : 49 C.L.J. 83.
5. I. L. R. 12 All. 51 (P. C.) : 16 I. A. 186.

to the extent of his share in the joint property. The true rule is laid down in the decision in the case of *Doe* v. *King*,[1] where Baron Parke said that a tenant-in-common is entitled to recover possession as against a trespasser only to the extent of his share. Baron Plat, however, differed from Baron Parke and Alderson and in *Doe* v. *King*,[2] wrote a dissenting judgment. It is respectfully submitted that the proposition of law as laid down by Baron Plat and Freeman in his treatise on *Tenancy and Partition* is the sounder of the two. "Now a tenant-in-common", observed Baron Plat, "is the owner of the whole estate-in-common with his co-tenants; therefore as soon as he has proved his right to the possession in common with others and that the defendant, having no such right is a wrong-doer as against him, he is, in my opinion, entitled to a general verdict, for the purpose of receiving possession of the whole."

In *Mst. Prem Lata* v. *Mst. Janka*,[3] the Bench consisting of Kidwai, J., and Desai, J. (as he then was) after an exhaustive review of the case-law on the subject held that a person in possession cannot be evicted except by a person having a better title to possess and the person in possession may always plead *jus tertii*. In fact, this plea of *jus tertii* is only another way of setting up the plea that the defendant does not admit the plaintiff's title and he put him to proof of his title. It is an elementary principle of law that unless the plaintiff proves his title, he is not entitled to a decree for possession in a suit based on title. If, however, he is successful in proving that he has a title to a share in the property in suit but not to the entire property, a further question arises whether he can get a decree for possession against the trespasser in respect of the entire property or only to the extent of his share, Kidwai, J., after an exhaustive review of the relevant case-law on the subject enunciated the following principle at pages 357-358 of the report:

"In the case of co-owners, one of them may sue either for the vindication of his own rights in the property or for the vindication of the rights of all his co-sharers. If his interests cannot be separated from those of his co-sharers, e. g. where a trespasser is causing irreparable damage to his land by building upon it or digging a tank or in some way altering its nature, then the vindication of his own rights will carry with it a vindication of the rights of his co-sharers since the two are inseparable. In other cases in which one co-owner sues to vindicate his own rights, he will be granted a decree for those rights to the extent of his share and will, if necessary, be put in joint possession of the land with the defendant. There will be no difficulty in granting this relief because in the case of co-owners, as distinguished from coparceners, there is already an ideal partition and the interests of each are definite and ascertained with reference to shares. If one co-sharer, however, seeks to vindicate the rights of his other co-sharers, he can only be permitted to do so if he represents these co-sharers since a person in possession cannot be evicted except by a person having title to possession and may always plead *jus tertii*. In the case of co-owners the share of non-suing co-owners is also definite and ascertained and the defendant cannot be evicted from that share except by some person having title to it. The plaintiff, therefore, in order to succeed in such a suit must be either the agent or attorney of the co-owner whose share is sought to be recovered or must be clothed with some other legal authority to act for the other co-owner, e. g. as his guardian or next friend, or as the *lambardar* of the *mahal*. If he does

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1. (1851) 6 Ex. 791 : 20 L. J. Ex. 301 : 155 E. R. 765.
2. *Ibid.*
3. I.L.R. (1951) 2 All. 328.

not possess any of these capacities, he may nevertheless act on behalf of his-co-sharers if he complies with the requirements of Order I, rule 8, C. P. C., on the ground that his interest are the same as those of the other co-sharers, that is to recover possession of the property from trespasser. If he is neither the agent nor attorney nor, in any other manner, the representative in law of the other co-sharer and he does not frame his suit in accordance with Order I, rule 8, C.P.C., he cannot get the relief claimed."

Desai, J., also reviewed the previous case-law on the subject and made the following observations :

"If the tenants-in-common are dispossessed from the whole property or a fractional share of it, each of them has a distinct and separate remedy against the trespasser. This would apply to a relief of a quantitative nature such as that for possession, mesne profits, declaration of title, etc., but not a relief of a qualitative nature such as that for injunction, accounting damages, etc.

"The position is different when a specific area out of the property jointly held by tenants-in-common is to be considered. Tenants-in-common have separate titles with unity of possession; they are joint owners of the whole of the property. They do not possess their respective shares in any specific area out of the property; as regards the specific area they are in the position of joint tenants. A joint tenant can be given a decree against a trespasser in respect of the whole property. So a tenant-in-common can be given a decree against a trespasser for the whole of specific area.

"The right of one tenant-in-common to recover possession of the whole property from a trespasser does not depend upon whether the trespasser was a rank trespasser or a trespasser with some colourable title. Nor does it depend upon whether he claims to be suing on behalf of all or not in denial of the title of the others. A plaintiff can succeed only on the strength of his own title and the fact that he sues for possession on behalf of himself and the other tenants-in-common does not form an exception to the rule."

There has been some conflict of opinion in various High Courts on the question whether or not some of the co-owners can eject a trespasser from the entire property with or without impleading the other co-owners as *pro forma* defendants to the suit. If all the co-owners of the property join in the suit as plaintiffs, there can be no question of a plea of *jus tertii* by the trespasser against whom the suit is filed. If some of the co-owners do not join as plaintiffs and they are impleaded in the suit as *pro forma* defendants and the plaintiffs specifically pray for a decree for possession in favour of themselves as well as *pro forma* defendants against the trespasser, the plea of *jus tertii* will not again be available to them unless they claim through the *pro forma* defendants and they support their claim.

A third case may be where only some of the co-owners file the suit for possession against the trespasser but they specifically admit in their plaint that there are other co-sharers also and they have filed the suit for the common benefit of themselves as well as those co-sharers who had not joined as plaintiffs or been impleaded as *pro forma* defendants. In such a case, unless the plaintiffs can show that they have some legal authority to act for those co-owners also who hold the property with the plaintiffs as tenants-in-common and who are not parties

to the suit or that they have complied with the requirements of Order I, rule 8, C. P. C. they are not entitled to get a decree for possession in respect of more than their own share, in a simple suit for possession of the entire joint property as was held by the Bench of the Allahabad High Court in the case of *Mst. Prem Lata* v. *Mst. Janka.*[1]

In a case where the plaintiffs implead the other co-owner as a *pro forma* defendant but still maintain that he has no interest in the property and the plaintiffs alone are the exclusive owners of the property, they can, by no stretch of imagination, be said to have filed the suit on behalf of that co-owner also so as to be entitled to a decree for possession in respect of the entire property. In *Ali Raza Khan* v. *Newazish Ali Khan,*[2] it was held by a learned Single Judge of the erstwhile Chief Court of Oudh in an original suit that co-owners who denied the title of the other co-owners could not get a decree for possession of the shares of those co-owners. This view was upheld by the Bench which decided the appeal filed against that decision of the learned Single Judge, in *Ali Raza Khan* v. *Nawazish Ali Khan.*[3] The case was then taken to Privy Council in second appeal and the same view was affirmed in *Nawazish Ali Khan* v. *Ali Raza Khan*[4] Their Lordships of the Judicial Committee made the following observations in that case at page 141 of the report:

> "With regard to Juliana estate the respondent claimed the whole estate for himself, relying on a custom which he failed to prove. Their Lordships agree with the Courts in India that it would be wrong to grant to the respondent an order for possession on behalf of himself and his co-heirs. The suit was neither framed nor fought as a representative suit."

Where a co-owner files a suit for possession against trespasser without impleading the co-owners of the property while wrongfully asserting that he was the exclusive owner of the property the aforesaid decision of the Privy Council as well as of the Allahabad High Court in *Mst. Prem Lata* v. *Mst. Janka*[5] would apply with full force to support the contention that the plaintiff cannot get a decree for possession in respect of more than his own share.[6]

43. Tenant's dispossession—Remedy.—There cannot be any manner of doubt that when a tenant is dispossessed by a stranger, he can maintain a suit under this section,[7] and an *adhiar* is a tenant rather than a labourer for purposes of this section.[8]

44. Landlord and tenant.—The operation of Sec. 6 (new) is not excluded in cases between landlords and tenants where there is no question of title involved.[9]

In *Shiavax C. Cambata* v. *Sunderdas Ebji,*[10] a suit for possession was filed under Sec. 9 (now Sec. 6) of the Specific Relief Act. In that suit the defendants had let out a shop in their building to one R. S. Dalaya. In course of time

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1. I.L.R. (1951) 2 All. 328.
2. I.L.R. 14 Luck. 666:A.I.R. 1939 Oudh 229.
3. I.L.R. 19 Luck. 109: A.I.R. 1943 Oudh 243.
4. A.I.R. 1948 P.C. 134.
5. I.L.R. (1951) 2 All. 328.
6. Jamal Uddin v. Mosque at Mashakgang, A.I.R. 1973 Alld. 328 at pp. 334-35.
7. Virjivan Das *v.* Mohd. Ali Khan, I.L.R. 5 Bom 208; Dobonath *v.* Ram Sunder, 19 C.W.N. 1205; Ram Chandra *v.* Ramamoni, 20 C. W. N. 777; Veera-Swami Mudali *v.* Venkatachala Mudali, A.I.R. 1926 Mad. 18 at p. 19: 92 I. C. 55: 50 M.L.J. 102 (there is no authority to the contrary).
8. Debonath *v.* Ram Sunder, *supra.*
9. Bai Dahi v. Amulakhbhai Gambhirbhai Barot, A.I.R. 1974 Guj. 106 at p. 109: 14 Guj. L.R. 801.
10. 52 Bom. L.R. 381 : A.I.R. 1950 Bom. 343.

Dalaya transferred the tenancy to Sunderdas, the plaintiff, and put him in possession of the premises. The defendants with the help of their watchmen took forcible possession of the shop and the contents thereof from the plaintiff. The plaintiff, therefore, filed on the Original Side of the High Court of Bombay a suit for possession under Sec. 9 (now Sec. 6) of the Specific Relief Act. It was contended that by virtue of Sec. 28 read with Sec. 50 of the Bombay Rent Act, the High Court had no jurisdiction to try the suit and that the suit should be transferred to the Court of Small Causes at Bombay. The contention was upheld by the learned Trial Judge who ordered the suit to be transferred to the Court of Small Causes at Bombay. An appeal from that order was heard by a Division Bench of the High Court of Bombay consisting of Chief Justice M. C. Chagla and Mr. Justice Coyajee. It was contended that Sec. 9 (old) was intended to protect possession without any regard to the title or the origin of possession and that, therefore, its operation was not excluded even in cases where parties happened to be landlords and tenants. Upholding that contention it has been laid down that it is not every suit for possession to which the provisions of the Bombay Rent Act are attracted. The provisions of the Bombay Rent Act are attracted only to those suits for possession between a landlord and a tenant where they have been filed by a landlord as a landlord or by a tenant as a tenant and in his capacity as a landlord or a tenant and relying on his title as a landlord or as a tenant. It has been further laid down in that decision that though the plaintiff may set out his title in the plaint, those averments are entirely unnecessary and irrelevant, because the defendants cannot raise in a suit under Sec. 9 (now Sec. 6) of the Specific Relief Act, an issue as to the plaintiff's title in the suit. He cannot contest the position that the plaintiff is not entitled to possession because he is not a tenant. He can contest the plaintiff's claim only on one simple and short ground, viz. that the plaintiff was not in possession within six months of the filing of the suit. The issue as to relationship of landlord and tenant can never arise in such a suit. Therefore, in the opinion of the Division Bench of the High Court of Bombay, the suit for possession filed by a dispossessed tenant or sub-tenant against his landlord under Sec. 9 (old) of the Specific Relief Act, does not attract the provisions of Sec. 28 of the Bombay Rent Act because no issue as to title arises in such a suit.[1]

45. Serious conflict of opinion as to whether a landlord can sue for possession under Sec. 9 (now Sec. 6) when his tenant has been dispossessed.—There is, however, serious conflict of authority as to whether a landlord can bring a suit for possession under the section when his tenant has been dispossessed. The earlier Calcutta view was that he could not.[2] But the recent trend of judicial authority and the weight of authority is in the opposite direction.[3]

46. Madras view.—In *Veeraswami Mudali* v. *P. R. Venkatachala Mudali*,[4] the plaintiffs in two connected suits Nos. 475 and 476 of 1922, District Munsif's Court, Poonamallee, brought under Sec. 9 (old) of the Specific Relief Act, were unsuited on the ground that on the date of the suits the plaint lands, although trespassed upon by defendants, were leased to others and therefore only their lessees

1. Bai Dahi v. Amulakhbhai Gambhirbhai Barot, A.I.R. 1974 Guj. 106 at pp. 108-9: 14 Guj. L.R. 801.
2. Sonatan *v.* Halim, 6 C.W.N. 616; Fedu *v.* Gour, I.L.R. 19 Cal. 544; Fainie *v.* Gunga, I.L.R. 14 Cal 649.
3. Bindubasini *v.* Jahnavi, 13 C.W.N. 303; Janki Nath *v.* Dinamoni, 13 C.W.N. 305; Nobin *v.* Kailash, 7 I.C. 924 : 12 C.L.J. 483 : 15 C.W.N. 294; Akhil Chandra Dey *v.* Akhil Chandra Biswas 10 I.C. 455: 16 C.W.N. 715; *see* also, Sheikh Garibulla *v.* Nabin Chandra Bhattacharya, 36 C.W.N. clxiv, following Akhil Chandra Dey *v.* Akhil Chandra Biswas, 15 C.W.N. 715.
4. A.I.R. 1926 Mad 18.

and not plaintiffs themselves were entitled to sue. This petition is brought in order to revise the decision.

Plaintiffs have their remedy by way of suit and in such circumstances in the Madras High Court will not ordinarily interfere by way of revision.[1]

But if the remedy is clear, the parties will not necessarily be driven to another suit.[2] Therefore the question for determination in this case resolves itself into whether there is clear authority supporting or controverting the decision of the District Munsif.

There has been sharp divergence of judicial opinion upon this point as was clearly revealed when it came before a Full Bench of the Allahabad High Court, Blennerhassett, J., could see no reason why a landlord who has put a tenant in possession should not himself sue to eject a trespasser. Edge, C. J., affirmed, as prevailing all the world over, that when a man creates a tenancy under him which entitles the tenant to the exclusive use of the property, the man creating the tenancy cannot have any right to actual possession so long as the tenant is entitled to possession. It was accordingly held with the concurrence of four other Judges that in these circumstances, plaintiffs might be entitled to a declaratory decree that the trespasser could not interfere with his right to receive rent and a decree to be put into possession of the rents; but so long as he did not himself possess the right to enjoy physical possession he could not eject the trespasser.[3]

Two years later the question came before a Bench of the Madras High Court which assumed it to be an elementary rule that a plaintiff who seeks possession must show that at the date of the suit he was entitled to such relief.[4]

So far the law on the matter was clear. The next Madras ruling,[5] hardly affected the previous decision; for it was held that the landlord must be entitled to possession at the time of suit, and he was so entitled in that case because the lease had terminated immediately after the dispossession of the tenant by a third person and the tenant was no longer interested in the matter. But unfortunately the head-note to this ruling is drafted as if affirming that a landlord can always bring a suit for possession when his tenant has been dispossessed by a third party. For this unqualified statement, there might seem at first to be better authority in *Rangaswami Aiyangar* v. *Krishna Goundan*,[6] when Sankaran Nair, J., sitting alone, does appear to allow a landlord to sue for physical possession of property of which his tenant had been dispossessed. But though that is the effect of the judgment, the reasoning proceeds on the presumption that it is only a question of receiving rent, a matter about which, as Sir John Edge showed in *Sita Ram* v. *Ram Lal*,[7] there is no difficulty. An earlier Madras case is cited : *Innasi Pillai* v. *Sivagnana Desikar*,[8] which also is entirely confined to the question of rent; and before concluding Sankaran Nair, J., makes it clear that he is not differing from *Ramanadhan Chetti* v. *Pulikutti Servai*.[9] It is not

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1. Devata Sri Ramamurti *v.* Venkata Sitaramachandra Row, (1914) M.W.N. 95 : 22 I.C. 279.
2. Sree Krishan Doss *v.* Chandook Chand, I.L.R. 32 Mad 334 : 5 M. L. T. 125 : 19 M.L.J. 307 (F.B.).
3. Sita Ram *v.* Ram Lal, I.L.R. 18 All. 440 : (1896) A.W.N. 162 (F.B.).
4. Ramanadhan Chetti *v.* Pulikutti Servai, I.L.R. 21 Mad. 288 : 8 M.L.J. 121.
5. Jaganathacharry *v.* Rama Rayer, I.L.R. 28 Mad. 238.
6. (1910) M.W.N. 838: I.C. 844 : 9 M.L.T. 205.
7. I.L.R. 18 All. 440 : (1896) A.W.N. 162 (F.B.).
8. (1895) 5 M.L.J. 95.
9. I.L.R. 21 Mad. 288 : 8 M.L.J. 121.

an easy judgment to understand, but it is no authority for holding that the landlord can sue in these cases.

In *Krishnan Nambudri* v. *Secretary of State*,[1] Wallis, J., and Abdur Rahim J., re-affirmed *Ramanadhan Chetti* v. *Pulikutti Servai*,[2] and its statement of the elementary rule. Thus it may be said that at this date there was no real difference of opinion, and the ruling of the Allahabad Full Bench prevailed.

In *Ambalavana Chetty* v. *Singaravelu Odayar*,[3] a plaintiff who had long been out of possession, seems to have suggested that if his tenant had been in possession (which was not the fact) there would be no bar of limitation. His plea was rejected on the facts, but his hypothesis was fully discussed by Sundara Aiyar, J., who has assembled the various rulings on the point. His Lordship says that it is held that the landlord, where his tenant is ousted by a trespasser may sue under Sec. 6 of the Specific Relief Act, 1963.

But as shown in *Ramaswami Aiyangar* v. *Krishna Goundan*,[4] *Jagannathacharry* v. *Rama Rayer*,[5] and *Innasi Pillai* v. *Sivagnana Desikar*,[6] none of these cases is real authority for that broad proposition. He acknowledges that *Ramanadhan Chetti* v. *Pulikutti Servai*,[7] and *Krishnan Nambudri* v. *Secretary of State*,[8] are against him but on the whole is inclined to hold that the landlord has a cause of action. This opinion, it may be noted, is *obiter* and is not very strongly expressed.

In 1914 it was held in *Somiamma* v. *Vellaya Sethurayan*,[9] that if a landlord had given a lease to a tenant the landlord might eject a trespasser in order to put his tenant into possession. The tenant in that case "had not been put in possession at all, but was anxious to obtain possession". Such a case seems to proceed on the assumption that the landlord has a right to immediate possession in order to fulfil his contract; and the elementary rule in *Ramanadhan Chetty* v. *Pulikutti Servai*,[10] would not then be infringed. It is not as though only the tenant had the right of immediate possession.

In *Tiruvengada Konan* v. *Venkatachala Konan*,[11] it was ruled that though a landlord is not entitled to immediate or *khas* possession, he may obtain a decree for the possession of the reversion and for formal possession. This ruling practically follows *Sita Ram* v. *Ram Lal*.[12] It also questions whether the *obiter dictum* in *Ambalavana Chetty* v. *Singaravelu Odayar*,[13] is not too broadly stated.

In 1916 the question came before Oldfield, J., and Philips, J.: *Kathiri Kutti Musaliar* v. *Chekkutti Musaliar*.[14] They held that a landlord could sue to enable himself to fulfil his contract to give or restore possession to his tenant. Of course, if the ruling stopped at the words "to give" it would merely re-affirm *Somiammal* v. *Vellaya Sethurayan*,[15] but the addition of the words "to restore" opens up the whole question and in effect this is a ruling contrary to *Ramanadhan Chetti* v. *Pulikutti Servai*.[16] Oldfield, J., begins by remarking that the

1. (1909) 19 M.L.J. 347 : 4 I.C. 30 : 5 M.L.T. 213.
2. I.L.R. 21 Mad. 288 : 8 M.L.J. 121.
3. (1912) M.W.N. 669: 15 I.C. 146.
4. (1910) M.W.N. 838 : 8 I.C. 844 : 9 M.L.T. 205.
5. I.L.R. 28 Mad. 238.
6. (1895) 5 M.L.J. 95.
7. I.L.R. 21 Mad. 288 :8 M.L.J. 121.
8. (1909) 19 M.L.J. 347 : 4 I.C. 30 : 5 M.L.T. 213.
9. (1915) 29 M.L.J. 233 : (1915) M.W.N. 12 : 16 M.L.T. 532 : 26 I. C. 347 : 1 L.W. 1047.
10. I.L.R. 21 Mad. 288 : 8 M.L.J. 121.
11. I.L.R. 39 Mad. 1042 : 32 I.C. 198 : 30 M.L.J. 258.
12. I.L.R. 18 All. 440 : (1896) A.W.N. 162 (F.B.).
13. (1912) M. W. .N. 669 : 15 I.C. 146.
14. (1917) 5 L.W. 330 : 39 I.C. 425 : (1917) M.W.N. 339.
15. (1915) 29 M.L.J. 233 : (1915) M.W.N. 12 : 16 M.L.T. 532 : 26 I.C. 347 : 1 L.W. 1047.
16. I.L.R. 21 Mad. 288 : 8 M.L.J. 121.

exposition of the law in *Ambalavana Chetti* v. *Singaravelu Odayar*,[1] is consistent with the decisions in *Narayanaswami Naidu Garu* v. *Verramilli Ramakrishnayya*,[2] and *Soniammal* v. *Vellaya Sethurayan*.[3] The former merely states what is more elaborately developed in the latter ruling that a landlord can sue in order to fulfil his contract to put his lessee in possession. Of course, the broader proposition in *Ambalavana Chetti* v. *Singaravelu Odayar*,[4] that he can sue whenever his tenant is dispossessed is not inconsistent with these rulings. Then Oldfield, J., finds that these rulings admit exceptions to the general rule, though it seems that they establish only one exception, if it can indeed be called an exception. This rule is that on the date of the suit the landlord must show that he has a right to be in possession. If he has never put his tenant in possession and has to get possession in order to do so, he has a right to be in possession and his suit is not in contravention of the rule. But when it is also claimed that after a landlord has put his tenant into possession and that tenant has been dispossessed, the landlord may sue to restore his possession, it is not to set up an exception to the rule, it is to negative the rule altogether. Oldfield, J., proceeds that he cannot follow *Krishnan Nambudri* v, *Secretary of State*,[5] in so far as it rules that a landlord cannot give or restore. *Krishnan Nambudri* v. *Secretary of State*[6] is not concerned with the question whether he can give ; but it certainly rules that he cannot restore and in declining to follow this ruling, Oldfield, J., is maintaining the opposite and over-riding *Ramanadhan Chetti* v. *Pulikutti Servai*.[7] No doubt his Lordship seeks to distinguish this ruling by finding on the facts that the trespasser colluded with the tenant and is therefore only the licensee of the tenant against whom the landlord can have no cause of action during the continuance of the lease. But in *Ramanadhan Chetti* v. *Pulikutti Servai*,[8] although it was alleged in the plaint that the tenant and trespasser had colluded, there is no finding to that effect nor any mention of collusion in the body of the judgment. When their Lordships lay down the elementary rule, they are not considering collusion. *Kathirkutti Musaliar* v. *Chekutti Musaliar*[9] must be taken as contrary to *Ramanadhan Chetti* v. *Pulikutti Servai*.[10] In fact Phillips, J., practically states as much in his concluding sentence. The whole question was then reviewed by Wallis, C.J., in *Mohideen Ravuther* v. *Jayarama Aiyar*.[11] The principle underlying the rule is fully explained and the three ruling cases: *Ramanadhan Chetti* v. *Pulikutti Servai*,[12] *Krishna Nambudri* v. *Secretary of State*,[13] and *Sita Ram* v. *Ram Lal*,[14] approved. The acceptance of the *obiter dictum* in *Ambalavana Chetti* v. *Singaravelu Odayar*,[15] as authority is deprecated with an expression of regret that *Sita Ram* v. *Ram Lal*,[16] was not brought to the notice of the learned Judge. The learned Chief Justice even goes so far as to find that the landlord cannot sue in order to fulfil his contract at page 940, differing from the view already expressed by Sadasiva Aiyar, J., in *Soniammal* v. *Vellaya Sethurayan*,[17] which view Sadasiva Aiyar, J., re-affirms in a dissenting judgment in this case.

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1. (1912) M.W.N. 669 :15 I.C. 146.
2. I.L.R. 33 Mad. 499 : (1910) M.W.N. 221 : 5 I.C. 477 : 7 M.L.T. 119.
3. (1915) 29 M.L.J. 733 : (1915) M.W.N. 12 : 16 M.L.T. 532 : 26 I. C. 347 : 1 L. W. 1047.
4. (1912) M.W.N. 669 : 15 I.C. 146.
5. (1909) 19 M.L.J. 347 : 4 I.C. 30 : 5 M.L.T. 213.
6. *Ibid.*
7. I.L.R. 21 Mad. 288 :8 M.L.J. 121.
8. *I bid.*
9. (1917) 5 L.W. 330 : 39 I.C. 425 : 1917 M.W.N. 339.
10. I.L.R. 21 Mad. 288 : 8 M.L.J. 112.
11. I.L.R. 44 Mad. 937 : 13 L.W. 281 : (1921) M.W.N. 43 : 29 M.L.T. 78 : 62 I.C. 284 : 40 M.L.J. 38.
12. I.L.R. 21 Mad. 288 : 8 M.L.J. 121.
13. (1909) 19 M.L.J. 347 : 4 I.C. 30: 5 M.L.T. 213.
14. I.L.R. 18 All. 440 : (1896) A.W.N. 162 (F.B.)
15. (1912) M.W.N. 669:15 I.C. 146.
16. I.L.R. 18 All. 440 : (1896) A.W.N. 162 (F.B.).
17. (1915) 29 M.L.J. 233 : (1915) M.W.N. 12 : 16 M.L.T. 532 : 26 I.C. 347 : 1 L.W. 1047.

In *Udaya Kumar Das* v. *Katyani Debi*,[1] it is held that the view of Sundara Aiyar, J., in *Ambalavana Chetty* v. *Singaravelu Odayar*,[2] cannot be justified on principle and is opposed to what is regarded by Lord Alverstone, C.J., as well-established doctrine. The question is concluded by *Sita Ram* v. *Ram Lal*,[3] *Ramanadhan Chetti* v. *Pulikutti Servai*[4] and *Mohideen Ravuther* v. *Jayarama Aiyar*.[5]

A preliminary objection has been raised that no appeal or review lies against the decree under Sec. 9 (now Sec. 6), Specific Relief Act, because the petitioner has got other remedies. No doubt the Allahabad High Court held so in *Ram Anand* v. *Sheo Bala*,[6] which followed *Jwala* v. *Ganga Prasad*,[7] and *Ram Kishan Das* v. *Jaikishan*.[8] In *Devate Sri Ramamurti* v. *Venkata Sitaramachandra Rao*,[9] in a Letters Patent Appeal against the order of Sankaran Nair, J., passed in revision, the Allahabad view was generally followed but in Madras High Court this rule is not regarded as absolute as can be seen from the judgment reported in *Veeraswami Mudali* v. *Venkatachala Mudali*,[10] in which Jackson, J., sums up this matter thus:

> "Plaintiffs have their remedy by the way of suit and in such circumstances this Court will not ordinarily interfere by way of revision."[11]

But if the remedy is clear the parties will not necessarily be driven to another suit.[12] The contrary view has been adopted in several rulings of the same Court.[13] Where, however, tenancy terminates after the date of dispossession, then the landlord can certainly sue under this section as the rule of law laid down in the first set of rulings of the Madras High Court cannot be said to have been offended against.[14]

47. Allahabad view.—In the Allahabad High Court the leading case is *Sita Ram* v. *Ram Lal*,[15] Sir John Edge, C.J., who wrote the main judgment in that case observed as follows: "Where a man whether the owner or merely a tenant creates a tenancy under him which entitles the tenant the exclusive use of the land or of the house, as it may be, the man creating the tenancy cannot have any right to actual possession; unless he has by the lease or by agreement

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1. A.I.R. 1922 Cal. 87 : I.L.R. 49 Cal. 948: 35 C.L.J. 292.
2. (1912) M.W.N. 669 :15 I.C. 146.
3. I.L.R. 18 All. 440 : (1896) A.W.N. 162 (F.B.).
4. I.L.R. 21 Mad. 288 : 8 M.L.J. 121.
5. I.L.R. 44 Mad. 937 : 13 L.W. 281 : (1921) M.W.N. 43 : 29 M.L.T. 78 : 62 I.C. 284: 40 M.L.J. 38, *cf.* Veeraswami Mudali *v.* P. R. Venkatachlala Mudali, A.I.R. 1926 Mad. 18 at pp. 18-20: 1925 M.W.N. 763 : 50 M.L.J. 102.
6. (1921) 63 I.C. 809.
7. I.L.R. 3 All. 331 : (1908) A.W.N. 142: 5 A.L.J. 297.
8. I.L.R. 33 All. 647 : 11 I.C. 814.
9. I.L.R. (1914) Mad. 382 : 22 I.C. 279.
10. 92 I.C. 20 : A.I.R. 1926 Mad. 18.
11. Deovata Sri Ramamurthi *v.* Venkata Sitarama Chandrarao, 22 I.C. 279: A.I.R. 1914 Mad. 382; Krishna Doss *v.* Chandook Chand, I.L.R. 32 Mad. 334 : 4 I.C. 509.
12. (Kanneganti) Rammanemma *v.* (Kanneganti) Basavayya, A.I.R. 1934 Mad, 558 at pp. 558-59 : 1934 M.W.N. 443: 40 L.W. 277; Ramanadhan Chetti *v.* Pulikutti Servai, I.L.R. 21 Mad. 288:8 M.L.J. 121; Krishna Nambudri *v.* Secretary of State, 4 I.C. 30: 19 M.L.J. 347:5 M.L.T. 213; Mohideen Ravuthar *v.* Jayarama, Aiyer, I.L.R. 44 Mad. 937 : 62 I.C. 284 : 40 M.L.J. 38 : 29 M.L.T. 78 : 1921 M. W. N. 43: 13 L.W. 281.
13. Rangaswami *v.* Krishna, 8 I.C. 844 : 9 M.L.T. 205 : 1910 M.W.N. 838 ; Inasi Pillai *v.* Sivaagnga, 5 M.L.J. 95; Ammbalavana *v.* Singaravelu, 15 I.C. 146: 1912 M.W.N. 669; Kathiri Kutti *v.* Chekutti, 39 I.C. 425 :1917 M.W.N. 339: 5 L.W. 330; Soori Ammal *v.* Vellaya, 26 I.C. 347: 29 M.L.J. 233 16 M.L.T. 532 : 1915 M.W.N. 12 : 1 L.W. 1047: Tiruvengaya *v.* Venkatachala, I.L.R. 39 Mad. 1042 : 32 I.C. 198: 30 M.L.J. 258.
14. Jaggan Nath *v.* Rama Rayer, I.L.R. 28 Mad. 238.
15. I.L.R. 18 All. 440 (F.B).

with his tenant reserved to himself a right to enter and take possession. He has of course a right by due process of law, if the facts arise, to have the tenancy created by him determined and his tenant ejected, but so long as the tenant is entitled to possession, the landlord cannot be entitled to possession. That right to possess has been parted with by the creation of the tenancy. It is no new proposition of law and the application of that proposition of law, which I believe to be correct, does not introduce into India any new system either of law or procedure. A landlord whose title is denied by his tenant has got a right to have the tenancy determined. A landlord whose title is questioned by any one else than the tenant has got a right to a declaration under Sec. 42 of the Specific Relief Act, 1877 (which corresponds to Sec. 34 of the present Act) ; and if any one enters on the receipt of the rents and profits of the land and takes from his tenants the rents which were due to him, he is entitled as against such person, not only to a decree declaring his title, but to a decree putting him into possession, that is, what is known as formal possession, as contra-distinguished from actual or *khas* possession of the lands as against the person wrongfully taking the rents and profits to which he, the landlord, is entitled." In a subsequent case it has been re-affirmed *obiter dictum* that a landlord when he is deprived of the possession of the benefits arising out of the land demised by reason of the dispossession of the tenant, is entitled to obtain recovery of possession under this section.[1]

The Allahabad view is followed by the Patna High Court.[2]

48. Oudh view.—In Oudh it has been held that dispossession of tenant by a trespasser is the dispossession of his landlord and entitles the landlord to maintain an action under this section. But a mere attornment by a tenant in actual possession to another person coupled with a refusal to pay rent to the proprietor does not amount to the dispossession within the scope of this section.[3]

49. Sind view.—The Sind Court also hold that the dispossession of the tenant entitles the landlord to bring a suit for possession under this section.[4]

50. Burma view.—In Burma it has been held that ordinarily a landlord cannot bring a suit for possession under this section. But where the dispossession took place in the interval between the relinquishment of one tenant and the entry of another tenant the landlord can bring such a suit.[5]

51. Nagpur view.—In Nagpur it seems to be well settled that when a tenant has been ousted by a person other than his landlord the landlord is competent to file a suit for actual possession under this section impleading the dispossessed tenant as co-plaintiff.[6] It has been held that the possession of the village share is correlated to the possession of *sir* and *khudkasht* lands and that a landlord must be deemed to be dispossessed from the share when he or his tenant is dispossessed from *sir* and *khudkasht*.[7]

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1. Shyama Charan Ghosh *v.* Mohd. Ali, 3 I.C. 466 : 10 A.L.J. 291 : 6 A.L.J. 697; Jadunath Singh *v.* Biswanath Singh, 1950 A.W.R. 242 : 1950 A.L.J. 288.
2. *See* Sailesh Kumar *v.* Rama Devi, A.I.R. 1962 Pat. 339 : 1952 Bh. L.R. (Pat.) 203; Sita Ram *v.* Ram Lal , I.L.R. 18 All. 440 (F.B.) foll. : Ratanlal Ghelabhai *v.* Amar Singh Rupsang, I.L.R. 53 Bom 773 not foll.
3. Nihalsing *v.* Raghuraj, 32 I.C. 202 : 18 O.C. 353 : 3 O.L.J. 588.
4. Shahibrakhio *v.* Jumraomal. 12 I. C. 190: 5 S.L.R. 42.
5. San Hlaw Baw *v.* Hlaw Baw, 37 I. C. 20 : 9 Bur. L.T. 173.
6. Bhojraj *v.* Sheshrao, I.L.R. (1948) Nag 422 : 1948 N.L.J. 337.
7. *Ibid.*

52. Bombay view.—So far as Bombay High Court is concerned the law is well settled. According to the High Court where a trespasser wrongfully takes possession of land which has been let out to a tenant, in denial of the landlord's title, there is an injury to the reversion and the landlord can institute a suit for possession in his own name under this section.[1]

In a suit under Sec. 6 (new) the decree must either dismiss the suit or order the plaintiff to be put into possession by the defendant, such decree being based on previous possession and dispossession merely and not on title. In this connexion reference may be made to *Daw Po* v. *U.Po Hmyin*,[2] wherein Dunkley, J., said:

> "The plaint in such a suit must aver previous possession and dispossession by the defendants otherwise than in due course of law within six months of the suit being brought, and should aver nothing else, and the only prayer in such a suit can be a prayer for the recovery of possession. The decree must either dismiss the suit or order the plaintiffs to be put into possession by the defendant, such decree being based on previous possession and dispossession merely and not on title."

From the definition of the word "decree" given in Sec. 2 (2), C.P.C., it is plain that when a suit is dismissed on merits decree must follow. In dismissing the suit the Court gives a decision which is complete and final as regards that Court.[3]

The object of this enactment is to provide a summary and speedy remedy for the recovery of possession of property to a person dispossessed without his consent and otherwise than through a process of law. In fact, this legislation discourages people to take law in their own hands. A person claimiug certain property must get its possession either with consent of the person in possession or by other legal means. The question of the title in such a case is irrelevant; but the Court is to look to the possession at the time the person is dipossessed without his consent and by illegal means. In *Govind Ram Janana Das* v. *Mst. Mewa*,[4] the trial Court has found that the tenant of the plaintiff was in actual physical possession of the suit land at the time he was forcibly dispossessed by the defendant. The question for determination, therefore, is whether possession of the tenant can be considered to be the possession of his landlord the plaintiff. It cannot be doubted that the plaintiff was in possession of the suit land through his tenants; in other words, he was not in actual physical possession of the land but as in its constructive possession. The word "used" in Sec. 6 is "dispossessed". There is nothing in this section to show that the possession is confined only to actual physical possession.

A suit is competent by the landlord, even if he is not in actual physical possession of the land but in its possession through a tenant at the time of illegal dispossession. This conclusion is further strengthened by the words "he or any person claiming through him may, by suit, recover possession thereof" used in the section. The language of this section, therefore, clearly indicates that besides the person dispossessed, any person claiming through him can seek his remedy provided in this section for the recovery of possession. It neaessarily follows that the person seeking relief under Sec. 9 need not himself be in actual physical possession of the property. A contrary view to this will defeat the

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1. Ratan Lal *v.* Amar. Singh, A.I.R. 1929 Bom. 467 at pp. 467-68 : 122 I.C. 54: 31 Bom. L.R. 1042: I.L.R. 53 Bom. 773.
2. A.I.R. 1940 Rang 91.
3. Walaiti Ram *v.* Govind Ram, A..I.R. 1954 Punj. 45 at pp. 45-46.
4. A.I.R. 1953 Pepsu 188.

aims and objects of this enactment. Supposing a landlord is incompetent to sue and his tenant who is dispossessed refuses to institute a suit, the landlord would be put in a very awkward situation and would be forced to file a regular suit. In such a case a wrongdoer will naturally be placed in an advantageous position. To accept this position it would be putting a premium on a wrong act of trespasser. This position is not contemplated by the relevant legislation. On the other hand, this section provides for a speedy and summary remedy to recover possession taken away by unlawful means. The object of the legislation, besides this is to place the parties in their original position. Trespasser, if he so likes, can bring a regular suit to prove his title. A contrary construction would result in protracted litigation for person ousted from lawful possession by unlawful means on the part of a trespasser.

It is no doubt true that there is conflict of authorities as to whether a andlord can bring a suit for possession under this section when his tenant has been dispossessed; but the weight of authorities is in favour of competency of such a suit. A similar question came for consideration before a Bench of the Patna High Court and the learned Judges took the view that the landlord could nstitute the suit when his tenant was dispossessed.

In *Sailesh Kumar* v. *Rama Devi*, 'it was held:

> "Where a tenant is possessed by a trespasser, his landlord can maintain a suit under Sec. 9 (old) against the trespasser for possession even when at the date of dispossession the property is in occupation of the tenant entitled to its exclusive use."

The learned Judges followed the decisions given in *Jadunath Singh* v. *Bishunath Singh*,[2] *Ratanlal Ghelabhai* v. *Amarsingh Rupsingh*,[3] and dissented from a judgement in *Veeraswami* v. *Venkatachala*.[4] *Sita Ram* v. *Ram Lal*[5] was distinguished. During the course of judgment, the learned Judges observed:

> "In support of his contention, he placed reliance on the case of *Sita Ram* v. *Ram Lal*,[6] and *Veeraswami* v. *Venkatachala*.[7] It is sufficient to state that the Allahabad case was not one under Sec. 9 (old), Specific Relief Act, and it is beside the point in issue before us. The Madras case, however, supports the contention. That case is a single Judge case and it appears that in Madras High Court there are conflicting decisions on this point."

Same view of the law is taken in *Jadunath Singh* v. *Bishunath Singh*.[8] In *Veeraswami* v. *Venkatachala*,[9] a contrary view is taken. As already observed by the learned Judges in the Patna case, decision of the Madras High Court on this point are conflicting. *Held* that the suit by landlord under Sec. 6 (new) of the Act is competent when his tenant has been dispossessed without his consent and by unlawful means. In the instant case the Trial Court dismissed the suit on the ground that theplaintiff not being in possession was not competent to institute the suit. If the pl ntiff is entitled to institute such a suit under Sec. 6 (ıew) of the Act, the finding of the Trial Court to the contrary deprives him of his right to relief provided by Sec. 9 (old) of the Act and the Trial Court thus failed to exercise jurisdiction which it ought to have exercised. Courts are competent to

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1. A.I.R. 1952 Pat. 339 .
2. I.L.R. (1951) 2 All. 15 : 1950 A.L.J. 288.
3. A.I.R. 1929 Bom. 467.
4. A.I.R. 1926 Mad. 18.
5. I.L.R. 18 All. 440 (F.B.).
6. *Ibid.*
7. A.I.R. 1926 Mad. 18.
8. 1950 A.L.J. 288:I.L.R. (1951) 2 All. 16.
9. A.I.R. 1926 Mad. 18.

interfere in such circumstances. Section 6 (new) itself shuts out the remedy by way of appeal or review. If the intention of the Legislature was to shut out a remedy by way of revision also it could have been similarly and specifically mentioned. But the Legislature has not done so. *Held* that this is a fit case to warrant interference in revision.[1]

It is submitted that the view expressed by the majority of the High Courts and the earlier decisions of the Madras High Court that a landlord could sue for the dispossession of his tenant is the correct view. Otherwise, there will be grave injustice to the landlord in some cases.

Where exclusive occupation of immoveable property is given to a tenant and the tenant is dispossessed by a stranger, the proper remedy is for the tenant to file a suit for possession, but the landlord, if he desires to sue immediately on the possessory right, can sue in the name of the tenant and further for an injury to the reversion, the landlord can sue in his own name.[2] Even assuming the landlord cannot sue alone, the Court can pass a decree for ejectment in such a case where the tenant has been impleaded as a defendant and all the parties interested in the land are, therefore, the Court.[3]

In *Ratanlal Ghelabhai* v. *Amarsingh Rupsing*,[4] the learned Judges of the High Court of Bombay pointed out that even when exclusive occupation of immoveable property is given to the tenant, who is subsequently dispossessed, it is open to the landlord to bring a suit in his own name under Sec. 6 (new) of the Specific Relief Act. While referring to the provisions of Sec. 6 of the Specific Relief Act, 1963, it was observed:

> "There is nothing in this section to show that possession is confined to actual physical possession. In the case of a landlord and tenant, the landlord is in possession through his tenant, and, as pointed out in *Virjivandas Madhavadas* v. *Mohamed Ali Khan*,[5] the proper remedy where exclusive occupation of immoveable property is given to a tenant is for the tenant to file a suit for possession but the landlord, if he desires to sue immediately on the possessory right, can sue in the name of the tenant and further for an injury to the reversion, the landlord can sue in his own name. "

Applying that principle to *Krishnaji Madhavarao Khannukar* v. *Mohamed Husen Budansaheb*,[6] it seems Kashimsaheb Gavas being only an agent and not a tenant, it was fully competent for the plaintiff in this case to bring a suit under Sec. 9 (now Sec. 6) of the Specific Relief Act, in his own name.[7]

53. Without his consent.—The phrase "without his consent" means contrary to the wishes of the person dispossessed. Thus where a person himself lets another into possession, but the latter subsequently acts in a way indicating his intention to interfere with the former's right and ownership, a suit under the present section will not be competent.[8]

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1. Gobind Ram Jamna Dass *v.* Mewa, A.I.R. 1953 Pepsu 188 at pp. 189-90 ; I.L.R. (1952) Patiala 679.
2. Ratan Lal *v.* Amar Singh, A.I.R. 1929 Bom. 467 at pp. 467-68: 122 I.C. 54: 31 Bom. L.R. 1042 : I.L.R. 53 Bom. 773.
3. *Ibid.*
4. I.L.R. 53 Bom. 773 : A.I.R. 1929 Bom. 467.
5. I.L.R. 5 Bom. 208.
6. A.I.R. 1959 Mys. 127.
7. *Ibid.* at pp. 128-29.
8. Baldeo Das *v.* Magniram, 29 A.W.N. 7,

54. Otherwise than in due course of law.—The words "otherwise than in due course of law" are not synonymous with the word "illegally". The phrase means in the regular, normal process and effect of the law, operating on a matter which has been laid before Court, civil or criminal, for adjudication. It would ordinarily exclude self-help.[1] To read the words "due course of law" as merely equivalent to the word "legally" is to deprive them of a force or of a significance which they carry on their very face. For, a thing which is perfectly legal, may still be by no means a thing done in due course of law; to enable this phrase to be predicated of it, it is essential, speaking generally, that thing should have been submitted to the consideration and pronouncement of the law, and the due course of law means, regular normal process and effect of law operating on a matter which has been laid before it for an adjudication. That is the primary and natural meaning of the phrase, though it may be applied in a derived or a secondary sense to other proceedings held under the direct authority of the law; in this sense it may be said for instance that revenue or taxes are collected in due course of law. But this latter use of the expression has clearly no bearing upon the words in the particular context in which they occur in the present Sec. 6; there they must be read in their primary sense as referring to the process and operation of the law invoked by the ordinary method of civil suits.[2] As pointed out in *Moore* v. *Monoranjan*, the Honourable Judges in the above-noted Bombay case did not intend to use "civil" in contradistinction for "criminal proceeding" and a matter may be said to have happened in due course of law, if it be the result and operation of the law invoked by the ordinary method of any judicial proceeding. Though landlord is entitled to possession of his land from his tenant after the expiry of the period of tenancy, yet if the tenant holds over he may not dispossess him of his own authority. If he does so it is competent to the tenant to sue the landlord for possession under this section.[4] In India the common law right of the re-entry by the landlord does not exist, and even where the landlord has obtained possession of the premises after the tenancy has been validly terminated it is open to the tenant to institute a suit within six months of dispossession under Sec. 6 of the Specific Relief Act, 1963.[5] Where the tenancy has not terminated or where on account of certain circumstances it is not open to the landlord to terminate the tenancy there is no reason why he should be allowed to dispossession his tenant without having recourse to law and then to retain possession which he could not obtain through a court of law. In the present case, though the tenancy is a monthly tenancy, it has not been terminated. Apart from the provisions of the Bombay Rent (War Restrictions) Act a monthly tenancy can be terminated only in the manner prescribed under Sec. 108 of the Transfer of Property Act which applies to Sind. In *Secretary of State* v. *Dinshaw Navroji*,[6] no notice to terminate the tenancy has been given by the landlord. There is no express or implied surrender of the tenancy and the non-payment of rent, if any, is due to the landlord having disturbed the possession of the tenant which undoubtedly gives the tenant a right to suspend payment of the rent. The effect of the Bombay Rent (War Restrictions) Act, 1918, is however to convert this monthly tenancy into a statutory tenancy and to empower the Court to grant relief to the landlord only under

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1. Jogendra Chandra Das *v.* Birendra Lal Das, A.I.R. 1935 Cal. 454 at p. 455: 56 I.C. 924 : 61 C.L.J. 307: 39 C.W.N. 394; Rudrappa *v.* Narsingh Rao, I.L.R.29 Bom. 213 : 7 Bom. L.R. 12 ; Moore *v.* Monoranjan, 12 C.W.N. 696 : 7 C.L.J. 547.
2. Rudrappa *v.* Narsing Rao, I.L.R. 29 Bom. 213: 7 Bom. L.R. 12.
3. 12 C.W.N. 696: 7 C.L.J. 647.
4. Rudrappa *v.* Narsingh Rao, *Supra*
5. *Ibid.*
6. A.I.R. 1925 Sind, 275.

certain specified circumstances. The first defendant could not, therefore, have obtained possession by resort to Court even if he had given a month's notice to the tenant to vacate the premises.

Under the English law it has been held that a tenant can claim the benefit of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, which is a statute in *pari materia* with the Bombay Rent Act and can sue to eject the landlord who has obtained peaceful possession of the demised premises in exercise of his common law right of re-entry.[1]

It would be defeating the objects of the Bombay Rent (War Restrictions) Act to allow the plaintiff to obtain lawful possession of the premises and to retain them. This is a fit case for a decree for possession.[2] It makes no manner of difference that the tenant is a tenant on sufferance.[3] A reference to the undernoted cases will show that the expression "due course of law" was interpreted as being in contrast with the acting of one's own authority or acting without the intervention of the Court.[4] If a tenant is dispossessed in execution of a decree against a landlord, it is not a dispossession otherwise than in due course of law.[5] Similarly, a dispossession in consequence of final order under Sec. 145 (new), Cr.P.C., is in due course of law.[6] Seizure by Sheriff of property specified in warrant but not coming within the description of the decree,[7] dispossession of tenant by auction-purchaser under Order XXI, rule 95 and not rule 96, C.P.C.[8] and possession taken by landlord after service of notice under Sec. 87, Bengal Tenancy Act,[9] are instances of dispossession in due course of law. Defendants started proceedings under Sec. 147 (new), Cr.P.C., claiming a right of way over certain land belonging to the plaintiff. During the pendency of the proceedings the plaintiff fenced the land. The proceedings subsequently terminated in favour of the defendant, the Court passing an order in terms of Sec. 147 (3) (new), Cr.P.C., prohibiting the plaintiff from interfering with the exercise of his right of way by the defendant over the land. But no mandatory order for removal of the fence was passed. The defendant, however, removed the fencing and began to exercise his right of way, whereupon plaintiff instituted a suit under this section. It was held that assuming the act of passing over the land is dispossession the defendant's acts in pulling down fence and exercising right of way were done in due course of law and a suit under Sec. 9 of the Specific Relief Act, 1877 (which corresponds to Sec. 6 of the present Act) was not competent.[10] On the adjudication as insolvent of a Hindu father, some of the family properties were sold by the Official Receiver. There was obstruction in delivery and on the application of the Receiver and the sons, the Court ordered for the removal of the obstruction. Thereupon one of the sons filed a suit under the present

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1. *See* Remon *v.* City of London Real Property Co., (1921) 1 K.B. 49 : 89 L.J. K.B. 1105 : 123 L.T. 617 : 36 T.L.R. 869 : 18 L.G.R. 691; Cruse *v.* Terrell, (1922) 1 K.B. 664 : 91 L.J.K.B. 499 : 20 L.G.R. 418 : 126 L.T. 750 : 66 S.J. 365 : 38 T.L.R. 379.
2. Secretary of State *v.* Dinshaw Navroji, A.I.R. 1925 Sind 275 at pp. 278-79.
3. Tamiz-ud-din *v.* Ashrab Ali, I.L.R. 31 Cal. 647 (F.B.) : 8 C.W.N. 446; Kuldeep Singh *v.* Gillanders Arbuthnot & Co., I.L.R. 26 Cal. 615; Sofaell Khan *v.* Wooperi Khan, 9 W.R. 123; *see* also 21 W.R. 123; 14 W.R. 41; 23 W. R. 383 ; 9 W.R. 513; 7 C.W.N. 218; 11 W.R. 108.
4. Kholab *v.* Kisen Sundra, 8 W.R. 389; Sofaell Khan v. Wooperi Khan, *supra*; Walli Ahmad *v.* Ajuddia, I.L.R. 13 All. 537; *see* also 9 W.R. 11.
5. Kamini Sundari *v.* Sabed Sheikh, 14 C.W.N. 403.
6. Moore *v.* Monoranjan, 7 C.L. J. 547 :12 C.W.N. 696.
7. Fadab *v.* Heera, (1866) 1 Ind. Jur. N.S. 21.
8. Muluk *v.* Bharat, 12 C.W.N. 694.
9. Suresh *v.* Nesa Bibi , 11 C.L.J. 433.
10. Jogendra Chandra Dass *v.* Birendra Lal Das, A.I.R. 1935 Cal. 454 at p. 455: 56 I.C. 924 : 61 C.L.J. 307 : 39 C.W.N 394.

section for possession of a part of the house of which he complained he had been forcibly dispossessed by the Receiver. It was held that the son had not been dispossessd otherwise than in due course of law.[1] The Civil Court has jurisdiction to try a suit where any person is dispossessed without his consent from immoveable property otherwise than in due course of law. The contention of the defendant is that the plaintiff was not dispossessed otherwise than in due course of law, but that he was dispossessed in due course of law by a Revenuel Court which held as that Court had jurisdiction to do as regards a gricultura land, that the plaintiff was the defendant's sub-tenant. The learned Judge of the Trial Court has quoted certain rulings : *Rudrappa v. Narsingrao*[2], and *Rashanullah* v. *Hajir Mahmud.*[3] What he has said on the authority of these two rulings:

> "The phrase means the regular normal process and effect of the law operating on a matter which has been laid before it for adjudication. Thus it appears that even if a man is dispossessed through a law court, still that dispossession would not be in due course of law if the process employed was one that ought not to have been followed."

Following up these observations the ejectment of the plaintiff must be held to have been in due course of law. The process employed by the defendant was a correct one of suing in the Revenue Court for the ejectment of a sub-tenant. It was a regular normal process of a Revenue Court to order the ejectment of a sub-tenant from agricultural land. The Revenue Court had jurisdiction to adjudicate upon the matter. It was pointed out that when both the defendant and the plaintiff equally broke the law forbidding mortgage of an occupancy holding the defendant could not obtain possession without paying the mortgage charges of the plaintiff. That, however, is a point for the consideration of the Revenue Court. The authority of the Revenue Court thereby is not shaken in ejecting a sub-tenant. It is not as if the mortgages were valid ones and the Revenue Court would have no authority to brush aside valid mortgage transactions.

Held, that no suit under Sec. 6 (new), Specific Relief Act, lay to the Munsif's Court.[4] It has, however, been held by the Calcutta High Court that a dispossession by legal process which ought not to have been applied is not a dispossession in due course of law.[5] Thus when an auction-purchaser on obtaining possession of immoveable property under Order XXI, rule 95, C.P. C., dispossesses the tenant of the judgment-debtor, the dispossession of the tenant is not in due course of law and he is entitled to bring a suit under this section.[6] So, also where an officer, authorized only to attach some properties dispossesses the person in possession, it amounts to a dispossession otherwise than in due course of law.[7]

55. Partial dispossession.—A suit under this section would be competent whether the dispossession of the plaintiff is partial or from the whole of

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1. Subbarayudu *v.* Satyanandam, 143 I.C. 833 : A.I.R. 1933 Mad. 609; *see* also Mst. Rajwanta Kuer v. Mahabir Rai, I.L.R. 53 All. 414:129 I.C. 559: A.I.R. 1931 All. 205 : 15 R.D. 185.
2. I.L.R. 29 Bom. 213 : 7 Bom. L. R. 12.
3. (1915) 18 I.C. 727.
4. Mst. Rajwanta Kuer *v.* Mahavir Rai, A.I.R. 1931 All. 205 at p. 206.
5. Roshanullah *v.* Hazir Mahmud, 18 I.C. 727.
6. Mulluk *v.* Bherab, 12 C.W.N. 694; Baroda *v.* Chandra Kumar, 1 C.L.J. 30 N.
7. Anupchand *v.* Amerchand, A.I.R. 1951 Mys. 101 at p. 102 : 1951 D.L.R. (Mys.) 49.

the property.[1] Where the dispossession is of a part only he need not sue for the whole.[2]

56. Any other title.—"Any other title" means any title other than mere anterior possession, e.g. ownership.[3] In a suit under this section the Court can go into the question of possession within six months and not into the defendant's title, whatever and how good it may be.[4] A plaintiff is entitled to a decree for possession no matter what title might be shown against him, and no matter how infirm might be his own title to possession, so long as he had actually held possession. The fact that the plaintiff, in addition to alleging and proving the facts which would entitle him to a decree under sub-section (1) of Sec. 6 (new) claims another title, e.g. as mortgagee would not disentitle him to decree under sub-section (1) of Sec. 6 (new).[5] If the suit is brought within the prescribed period, i.e. within six months from the date of dispossession, even the rightful owner is precluded from showing his title to the land.[6] It is no answer to a suit for possession under Sec. 6 of the Specific Relief Act (which corresponds to Sec. 9 of the old Act of 1877) brought against a mortgagor by mortgagee who has been forcibly dispossessed by the mortgagor to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee (the mortgagor's proper remedy being by way of a suit to set aside the mortgage and recover possession),[7] or that the mortgage is in contravention of law,[8] or by a tenant against the landlord that the tenant was holding over at the date of dispossession.[9] In any event, but subject of course to any plea that may be taken on the ground of limitation, a suit for recovery of the money lies on the facts alleged against defendants Nos. 1, 2 and 3. on the other hand, a person who has contracted a usufructuary mortgage over an occupancy holding, in contravention of the provisions of the law, will not receive the assistance of the courts in a suit for recovery of possession based upon title, such title being *ex hypothesi* invalid. The plaintiff, however, could undoubtedly have sued to be put back in possession under Sec. 9 (old) of the Specific Relief Act, without pleading her title at all. If the claim for recovery of possession is further pressed in the Trial Court, apart from claim against defendants 1, 2 and 3 for recovery of the money, that Court must consider whether it can allow or should allow, an amendment of the plaint, so as to deal with this suit as if it had been brought under the Specific Relief Act independently of any question of title.[10]

In *Dinkarsha* v. *Anantsha*,[11] where the Judicial Commissioner laid down that where a tenant has been ejected by a third party, the landlord is not competent to bring a suit for possession under Sec. 6 (new) of the Specific Relief Act. A perusal of the judgment shows that the question of law involved therein

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1. Sabhapati *v.* Sabraya, I.L.R. 3 Mad. 250; Omar *v.* Nawab, 11 W.R. 229.
2. Omar *v.* Nawab, *supra.*
3. Enaetoollah v. Kishen, (1867) 8 W.R. 386; Wise *v.* Ammer-un-nissa, 7 I.A. 73; Bandu *v.* Naba, I.L.R. 15 Bom. 238; Nisa *v.* Kanchiram, I.L.R. 26 Cal. 579.
4. Makhdum Baksh *v.* Hasihim Ali, 29 I.C. 210; Davatu Ram Murti *v.* Vatikau Sitaram, 22 I.C. 279: 1914 M.W.N. 95; Ram Harakh *v.* Sheodhilal, I.L.R. 15 All. 384; Mashaw *v.* Gun, 1 Bur. L.J. 165.
5. Ram Harakh *v.* Sheodhilal, *supra.*
6. Ismail Ariff *v.* Mohd. Ghous, I.L.R. 20 Cal. 834 (P.C.): 20 I.A.99; Enaetoollah *v.* Kishen, *supra*; Makhdum Bakhsh *v.* Hashim Ali, *supra*; Davatu Ram Murti *v.* Vatikau Sitaram, *supra.*
7. Sayaji *v.* Ramji, I.L.R. 5 Bom. 446; Sheo Zoor Koeri *v.* Mst. Kausilia, 1923 All. 81 at p. 81: 20 A.L.J. 972 (though, mortgage invalid); Shamsher Khan *v.* Abdul Sattar Khan, A.I.R. 1926 Nag. 290 at p. 291 : 22 N. L. R. 30 : 94 I.C. 70 (mortgagee can sue his tenant).
8. Sheo Zoor Koeri *v.* Mst. Kausilia, *supra.*
9. Rudrappa v. Narsingrao, I.L.R. 29 Bom. 213.
10. Sheo Zoor Koeri *v.* Mst. Kausilia, A.I.R. 1923 All. 81 at p. 81.
11. (1908) 16 C.P. L.R. 154.

was doubtful, and that the learned Judge on the facts of that particular case held that the suit was not maintainable by the landlord. In *Sonaton Shome* v. *Sheikh Helim*,[1] it was laid down that where the plaintiff was in constructive possession of a plot of land through his tenant, and the latter was dispossessed, the plaintiff has no right to bring a suit under Sec. 6 (new) of the Specific Relief Act.

On the other hand, there is authority to the contrary. In *Bindubashini Chaudhurani* v. *Shrimati Janhavi Chaudhurani*,[2] it was held that in the case the ouster of a tenant in actual occupation of the land amounted to the ouster of the immediate landlord to whom rent was to be paid, and that Sec. 9 (old) of the Specific Relief Act is not confined in its application to cases in which the plaintiff has been deprived of actual possession. A similar view was held in *Nobin Das* v. *Kailash Chandra Dey*,[3] a case of a usufructuary mortgage in favour of the plaintiff. And in *Akhil Chandra Dey* v. *Akhil Chandra Biswas*,[4] it was decided that the ouster of a tenant is an ouster of the landlord for which the landlord can sue under Sec. 6 (new) of the Specific Relief Act. The same view was maintained in *Rathnasabapathi Pillai* v. *Ramaswami Aiyar*,[5] in which the case of *Jagannatha Charry* v. *Rama Rayer*,[6] was followed. The Oudh Judicial Commissioner held the same view in *Nihal Singh* v. *Raghuraj Bahadur Singh*.[7] A mortgagee in possession through tenants is entitled to invoke the aid of Sec. 6 (new) of the Specific Relief Act on his tenants being ejected from possession by others.[8] Similarly, the pleas of agency,[9] partial dispossession,[10] a magistrate's award under Sec. 545,[11] Mamlatdar's decree,[12] are not available to defendant in a suit under this section. Though in a suit under this section the defendant cannot set up any defence of title still evidence of title may be admitted for the purpose of ascertaining the nature of possession.[13]

Where the defendants who after the death of the limited owner, would have been entitled to the property as reversioners of the last male holder or peacefully dispossessed the alienee of the unlimited owner, the transfer in favour of the alienee being valid for the lifetime of the limited owner but voidable at the option of the reversioner after the death of the limited owner, could the alienee claim in a suit to be put back in possession. This *quaere* was answered by V. Bhargava, J., in *P.Anant Bahadur Singh* v. *Astha Bhuja Bux Singh*[14] in the following words: "It is clear that the defendants who are the reversioners exercised their right of repudiating the transfer after death of Smt. Dhiraj Kumari by dispossessing the plaintiff. This act of theirs amounted to a repudiation of that transfer. They had an alternative remedy of giving effect to this repudiation by bringing a suit against the plaintiff. The fact they had such a right to bring a suit did not, however, bar their exercising the right without the intervention of any Court provided of course that they could do so without committing any criminal offence. In the present case the defendants did dispossess the plaintiff peacefully. Now that the rightful owners are in possession, the plaintiff who has no title to the

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1. (1902) 6 C.W.N. 616.
2. (1909) 13 C.W.N. 303.
3. (1910) 15 C.W.N. 294. : 12 C.L.J. 483.
4. (1910) 15 C.W.N. 715.
5. I.L.R. 33 Mad. 452 : (1910) M.W.N. 112 : 20 M.L.J. 301.
6. I.L.R. 28 Mad. 238.
7. (1916) 18 O.C. 353 : 3 O.L.J. 588.
8. Samsherkhan *v.* Abdul Sattar Khan, A.I.R. 1926 Nag. 290 at pp. 290-91.
9. Virjivan Das *v.* Mohd. Ali Khan, I.L.R. 5 Bom. 208.
10. Omar *v.* Nawab, 11 W.R. 229 ; Sabhapati *v.* Sabraya, I.L.R. 3 Mad. 250.
11. Jwala *v.* Ganga Prasad, I.L.R. 30 All. 331 : 1908 A.W.N. 142 : 5 A.L.J. 297.
12. Ramchandra *v.* Narsingcharya, I.L.R. 24 Bom. 251; see *contra* in Ramchandra *v.* Bhikibai, I.L.R. 6 Bom. 477.
13. Bawachattigir *v.* Matonomal, 4 I.C. 359 : 3 S.L.R. 149 (Mustapha Saheb *v.* Sabha Pillai, I.L.R. 23 Mad. 179 approved).
14. A.I.R. 1960 All. 227 at pp. 227-28,

property cannnot obtain the aid of Court to dispossess the rightful owner." The learned Judge relied upon the following passage from the decision of the Privy Council in *Bijoy Gopal Mukerjee* v. *Krishna Mahesh Devi*,[1] for his support:

> "A Hindu widow is not a tenant for life but is owner of the husband's property, subject to certain restrictions on alienation and. subject to its devolving upon her husband's heirs, upon her death, But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the option of the reversioner's heir. He may think it fit to affirm it or he may, at his pleasure, treat it as a nullity without the intervention of the Court, and he shows his election to do the latter by commencing an action to recover possession of the property." He then concludes, "In the present case as I have said earlier the defendants showed the exercise of their right of election by dispossessing the plaintiff peacefully without the intervention of the Court. Once they did so, their possessions became rightful possession over his property. The plaintiff had no title in the property , on the basis of mere possessory title he could not come to the Court against the rightful owners though he could have done so against all other persons, who had no title to the property."

57. Decree, nature of.—A decree in a suit under this section should simply award possession. An order allowing the plaintiff to remove the house built on the land by the defendant is beyond the jurisdiction of the Court.[2]

This section comes into operation only for a limited purpose. It cannot be invoked unless the defendants have deprived the plaintiffs of actual physical possession. This section has nothing to do with questions of title. It is intended for the purpose of maintaining the possession of persons who are in actual physical possession of land and for discouraging persons from attempting to take physical possession of land from another by force. All that the Court can do is to restore the plaintiffs to physical possession. It cannot direct the defendants to remove any structures which they have erected on the land or permit the plaintiffs to pull down the structures. In a suit under this section the question of the title of the respective parties is not adjudicated upon and, therefore, it would be wrong to pass any order regarding the structures on the land.[3] Nor can the Court direct the defendant to remove any structures which he has erected on the land and fill up excavation made by him or direct him to pay to the plaintiff the cost of removing such structures and filling up excavations.[4] But the jurisdiction of the Court under this section is not ousted simply because the trespasser has erected a house on the land.[5] A claim for damages should neither be included nor decreed in a claim for recovery of possession under this section, as a claim for damages necessarily puts in issue the plaintiffs title. A decree for possession under Sec. 6 of the Specific Relief Act, 1963 and for damages is a bad decree liable to be set aside in its entirety in as much as it cannot be split up into two portions, i.e. (1) a valid decree for possession under Sec. 6 of the Act, (2) a bad decree for damages. In

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1. I.L.R. 34 Cal. 329 : 34 I.C.87.
2. Rahmat Ullah *v.* Mofizullah, 28 I.C. 473.
3. Soha Mia *v.* Prakash Chandra Bhattacharya, A.I,R. 1940 Cal. 464 at pp. 465, 466 : 44 C.W.N. 895.
4. *Ibid.*; Tilak Chandra *v.* Fatik Chandra, I.L.R. 25 Cal. 803.
5. Pushpa Bewa, 3 C.L.J.

damages. In such a case an appeal shall lie fr om the whole decree and not from the part of it.[1]

In a case a claim for mesne profits was joined with a claim for possession under Sec. 6 (new) of the Specific Relief Act. The suit was decreed in favour of the respondents both for possession and for Rs. 400 in respect of mesne profits but the decree as to mesne profit was set aside in the appeal.

A claim for mesne profits cannot be joined with a claim under Sec. 6 (new).[2] Likewise a claim for mesne profits is out of the scope of this section and cannot be decreed. The reason is that a decree for mesne profits cannot be passed if the defendant has a title in him and the question of title is beyond the scope of the section.[3] The mere fact that mesne profits cannot be recovered in a suit under this section cannot prevent the Court from passing a decree granting restorative possession.[4] Where decree for possession as well as for mesne profits is passed, only so much of it as relates to possession will be allowed to stand.[5] Standing crops cannot by any stretch of imagination be described as mesne profits.[6]

Therefore if the person dispossessed gets a decree for possession of his land, he is entitled to any crops growing thereon and he can cut them.[7] A plaintiff obtained a decree for possession of lands with crops standing on them under the present section. Before the execution of the decree the defendant removed the crops. The plaintiff filed a suit for the recovery of the price of the crops. The defendant denied his title to the land. It was held that the defendant could not by cutting and removing the crops nullify the decree and was liable for the price of the crops.[8]

58. Effect of decree.—A decree in a suit under this section shifts the onus of proving title to the defeated party when he subsequently brings a suit in ejectment.[9] "A decree under Sec. 6 (new) is final to the extent to which it goes and the effect of it is, rightly or wrongly, to put the plaintiff in possession and to put upon the defendant, in any proceedings which he took, the burden of proving his title."[10] Where execution of a decree obtained under this section is stayed pending a suit by the defendant for declaration of title and confirmation of possession, the burden lies on the plaintiff to establish his right to present possession. So the effect is the same whether the decree under this section is executed or its execution is stayed pending a regular suit by the defendant.[11] Again a decree under this section is a *prima facie* evidence of title to the land even against

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1. Nazir Ahmad *v.* Abid Ali, 8 A.L.J. 910.
2. Tilak Chandra Dass *v.* Fatik Chandra Dass, L.I.R. 25 Cal. 803 and Munshi Nazir Ahmad *v.* Abid Ali, (1911) 8 A.L.J. 910:11 I.C. 38 ; Ma Ngwe Bwin *v.* Maung Po Maung A.I.R. 1972 Rang. 142 at p. 143 : I.L.R. 5 Rang 123; *see* also Abdul *v.* Uthomouza, A.I.R. 1927 Mad. 722.
3. Thavasi *v.* Arumugum, 30 M.L.J. 326: 2 L W. 157 : 1915 M.W.N. 170 : 28 I.C. 1; Janardan *v.* Ram Chandra, 46 I.C. 885.
4. Yallamanchil *v.* Pamu Ramaswami, 25 I.C. 802 : 16 M.L.T. 190.
5. Ma Ngwe Bwin *v.* Maung Po Maung, *supra*.
6. Apanna *v.* Kuliga Krishnamma, A.I.R. 1935 Mad. 134 at p. 135.
7. *Ibid.*; Shirajdi *v.* Imam Bux, 13 W.R. 104; Munna Singh *v.* Ausan Singh, I.L.R. 41 All. 103 ; 48 I.C. 422 : 16 A.L.J 924.
8. Munna Singh *v.* Ausan Signh, *supra*.
9. Ziaullah Sheikh *v.* Inu Khan, I.L.R 23 Cal. 693; Kailash *v.* Gajendra, 13 I.C. 407: 15 C.L.J. 1 ; *see* also 7 W R. 230; Sinbo *v.* Surat, 16 W.R. 34:17 W.R. 161 ; Manohar *v.* Anantamoyee, 17 C.W.N. 802.
10. Ziaullah Sheikh *v.* Inu Khan, *supra*.
11. Manohar *v.* Anantomoyee, 17 C. W. N. 802.

a stranger, for a decree under this section establishes possession and is evidence of title.[1] The decree which directs that the plaintiff be put into possession is certainly evidence of his possession and of his right to possession apart from any question of title against the defendant. It is also some evidence but not conclusive evidence of his possession prior to the decree as that was a matter in issue and which had to be determined in suit.[2] A decree under this section is a decree for possession within the scope of Order XXI, rule 97, C.P.C.[3]

A person against whom an order is made under this section can sue for a declaration of title and for restraining the opposite-party from interfering with his possession.[4] The object of this section is to discourage people from taking the law into their own hands, however good their title may be.[5] It provides "a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised."[6] An order of decree passed under that section is not open to appeal or to revieu at the instance of the defeated party; and the section expressly provides that nothing contained therein shall bar any person from suing to establish his title to such property, and to recover possession thereof. It was, therefore, competent to the respondent to institute this suit to establish his title to the lands in dispute; and being in possession thereof, the only further relief which he could seek was an injunction to restrain the appellant from disturbing his possession.[7]

In the case of *Jwala* v. *Ganga Prasad*,[8] it was held by the Bench of the Allahabad High Court that when a suit under Sec. 6 (new), Specific Relief Act, is decreed, the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession, and a similar view was taken in the case of *Ram Kishan Das* v. *Jai Kishan Das*,[9] where the plaintiff's suit had been dismissed by the Trial Court.[10]

It is settled law that a person against whom an order under Sec. 9, Specific Relief Act (which corresponds to Sec. 6 of the present Act) is made may sue for a declaration of title and for restraining the opposite-party from interfering with his possession.[11]

A decree under this section affords a cause of action to the rightful owner who has regained possession without the help of law but has been evicted in execution of such decree. The weight to be attached to a decree under this section depends upon the nature of the summary enquiry which preceded it.[12]

59. Admissibility of the judgment.—A judgment in a case under Sec. 6 (new) of the Specific Relief Act, is not admissible under Sec. 41, or under Sec. 42 of the Indian Evidence Act. It is relevant only under Sec. 13 and Secs. 40 and 43 of the Evidence Act, that is to say, as evidence of a transaction or

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1. Kailash *v.* Gajendra, 13 I. C. 407 : 15 C. L. J. 1; Radha *v.* Zamir-un-nissa, 11 W. R. 83.
2. Ziaullah Sheikh *v.* Inu Khan, I. L. R. 23 Cal. 693.
3. Narasamma *v.* Sarasamman, A. I. R. 1926 Mad. 353.
4. Bhioraj *v.* Sheshrao, I. L. R. (1948) Nag. 422 : 1948 N. L. J. 337.
5. Krishnarav *v.* Vasudev, I. L. R. 8 Bom. 371.
6. Wali Ahmad Khan *v.* Ajudhyia Kandu, I. L. R. 13 All. 537 : 1891 A.W.N. 196.
7. Mari Doddatamma Markundi *v.* Santaya Ramkrishna Pai Kolle, A. I. R. 1922 Bom. 216 at p. 216 : 24 Bom. L.R. 768.
8. I. L. R. 30 All. 331 : 5 A. L. J. 298 : 1908 A. W. N. 142.
9. I. L. R. 33 All. 647 : 11 I. C. 814.
10. Badri Das *v.* Mst. Dhanni, A. I. R. 1934 All. 541 at p. 542 : 1934 A. L. J. 738.
11. Gouranga Chandra *v.* Satish Chandra, A. I. R. 1955 Tripura 13 at p. 14.
12. Sinbo *v.* Surat, 16 W. R. 34.

instance where the right to possession was claimed or disputed and also as evidence to show that there was such a judgment, decree or order or to found a further claim to determine whether cognizance should or should not be taken of a suit.[1]

60. Res judicata.—Having regard to the summary character of the proceedings under Sec. 6 of the Specific Relief Act, 1963 and the fact that in the very section itself it is stated, that nothing stated therein should bar any person from suing to establish his title and recover possession in the said proceedings, it is evident that the Legislature did not intend to give the proceedings the character of finality which is essential to invest the decision with a character which will make it operative as *res judicata*.[2] The section does not in any way contemplate an enquiry into title. When trying suits under this section the Court must strictly confine itself to evidence of possession and possession only. Questions of title are not to be agitated.[3] Since an enquiry into question of title is not within the scope of the section, even if a court decides the question of title when the suit expressly purports to be one under Sec. 6 (new) the decision of the question of title does not operate as *res judicata*.[4] But a decree under this section will be final so far as it goes.[5] In other words, a decision under this section will be *res judicata* on the point whether the plaintiff was dispossessed within six months of the suit.[6] In considering to what extent if at all the decision in the possessory suit is admissible, one has to distinguish between the judgment or decree in the said suit and the findings on the issues on which it is based. So far as the decree is concerned, it is admissible only if it is relevant under some particular section or other of the Evidence Act. As a rule, judgments, orders or decrees are admissible if they are admissible under the provisions of Secs. 13, 40, 41, 42 or 43 of the Evidence Act. So far as a judgment in a case under Sec. 6 (new) of the Specific Relief Act is concerned it does not come under Sec. 41, nor under, Sec. 42, and it is relevant only under Sec. 13 and Secs. 40 and 43, that is to say, as evidence of a transaction or instance where the right to possession was claimed or disputed, and also as evidence to show that there was such a judgment or decree, or in order either to found a further claim or to determine whether cognizance should or should not be taken of a suit or whether a trial should or should not be held.[7] A decree for possession under this section in a suit beyond the pecuniary limits of that Court's jurisdiction is not *res judicata* but is at the same time some evidence of dispossession by the defendants in a subsequent suit against the same defendant to recover the mesne profits.[8] Where a suit has been brought under the present section, a subsequent suit for mesne profits is not barred either under Order. II, rule 2, C.P.C. or by the rule of *res judicata*.[9] Similarly, where

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1. Chhadek Karikar *v.* Sayad Ali Kaviraj, A. I. R. 1925 Cal. 1046 at p. 1047; Gouranga Chandra *v.* Satish Chandra, A. I. R. 1955 Tripura 13 at p. 14.
2. Chhadek Karikar *v.* Sayad Ali Kaviraj, A. I. R. 1925 Cal. 1046 at p. 1048 : 85 I. C. 979 ; Gouranga Chandra *v.* Satish Chandra, *supra*.
3. Babu Ram *v.* Bashiruddin, 1946 Al. L. J. 30.
4. Mohd. Haji *v.* Wazir Ali, 41 I. C. 974; 2 O. C. 227 ; Narayan Rao *v.* Dharmachar, I. L. R. 26 Mad. 54 : 13 M. L. J. 146; *see* also I.L.R. 31 Cal. 647 (F. B.); Krishnarao *v.* Vasudev, I. L. R. 8 Bom.
5. 371. Ziaullah Sheikh *v.* Inu Khan, I.L.R. 23 Cal. 693.
6. Gangaji *v.* Dhansingh, 27 I. C. 977 : 11 N. L. R. 31; Gopal Bhattacharji *v*, Sarat Kumari Debi, A. I. R. 1928 Cal-758 at p. 758; 114 I. C. 82 ; Hridaynath Ray *v.* Probodh Chandra, A.I.R. 1933 Cal. 923 at p. 923 : I.L.R. 60 Ca. 1171 : 147 I.C. 747 : 37 C. W. N. 1148 : 57 C. L. J. 549.
7. Chhadek Karikar *v.* Sayad Ali Kaviraj A. I. R. 1925 Cal. 1046 at p. 1047.
8. Ziaullah Shaikh *v.* Inu Khan, I. L. R. 23 Cal. 693.
9. Sheokumar *v.* Narain Das. I. L. R. 24 All. 501 : 1902 A.W.N. 139; Thavas *v.* Arumugam, 28 I. C. 1 : 30 M.L.J. 326

during the pendency of a suit filed under this section, the plaintiff files a second suit asking for cancellation of a deed of gift under which the defendant claims title, the second suit is not hit by Order II, rule 2, C.P.C.[1] A suit for damages also is maintainable after dismissal of a suit for possession under this section.[2]

61. Possessory suit.—In a suit under Sec. 6 (old Sec. 9), Specific Relief Act, all that a plaintiff need allege and prove in his previous possession and dispossession within six months and if he does that he will succeed as against even the true owner as it is not permissible to the defendant to set up his title. The question has arisen and not infrequently whether a person who does not come in under Sec. 6 (new) of the Specific Relief Act within six months can succeed on the basis of his possessory title. Of course, if the defendant has better title he cannot succeed and there can be no two opinions about it.[3]

Where a Mohammedan widow on the death of her husband retained possession over her husband's properties in lieu of her dower debt during her lifetime and after her death defendants entered into the possession of those properties in assertion of their own rights as heirs of the husband, the plaintiff as the sister of the deceased widow after more than six months of the death of the widow brought a suit for possession as her sole heir, it was held that the plaintiff could not succeed in her suit because her suit was not a suit to enforce the right of a possessory title-holder but the suit was in the nature of a right claimed by her to possess property as of right and such a suit could not be deemed to be a suit for the enforcement of a right enforceable under Sec. 6 (new) of the Specific Relief Act as it would be barred by limitation and if there was any right of the plaintiff it was unenforceable in law.[4]

As against a trespasser there is conflict of opinion. According to Allahabad, Bombay, Burma, Madras, Lahore, Nagpur, Oudh, Patna and Sind Courts[5] if a person is in possession of land even without title thereto he cannot be successfully turned out by another who also has no title and if such a thing should happen the person first in possession is entitled to be put again in possession even if he should fail to prove that he had a title to the land.

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1. Jai Gopal *v.* Lalit Mohan, I. L. R. 26 All. 236 : 1904 A. W. N. 1
2. Baban *v.* Naya, I. L. R. 2 Bom. 19.
3. *See* Mashel *v.* Ahmad, I. L. R. 50 All. 85 : 103 I. C. 363 : A.I.R. 1927 All. 534.
4. Ziabunnissa *v.* Nazim Hasan, A. I. R. 1962 All. 197 at p. 199.
5. *Allahabad*—Gajrat Puri *v.* Raja Ram, 1937 A. W. R. 1140 : 1937 A. L. J. 1189; Ram Nath *v.* Nanak Chand, 143 I. C. 61 : A. I. R. 1932 All. 686 ; Madan Lal *v.* Chidu, I. L. R. 53 All. 221; 118 I. C. 829 : A. I. R. 1930 All. 852 : 1930 A. L. J. 1528; Ram Dayal *v.* Saraswati, I. L. R. 49 All. 191 : 99 I. C. 56 : A. I. R. 1927 All. 526 : 2 A. L. J. 281; Jawahar *v.* Jagan Nath, 100 I. C. 315 : A. I. R. 1927 All. 760; Wali Ahmad *v.* Ajodhia, I.L.R. 13 All. 537 (F. B.); Umrao Singh *v.* Ramji, I. L. R. 36 All. 51 : 22 I. C. 627; *see* also I.L.R. 29 All. 52; I.L.R. 27 All. 169 : 1906 A. W. N. 184; *Bombay*—Prem Raj *v.* Narayan, I.L.R. 6 Bom. 215 (F. B.) ; Krishnarao *v.* Vasudev, I.L.R. 8 Bom. 371; Hanumantrao *v.* Secretary of State, I.L.R. 25 Bom. 287; Gangaram *v.* Secretary of State, I.L.R. 30 Bom. 798 ; Bhagwan Singh *v.* Secretary of State, 10 Bom. L. R. 571; *Burtma*—Maung Naw *v.* Ma Shwe Hmant, 8 L. B. R. 277 (F. B.) ; Ma Shaw Maung *v.* Shwe Gan, 70 I. C. 99 : A. I. R. 1923 Rang. 54 : 1 L. B. R. 415 : 1 Bur. L. J. 165; *see* also 3 L. B. R. 27; *Lahore*—Daya Prakash *v.* Bhan Mal, A. I. R. 1936 Lah. 241; Abdul Hamid *v.* Sarbuland, 78 P. R. 1902 : 137 P. L. R. 1902; Munsa Devi *v.* Sansani, 117 I. C. 904 : A. I. R. 1930 Lah. 220; Tirath Ram *v.* Kahan Devi, I. L. R. 1 Lah. 583 : 60 I. C. 101 : A. I. R. 1921 Lah. 149 : 3 Lah. L. J. 35; Rahmat Ali *v.* Shadi Ram, 75 I. C. 877 : A. I. R. 1925 Lah. 45; Ladh Singh *v.* Ahmad, 97 I. C. 569 : A. I. R. 1927 Lah. 11; *Madras*—Narayannappa *v.* K. Hannumanthappa, 135 I. C. 910 : A. I. R. 1932 Mad. 32 : 1931 M. W N. 487; Periasami *v.* Anandayai, 80 I. C. 82 : A. I. R. 1924 Mad. 722 : 20 L. W. 14; Dhappa *v.* Marisunsu, 108 I. C. 194 ; A. I. R. 1927 Mad,

According to the principle of English law which has been recognized in Indian courts, possession is a good title against any one, who cannot show a better. Even a wrongful possessor has rights of an owner against all persons except the true owner and the earlier possessor. He is entitled to retain his possession uninterrupted and recover the same if dispossessed by any other trespasser.

The idea underlying this principle is two-fold. *Firstly*, force and fraud cannot be allowed to determine all disputes between persons who cannot show unimpeachable title to the property as a true owner and *secondly*, as acquisition of title by operation of law is a lawful mode of acquiring title, person in peaceful possession should be allowed to maintain the same against all but the true owner or his representative-in-interest and be protected from any invasion on and interruption in possession which may arrest the process of development of his title into an indefeasible right through the influence of time.

That is the reason, why the law has recognized the possessory ownership as distinct from proprietary ownership and made it heritable and transferable.

In *Govindbhai* v. *Dayabhai*,[1] the observation of their Lordships seems to support the argument advanced, that a person whose title has been disproved by the defendant cannot succeed in his suit for ejectment merely on the basis of his lost possession. The facts of the said case were different from the present one for therein it was found that the defendants were not mere trespassers and that the plaintiff's previous possession was not satisfactorily established. There can be no two opinions that the plaintiff, under these circumstances, had to establish both his title and possession within time. But the learned Judges in making the above observation have not limited the scope of the principle enunciated to such circumstances alone and have extended to all ejectment cases where the defendant could disprove the title of the plaintiff though he himself may not have a better. This view in its ultimate analysis amounts to a denial of the principle that possession can be a foundation for a right to possession. In this way, it differs from what may be said to be the uniform view of the majority of High Courts in India. The High Courts of Allahabad, Burma, Madras, Lahore, Nagpur, Oudh, Patna and Sind are of the view that the person who got possession by force cannot retain the same against his opponent unless he proves a better title.[2]

1185 : 1927 M. W. N. 752 ; Ajagar *v.* Chedalvada, 100 I. C. 62 : A. I.R. 1927 Mad. 572; Vythilinga *v.* Ponnuswami, I.L. R. 62 I. C. 295 : A. I. R. 1921 Mad. 642 : 41 M.L.J. 78; *see* also I.L.R. 23 Mad. 179; I.L.R. 26 Mad. 514; I.L.R. 33 Mad. 173; 6 M.L. T. 396; 15 I. C. 613; 4 I. C. 50 : 32 M. L. J. 85; 21 M. L. T. 62; 15 I.C. 97 : 12 M.L.T. 183 ; *Nagpur*—Ganji *v.* Dhan Singh, 27 I.C. 977 : 11 N.L.R. 31 ; Gam *v.* Beni, 43 I. C. 943 : 14 N.L.R. 82; *Oudh*—Phakhar *v.* Prago, I.L.R. 10 Luck. 659 :154 I.C. 570 : A.I.R. 1935 Oudh 268 : 1935 O.W.N. 230; Sohan Lal *v.* Sheikh Mohd., 126 I.C 675 : A. I. R. 1930 Oudh 374: 7 O.W.N. 547; Sarafraj *v.* Abdullah, 146 I.C. 1923 : A.I.R. 1933 Oudh 473 : 10 O.W.N. 1917 : 1934 O.L.R. 2; Khushwant *v.* Jagannath, 119 I.C. 872 : A.I.R. 1930 Oudh 184; *see* also 53 I.C. 746: 6 I.L.J. 499; *Patna*—Shiv Saran Rai *v.* Sukhdeo Rai, 171 I.C. 317: A.I.R. 1937 Pat. 418; Bodha *v.* Ashloke, I.L.R. 5 Pat. 765 : 88 I.C. 779 : A.I.R. 1927 Pat. 1; Sheikh Mirza *v.* Abdul Ghani 43 I.C. 338. 4 Pat. L.W. 130; Ajodhia Singh *v.* Awash Behari, 57 I. C. 320; Sabodra *v.* Gobardhan, 39 I.C. 458 : 22 L. J. 280 : 1 P.L.W. 327; *Sind*—Gobind Ram *v.* Savhagatullah, 27 I.C. 999 : 78 S.L.R. 218.

1. A.I.R. 1936 Bom. 201.
2. *See* Jawahir Gir *v.* Jagarnath Prasad, A.I.R. 1927 All. 760; Salle Singh *v.* Mullo Singh, A.I.R. 1932 All. 656; Mst. Mansa Devi *v.* Sansaru, A.I.R 1930 Lah. 220 (1); Dia Prakash ; Bhana Mal. A.I.R. 1936 Lah. 241*v.* Narayanappa *v.* Hanumanthappa, A.I.R. 1932 Mad. 32; Phakkar *v.* Pragih A.I.R. 1935 Oudh 268; Shiv Saran Rai *v.* Subdeo Rai, A.I.R. 1937 Pat. 418. Ram Keshar *v.* Hari Charan, A.I.R 1947 Pat. 444; and Govind Dutta *v* Jagnarain Dutta, A.I.R. 1952 Pat. 314.

This view appears to be based upon the principle that possession being the root of title, every possession must create a title, which as against the subsequent intruders has all the incidents and advantages of a true title.

The Calcutta High Court, however, seems to favour the view that possessory title cannot be recognized unless peaceful possession is sufficiently long.[1] This view seems to be be somewhat different from the one expressed in *Satischandra* v. *Madanmohan*,[2] where the learned Judge has referred to the Privy Council case of *J.P.Wise* v. *Ameerunnissa Khatoon*.[3] It has consistently held the view that if a trespasser is dispossessed by another trespasser, the person dispossessed can on the basis of his prior possession recover the same.[4]

It is obvious, therefore, that unless the defendant establishes better title he cannot successfully maintain his possession against the plaintiff who has been dispossessed by him. The plaintiff in this case is not an intruder. He got on the property without force or fraud with the free consent of the true owner, raised construction at a considerable outlay after vindicating his right in the municipality and remained in peaceable possession for a period of ten years or more.

Want of a registered deed may render his proprietary title to the land somewhat defective as against the true owner, but the possession given in pursuance of sale transaction cannot be violated even by the true owner, especially when the true owner never disputed his right in the municipal proceedings and allowed the *malgi* to come up. Even if the owner sued for possession, the plaintiff might successfully resist the suit under the provisions of Sec. 53-A of the Transfer of Property Act, if he can avail of the same. When the right to remain on the property can thus be defended against the true owner, a mere trespasser by show of force cannot defeat such a right. At any rate, whatever the alleged defect in the title to the land, proprietary interest of the plaintiff in the suit *malgi* is proved beyond dispute. By no show of reason, the defendant can retain his possession against the true owner. The Court below has rightly decreed the claim of the plaintiff. The appeal is, therefore, dismissed with costs.[5] Again in *State of Patiala and E.P. States Union, Patiala* v. *Mahendra Singh Nath Singh*,[6] it was stated : "It may be that the respondent had no legal right to stay on the land in question but the general purpose of the law is that regardless of actual condition of the title to the right of possession the party actually in peaceable and quiet possession shall not be turned out by strong hand, violence or terror. Our attention has not been invited to any provision of law which empowers a State Government by force or show of force to evict a person who is in actual possession of immoveable property. If the State Government is of the opinion that the State had superior title or the better right to possession it was open to them to bring an appropriate action against him and to secure his eviction in accordance with the provisions of law. They had no power, however, to take the law in their own hands and to order eviction of the petitioner."

In a later Bombay case, however, a discordant note has been struck and it has been held that when a person who has lost possession sues to recover it, he cannot rest upon his prior possession alone, unless it was such as to amount to *prima facie* evidence of title, for both title and possession have to be proved

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1 Kiran Chandra Roy *v.* Prosanna Kumar Chakravarti, A.I.R. 1934 Cal. 561.
2. A.I.R. 1931 Cal. 483.
3. 7 I.A. 73.
4. Laxmandas *v.* Anandgir, 12 Dec. L.R. 507; Raghubir Rao *v.* Gopal Rao, 36 Dec. L.R. 274.
5. Jagmohandas *v.* Kishen, A.I.R. 1957 Hyd. 37 at pp. 39-40.
6. A.I.R. 1958 Punj. 325 at p. 325.

in such a case.[1] On the other hand, so far as the Calcutta High Court is concerned it is well settled that mere previous possession will not entitle a plaintiff to a decree for recovery of property except in suit under Sec. 6 (new), Specific Relief Act. For the plaintiff to succeed he should allege and prove his title, at least possessory title; that is, possession for 12 years.[2] The distinction between the two conflicting views is well explained by an illustration given by Pollock and Mulla: "*A* alleging that he had been in quiet and undisturbed possession of certain land for one year and six months and that he was forcibly ousted from possession by *B*, who never had any title to the land at all, sues *B* eight months after the date of dispossession for possession. *A* has no title to land at all, but it is proved that he had been in possession as alleged. *B* also has no title of any kind to the land. Is *A* entitled to a decree? According to Bombay, Allahabad and Madras decision he is....According to the Calcutta High Court *A*'s possession being for a period less than 12 years, he is not entitled to possession, though *B* has no title." The majority of High Courts proceed upon the principle of the English law, also recognized in India that possession is a good title against all but the true owner and entitles the possessor to maintain a suit for ejectment against any other person than such owner who dispossesses.[3] The defendants being mere trespassers, if the plaintiff can prove that she is holding any property of Mool Singh, she will be legally entitled to claim a declaration to that extent. The law on the subject is contained in *Ismail Ariff* v. *Mohd. Ghous*,[4] *Ganga Ram* v. *Secretary of State*,[5] *Hanmantrao* v. *Secretary of State*,[6] and *Ayyapparaju* v. *Secretary of State*.[7] In *Ismail Ariff* v. *Mohd. Ghous*,[8] the cause of bringing, the suit was stated in the plaint to be that all the tenants of the property had attorned to the plaintiff and paid rent to him except four who, at the instigation of the defendant, had refused to recognize the plaintiff's title, and alleged in collusion with him that the land had been dedicated to religious and charitable purposes, and the plaint prayed for a declaration that the plaintiff was the sole and absolute owner of the land and that the defendant had no sort of right, title or interest therein, and for an injunction and damages. The plaintiff in that case had received possession and had it when the suit was brought. Their Lordships of the Privy Council held that lawful possession of land was sufficient evidence of right as owner, as against a person who has no title whatever and who was mere trespasser, and consequently the former could obtain a declaratory decree, and an injunction restraining the wrong-doer.

In *Ganga Ram* v. *Secretary of State*,[9] the plaintiff who was in possession of certain land had sued for a declaration that the defendant had no title to it and that it belonged to him. At the trial both plaintiff and the defendant failed to prove any title to the land, but the plaintiff proved that he had been for ten

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1. Gobindbhai *v.* Dahyabhai, : A. I. R. 1936 Bom. 201 a t pp. 208-9: 163 I.C. 38 Bom. L.R. 175.
2. Kiran Chandra Roy *v.* Prosanna Kumar, A.I.R. 1934 Cal. 561 at p. 562: I.L.R. 61 Cal. 409 : 150 I. C. 723 : 38 C.W.N. 435; Nisa Chand *v.* Kamchi Ram, I.L.R. 26 Cal. 579 : 3 C.W.N. 568; *see* also 42 I.C. 884; 36 I.C. 890: 20 C.W.N. 773 : I.L.R. 17 Cal. 256; I.L.R 9 Cal. 30; 5 C.W.N. 214 : 13 C.L.J. 649. I.L.R. 9 Cal. 130.
3. Narayan Rao *v.* Dharmchar, I.L.R. 26 Mad. 514:13 M.L.J. 146; Premraj *v.* Narayan, I.L.R. 6 Bom. 215; Sundar *v.* Parbati, I.L.R. 12 All. 51 (P.C.) : 16 I. A. 186; Ismail Ariff *v.* Mohd. Ghcus, I.L.R. 20 Cal. 834 (P.C.) : 20 I.A 99; *See.* also 100 I.C. 315 : A.I.R. 1927 All. 760; 143 I.C. 621 : A.I.R 1932 All. 686: 1932 A.L.J. 821 : I.L 1 24 All. 157.
4. I.L.R. 20 Cal. 834 : 20 I.A. 99 : 6 Sar. Sar. 305.
5. I.L.R. 20 Bom. 798.
6. I.L.R. 25 Bom. 287: 2 Bom. L.R. 111.
7. A.I.R. 1915 Mad. 29 : 25 I.C. 894 : I.L.R. 37 Mad. 298.
8. I.L.R. 20 Cal. 834.
9. I.L.R. 20 Bom. 798.

years in possession and had built a shed on it. It was held on the authority of the Privy Council judgment referred to above that the plaintiff was lawfully entitled to possession of the land in suit and to the shed thereon.

In *Hanmantrao* v. *Secretary of State*,[2] Jenkins, C. J., and Ranade, J., held that the plaintiff's possession, which was not shown to have wrongfully originated, was good against the whole world except a person who could show better title, that the burden to prove such title lay upon the defendant and that as he had failed to prove it, the plaintiff were entitled to the declaration sued for. In *Ayyapparaju* v. *Secretary of State*,[3] it was remarked by Abdul Rahim, J. that a person in possession of land even though for less than 12 years would, under Sec. 42 (old), Specific Relief Act, be entitled to a declaration that he was in lawful possession as against a wrong-doer who interfered with his possession. It follows from the above analysis of the authorities that a person in possession is considered in law to have that legal character or right which is contemplated by Sec. 42 (old), Specific Relief Act, and can protect his possession through Court against a mere trespaser. *Held* that the plaintiff was competent to institute the suit, if she could show that she was in possession of the properties in suit at the time it was instituted.[4] The underlying idea of this rule seems to be that acquirsition of title by operation of the law of limitation being a lawful mode of acquiring title, the person in peaceable possession is entitled to maintain such possession against all but the true owner, and therefore, a third party who has no better title than the person in possession has no right to invade upon the possession of the latter and interrupt or arrest his lawful acquisition of title by his continuing to remain in possession for the statutory period.[5] According to the majoriy the interest of a person in possession is heritable and transferable. It is capable of being disposed of by deed or will or by execution sale.[6] Even a trespasser can exercise acts of ownership, except as against the rightful claimant.[7] Even according to the Calcutta view the possession is not altogether useless as it may furnish evidence of title. Consequently it has been held that if possession has been of a peaceful nature and for a long period of time it may under certain circumstances give rise to an inference of title in the plaintiff as against a trespasser and entitle him to obtain a decree for recovery of possession against such a trespasser who has no right to possession whatsoever.[8]

In a Privy Council case—*Jagdish Narain* v. *Nawab Said Ahmad*,[9] there is an observation to this effect :

> "Plaintiffs were suing in ejectment, and they should only succeed on the strength of their own title."

62. Possession under a resumable grant from the Government, right to remain in possession only arises if the grant is not resumable.—Mere possession of the property, for however long a period it may be, will not clothe the possessor with any legal right if it is shown that the possession is under a grant from the State which is resumable. Such a long possession may give him a legal right to

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1. I.L.R. 25 Bom. 287.
2. A.I.R. 1915 Mad. 29.
4. Mst. Malan Singh *v.* Mohan Singh, A.I.R 1935 Lah. 547 at pp. 548-49.
5. Narayan Rao. *v.* Dharmachar, I.L.R. 26 Mad. 514 : 13 M.L.J. 146.
6. Govinda *v.* Mohan Lal, I.L.R. 24 All. 157 Maung Naw Ma *v.* Shew Hmant, 8 L,B.R. 277 (F.B.) ; Abdul Hamid *v.* Sarbuland, 78 P.R. 1922 : 137 P.L.R. 1902.
7. Ram Nath *v.* Nanak Chand, A.I.R. 1932 All. 686 at p. 688.
8. Kiran Chandra Roy *v.* Prosauna Kumar Chakravarti, A.I.R. 1934 Cal. 561 at p. 562 : I. L: R. 61 Cal. 419 : 150 I.C. 723 : 38 C.W.N. 435.
9. (1945) 50 C.W.N. 477 at p. 478 (P.C.).

protect his possession against third parties but as between the State and the grantee, possession of the grantee under a resumable grant cannot be said to confer any right on the grantee which would justify a claim for a writ under Art. 226 where the grant has been resumed. In dealing with this argument, their Lordships have assumed without deciding that though a suit under Sec. 6 (new) of the Specific Relief Act would have been incompetent against the appellant, a similar relief can be claimed by the respondents against the appellant under Art. 226. Even on that assumption, no right can be claimed by the respondents merely on the ground of their possession, unless their right to remain in possession is established against the appellant, and this can be done if the grant is held to be not returnable.[1]

63. Dispossession from the immoveable property—Suit for the declaration of title and recovery of possession after six months of dispossession when maintainable.—If the person is dispossessed of immoveable property otherwise than in due course of law, he has a summary remedy under Sec. 6 (new) for recovery of possession notwithstanding any title. The sole point which has to be determined in such a suit is whether the plaintiff was in possession within six months prior to the suit and whether he was dispossessed by the defendant otherwise than in due course of law. Title is no defence in such a suit. When a person dispossessed of immoveable property by a person who has no title and who is a trespasser does not sue within six months for recovery of possession under Sec. 9 (old) can he bring a suit for recovery of his possession relying on his prior possession ? On this point the authorities are not uniform.[2]

64. Decree for possession by a non-owner of the property.—In *Maya Ram v. Sant Ram*,[3] the plaintiff wanted possession under the provisions of the Specific Relief Act, and not under the ordinary law on the basis of a claimbased on title. When the suit was under Sec. 6, Specific Relief Act, 1963, such a relief could be granted. The mere fact that the plaintiff had referred to his claims of ownership in the plaint, shall not make a difference. That would be a matter of history not material or relevant for purposes of the suit under Sec. 6 (new). The plaintiff was claiming to be a tenant and wanted dispossession of a person having no title.

The plaintiff was thus entitled to a decree for possession though he could later be ejected by the defendants or by the owner of the property by seeking remedy before a competent court.[4]

65. Interference in revision by the High Court in exceptional circumstances in cases falling under the section—Dispossession without consent.—Interference in revision in cases under Sec. 6 (new) of the Specific Relief Act can be justified only in exceptional circumstances, e. g. when the suit is dismissed without trial under misapprehension of scope of Sec. 6 of the Act aforesaid,[5] or where the balance of convenience in a case is not in favour of driving the plaintiff to a regular suit,[6] or

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1. State of Orissa *v.* Ram Chandra Deb and Mohan Prasad Singh Deo, A.I.R. 1964 S.C. 685 at pp. 688-89 : 1964 S.C.D. 278 : (1964) 2 S.C.A. 356.
2. Kuttan Narayanan *v.* Thomman Mathayi, A.I.R. 1966 Ker. 179 at pp. 180-81, 182, 184: 1965 Ker. L.J. 1192: (1965) 2 Ker. L.R. 394 : 196 Ker. L.T.1: I,L.R. (1966) Ker. 185,
3. A.I.R. 1965 All. 409 at p. 410.
4. Maya Ram *v.* Sant Ram, A.I.R. 1965 All. 409 at pp. 40910.
5. *See* Ajodhiya Prasad *v.* Ghasiram, A.I.R. 1937 Nag. 326 at p. 327.
6. *See* Bhojraij *v.* Shesrao, A.I.R. 1949 Nag. 126 at p. 127 : I.L.R. (1948) Nag 422,

where the case of the applicant is clear.[1] Interference in revision in a particular case would depend on the circumstances of that case. If the case is disposed of on an obvious misapprehension as to the legal position, the decision of the Lower Court may be interfered with even in a revision. But, ordinarily the High Court will not interfere in revision with an order under Sec. 6 (new) of the Specific Relief Act as there is the remedy by way of suit.

66. Limits up to which a mere possessory title is recognized by the Indian law.—It might have been logical, perhaps even desirable to hold that Secs. 6 and 38 of the Specific Relief Act and Sec. 145 (new) of the Criminal Procedure Code set the limits up to which a mere possessory title is recognized by the Indian law. Under Sec. 38, a person in possession can obtain protection against all invaders of his enjoyment,[2] even if the invader be the true owner. If he is dispossessed without his consent, otherwise than in due course of law, by anybody other than the Central Government or the State Government he can, under Sec. 6, (new) by a suit brought within six months, recover possession even if it be that the dispossessor is the true owner. If he can muster enough strength to make a breach of the peace likely, the Magistrate having jurisdiction will step in under Sec. 145 (new) of the Criminal Procedure Code to maintain his possession until eviction in due course of law, or to restore it to him if he has been forcibly and wrongfully dispossessed within the two months preceding. But these statutory provisions notwithstanding, the courts in India have all along adopted the rule of English law that "possession is a good title of right against any one who cannot show a better and that a wrongful possessor has the right of an owner with respect to all persons except earlier possessors and except the true owner himself"[3]. In the words of the Privy Council in *Perry* v.*Clissold*,[4] "a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner".[5]

It is well settled that possessory title is a good title in a person to be granted a decree for possession under Sec. 6 of the Specific Relief Act, 1963. In case of eviction of a tenant in possession, and right to remain in possession, such a right being a possessory right can certainly be adjudicated in a Civil Court.[6]

67. Order under Sec. 145 (new), Cr. P. C.—Effect.—An order under Sec. 145 (new), Cr. P. C., declaring a particular person to be entitled to retain possession thereof until evicted therefrom, in due course of law, does not bar the opposite party from seeking relief under Sec. 6 (new), Specific Relief Act. It is a mistake to suppose that after such an order the aggrieved party's only remedy is to institute a suit to have his title declared and possession given to him.[7] There is, however, some authority for the proposition that where in proceedings under Sec. 145 (new), Cr. P. C., an order for attachment under Sec. 146 of the Code is made a suit under Sec. 6 (new), Specific Relief Act, will not lie.[8] But where

1. *See* Ramamanemma *v.* Bassavayya, A.I.R. 1934 Mad. 558 at p. 559.
2. Vasudeva Kurup. *v.* Ammini Amma, 1964 Ker. L.T. 468.
3. Salmond on *Jurisprudence*, 11th Ed., p. 345.
4. (1907) A.C. 73 at p. 79.
5. Rev. Father K.C. Alexander of Kuttik and Athilaya Kollakulhiyil Thadiyoor Muri *v.* Nair Service Society Ltd., A.I.R. 1966 Ker. 286 at p. 288: 1966 Ker, L.J. 313: 1966 Ler. L.T. 333.
6. Nasib Singh *v.* Bajo Ram, A.I.R. 1969 J. & K. 9 at pp. 11,12,
7. Jwala *v.* Ganga Prasad, I.L.R. 30 All. 331 : 5 A.L.J. 297: 1903 A.W.N. 142; U Kyawa Lu *v.* U Shawe So, A. I. R. 1929 Rang. at pp. 21-22 : I.L.R. 6 Rang. 667 : 114 I.C. 543. *See* also I.L.R. 26 Bom. 358; 20 W.R.C. Singh *v.* Damodar Singh, 1948 A. W. Kun war 12 (H.C.) 363 Bala Krishna Ayyar, In re, A.I.R. 1950 Mad. 753 at p. 754 : 1959 M.W.N. 19 : (1959) 1 M.L.J. 13 at pp. 14-15 I.L.R. 30 All. 331 foll., 7 C. L.R. 547 (distinguished).
8. Moore *v.* Monoranjan, 12 C.W.N. 696 : 7 C.L.J. 547; Azim-ud-din *v.* Ala-ud-din 43 I.C. 153 : 22 C.W.N. 931.

the dispossession complained of by the plaintiff is subsequent to Sec. 145 proceedings, as by attachment under Sec. 146 and putting the property in possession of an officer, a suit for possession under Sec. 6 (new) is not barred.[1]

68. What court must record.—A suit under Sec. 9 (Sec. 6 of the new Act) of the Specific Relief Act is maintainable by a party against whom an order under Sec. 145, Cr. P. C., was passed.[2]

It is incumbent to record a categorical finding as to the date when the plaintiffs were in possession, the date when they were dispossessed and whether the suit was filed within six months from the date of dispossession. Until these ingredients are proved, a suit under Sec. 9 (old) of the Specific Relief Act would not succeed.[3]

69. Whether a suit under Sec. 6 (new), Specific Relief Act, does not bar proceeding under Sec. 145 (new), Cr. P. C.—Where a suit is pending under the present Sec. 6, it will not operate as a bar to the Magistrate proceeding under Sec. 145 (new), Cr. P. C., with regard to properties which form the subject-matter of the suit.[4]

70. Suit on possessory title against a person armed with an order under Sec. 145, Cr. P. C.—A person aggrieved by an order passed under Sec. 145, Cr. P. C., against him can resort to any of the following three remedies :

(1) He may bring a suit under Sec. 9 (old), of the Specific Relief Act wherein no title will avail to any party and the suit would be decreed if the plaintiff succeeds in establishing that he was dispossessed without his consent otherwise than in due course of law, within six months of the date of the suit. Such a suit would be competent despite a contrary finding of the Criminal Court in proceedings under Sec. 145, Cr. P. C. It must be borne in mind that a finding recorded by the Criminal Court under Sec. 145, Cr. P. C., does not adjudicate upon any title of the parties and when the matter is raised before the Civil Court by way of a suit under Sec. 9 of the Specific Relief Act, that Court has to record its independent finding as to whether the plaintiff should be granted a relief under Sec. 9 of the Specific Relief Act. As was pointed out by the Supreme Court in *Bhinka* v. *Charan Singh*[5], in passing an order under Sec. 145 (6), Cr. P. C., the Magistrate does not purport to decide the parties' title or right to possession of the land but expressly reserves that question to be decided in due course of law. The foundation of his jurisdiction is an apprehension of breach of peace, and with that object he makes a temporary order irrespective of the rights of the parties, which will have to be re-agitated and disposed of in the manner provided by law. The life of the said order is conterminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction it displaces the order of the Criminal Court.

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1. Balkrishna Ayyar *v.* Veerannan Servai, 1950 M.W.N. 19.
2. Bijai Ram *v.* Shyam Sunder, (1971) A.W.R. (H. C.) 562 at P. 563; Jwala Prasad *v.* Gango Prasad, 5 A.L.J. 297.
3. Bijai Ram *v.* Shyam Sunder, (1971) A.W.R. (H. C.) 562 at p. 564.
4. Kishori Lal *v.* Sri Nath, I.L.R. 36 Cal. 370 : 13 C.W.N. 530 .
5. 1959 A.W.R. 440.

(2) He can bring a suit based on title as contemplated by Sec. 8 of the Specific Relief Act.

(3) He can also bring a suit on the basis of peaceful prior possession, that is, on the basis of what has been compendiously described as possession title. In such a suit the plaintiff would be entitled to a decree merely on proving peaceful prior possession without disturbance, provided the suit is brought within the statutory period of limitation. If the defendant, however, asserts and proves his title, the plaintiffs suit would not succeed, otherwise mere prior possession of the plaintiff would enure to the benefit against the whole world except the true owner.

It was also held by the Supreme Court in *Nair Service Society Ltd.* v. *K. C. Alexander*,[1] that the defendant must prove title himself and he cannot succeed merely by pleading title in a third party. Hence, a suit on possessory title is competent against a person even though he is armed with an order under Sec. 145, Cr. P. C., in his favour, unless he can prove title in himself.[2]

71. Effect of the order under Sec. 144, Cr. P. C., 1973.—An order of a Magistrate under the provisions of Sec. 144, Cr. P. C., 1973, directing a party to abstain from entering a land has not the effect of disturbing either title or possession, though it may prevent and does prevent the exercise of rights which a person in possession would otherwise be entitled to exercise during the continuance of the said order. Therefore, where a person so prevented is dispossessed he can bring a suit under the present section.[3]

It may be seen that the rule of evidence in Sec. 110, Evidence Act, need not be invoked for the obvious reason that Sec. 6 (old Sec. 9), Specific Relief Act, does not require the question of title to be gone into.

72. Decision of the Civil Court would prevail.—A suit under Sec. 6 of the Specific Relief Act, 1963 is a suit by a person dispossessed of immoveable property within a period of six months prior to the suit for recovery of possession of the said property from the person who has dispossessed him. This is a suit of a summary nature only in the sense that no question of title is involved in it and no appeal lies from the decision. The decision in it does not bar a suit to establish title. The only question for determination in a suit under Sec. 6 is whether the plaintiff was in possession within six months prior to the date of the suit and whether the plaintiff has been dispossessed otherwise than in due course of law. Under Sec. 145 (4) of the Code of Criminal Procedure, the Magistrate dealing with proceedings under Sec. 145 has to hold an inquiry as to possession and not as to title. If he decides that one of the parties was in possession he shall under the provisions of sub-section (6) issue an order declaring such party entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of that possession until such eviction. All that Sec. 145 (6) talks of is that a person who is found by the Magistrate not to be in possession must evict the person who is found to be in possession in due course of law. If the aggrieved person chooses to file a suit under Sec. 6 of the

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1. A. I. R. 1968 S. C. 1165.
2. Bija Ram *v.* Shyam Sunder, (1971) A. W. R. (H.C.) 562 at. pp. 564-650.
3. Nasirun Bibi *v.* Salim Akauda, 64 I.C. 572.

Specific Relief Act, for possession and recovers possession under a decree in such a suit, it will be an eviction of the person found by the Magistrate in possession in due course of law. Sub-section (6) of Sec. 145 nowhere enjoins a suit on title, nor is there any requirement that the party must seek to have the order of the learned Magistrate set aside. In fact, it will not be open to a Civil Court, without an express statutory provision to that effect, to determine whether the learned Magistrate was right or wrong. Such a question could only be determined in an appeal against the order under Sec. 145 of the Code of Criminal Procedure or in revision thereafter. It would be sufficient for a civil Court to come to the conclusion as to whether the plaintiff was or was not in possession within six months prior to the date of the suit and whether the plaintiff has or has not been dispossessed within that period. It would not be necessary for the Civil Court to go into the rights and wrongs of an order under Sec. 145. The decision of the Civil Court would prevail by virtue of Sec. 145 (6) of the Code of Criminal Procedure.[1]

73. Jurisdiction.—The question has in some cases arisen for consideration whether the suit for restoration of possession by a person dispossessed otherwise than in due course of law for which provision is made in this section lies in the case of tenancy land in respect of which the Tenancy Act bars the jurisdiction of Civil Courts, and gives exclusive jurisdiction on Revenue Courts.[2] In *Khushnud Husain* v. *Janki Prasad*,[3] the suit was brought under Sec. 6 (new), Specific Relief Act, for recovery of possession of an occupancy holding. The objection to jurisdiction put forward by the defendant that the Tenancy Act barred the jurisdiction of the Civil Court was not accepted by the Trial Court because a Civil Court alone could entertain a suit under Sec. 9 (now Sec. 6), Specific Relief Act, to which the bar of the Tenancy Act did not extend. Though Sulaiman, J., did not agree with the view of the Trial Court, the learned Judge, upon an examination of the averments in the plaint considered that the jurisdiction of the Civil Court was not excluded, and then observed : "Once the plaint was entertained the plaintiffs had to be pinned down to the allegations in their plaint and if these allegations were not proved the suit would have to be dismissed. The Court below however has gone into the question of fact and has found that the plaintiffs had been in possession within six months of the suit and were forcibly dispossessed by the defendant. On that finding it has accordingly given the plaintiffs a decree under Sec. 6 (new), Specific Relief Act. This finding cannot be challenged in revision."

This decision cannot be said to have decided the question of the jurisdiction of the Civil Courts to entertain suit for possession under Sec. 6 (new), Specific Relief Act, in cases in which the Tenancy Act imposes a bar.

In *Lal Bahadur Singh* v. *Surajpal Singh*,[4] the question directly arose whether a suit under Sec. 6 (new), Specific Relief Act, is a suit based on a cause of action in respect of which relief could be obtained, under Sec. 180 or Sec. 183, U. P. Tenancy Act, and whether the bar, imposed by Sec. 242, U. P. Tenancy Act, to the jurisdiction of the Civil Court extends to suits under Sec. 6 (new), Specific Relief Act. Braund, J., held that the scope of the suit is different and that the jurisdiction of the Civil Court to entertain suits under Sec. 6 (new), Specific Relief Act, was not barred by the Tenancy Act. The following observation of the learned Judge may be noted : "....Comparing, therefore,

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1. Atmaram Panduji Tidke *v.* Prabhawatibai Dattatraya Pakode, A. I. R. 1971 Bom. 148 at pp. 149, 150 : 73 Bom. L. R. 470.
2. *See* Sec. 242, U.P. Tenancy Act, 1939.
3. A.I.R. 1931 All. 663 at pp. 663-64 : I.L.R. 53 All. 534, : 132 I.C. 801.
4. 1946 A.L.J. 201. : AIR 1946 All. 486.

the cause of action, as I conceive it to be under Sec. 6 (new), Specific Relief Act, and thecauses of action under Secs. 180 and 183, respectively of the U. P. Tenancy Act, I have great difficulty in thinking that it can be fairly said that a suit under Sec. 6 (new) of the Specific Relief Act is a suit based on a cause of action in respect of which relief could be obtained under either Sec. 180 or Sec. 183 of the Tenancy Act. Test is this way. For the purpose of bringing a suit under either Sec. 180 or Sec. 183 of the Tenancy Act, would it be sufficient for the plaintiff to come to the Court and say merely this : "I have been dispossessed within the last six months—and nothing more ?' I venture to think that it would not be sufficient. He would have to go a long way further. For the purpose of Sec. 180 he would have to say that he had been dispossessed by a particular type of persons, namely, by a person who had omitted to get the consent of him who was entitled to admit him as a tenant. For the purpose of Sec. 183, he would have to say quite a lot of things, namely, that he was a tenant, that he had been tenant of a holding and several other things. I cannot think that the summary cause of action provided by Sec. 6 (new), Specific Relief Act, is the same thing as the cause of action, which is really a cause of action based on title, covered by the relevant sections of the U. P. Tenancy Act."

74. Test.—If upon a reading of the plaint, as a whole it is seen that the plaintiff claims the relief on the basis merely of his previous possession and dispossession by the defendant the suit is maintainable in a Civil Court under this section. But, if the plaintiff alleges his title to the land either as tenant or as landlord or in some other capacity and also alleges possession and dispossession the suit is cognizable only in a Revenue Court under Sec. 110 of U.P. Tenancy Act and the jurisdiction of the Civil Court is barred under Sec. 242 of the said Act.[1]

It is obvious that where the dispossession alleged by the tenant is not at the instance of the owner or landlord but by a third person, the suit is not barred by reason of the said Sec. 180 or Sec. 183 notwithstanding that the land is agricultural land under U.P. Tenancy Act. It has been held by a Division Bench of the Allahabad High Court in *Ganga Din* v. *Gokul Prasad*,[2] that if upon a reading of the plaint it is made out that the plaintiff claims a relief on the basis merely of his previous possession and dispossession by the defendant, the suit is one which is cognizable by the Civil Court under Sec. 6 (old Sec. 9), Specific Relief Act. Where the suit is based entirely on possession which had been disturbed by the defendants, the case is, therefore, clearly within the cognizance of the Civil Court.[3]

The law is now well settled that, if a plaintiff claims to be in possession and makes a grievance of the fact that he was dispossessed by the defendant without his consent and otherwise than in due course of law, he can maintain the suit in the Civil Court under Sec. 6 (new), Specific Relief Act, notwithstanding the fact that the property in dispute may be agricultural land. Therefore, there can be no doubt that the Revenue Court was a court which could not entertain the suit on account of want of jurisdiction. At the same time, there

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1. Ganga Din v. Gokul Prasad, A. I. R. 1950 All 407 at p. 409; Jagdish *v.* Melrilal, (1950) 5 D. L. R. (All. Luck) 119: 1950 A.L.J. 645 : 1950 A.W.R. 236.
2. A.I.R. 1950 All. 407.
3. Ram Naresh *v.* Deo Narain, A.I.R. 1954 All. 109 at pp. 109-10 : 1953 A,L.J, 528 (following Lal Bahadur Singh *v.* Surajpal Singh, A. I. R. 1946 All. 486 at pp. 487-88 : 1946 A.L.J. 201 and distinguishing Beni Madho Singh *v.* Prag, A.I.R. 1949 All. 510 at pp. 510-11: 1949 A.L.J. 24 ; *see* also Ram Lakhan *v.* Tulsha, A.I.R. 1954 All. 199 at p. 200.

can be no doubt that the plaintiffs had acted *bona fide* in presenting the plaint to the Revenue Court. They had been directed by the Munsif to present the plaint there and, according to the state of law as then understood, the suit was believed to be entertainable by the Revenue Court only. Therefore the plaintiffs are entitled to claim exclusion of the period spent in the Revenue Court.[1]

Section 6, Specific Relief Act, 1963, provides for a summary remedy for restoration of possession, in certain cases, which can be obtained in a Civil Court. Therefore, the claim for restoration of possession under the said section should be such as can be entertained by the Civil Court. The law relating to agricultural tenancies and other matters connected therewith has been consolidated and enacted in the U.P.Tenancy Act, 1939. In that Act under the heading "Ejectment of person occupying land without consent", Sec. 180 is as follows:

> "(1) A person taking or retaining possession of a plot of land without the consent of the person entitled to admit him to occupy such plot and otherwise than in accordance with the provisions of the law for the time being in force, shall be liable to ejectment under this section on the suit of the person so entitled....."

The dispute in the instant case relates to tenancy land. The opposite party is said to have taken possession of and been retaining possession over the land without the consent of the person entitled to admit him to occupy such land otherwise than in accordance with law for the time being in force. The applicant claims to be a tenant of the land on behalf of the landlord and seeks to recover possession over the land by ejectment of the opposite party. In order to determine the real nature of the relief claimed, courts have to consider the averments in the plaint and the pith and substance of the relief claimed and not the form in which it has been couched. Applying this test, it must be held that the suit is of the nature contemplated by Sec. 180, Tenancy Act.

Section 242, Tenancy Act, lays down:

> "Subject to the provisions of Sec. 286 all suits and applications of the nature specified in Sch. IV shall be heard and determined by a Revenue Court, and no court other than a Revenue Court, shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application, or of any suit or application based on a cause of action in respect of which any relief could be obtained by means of any such suit or application."

Section 180 is mentioned in Sch. IV. Therefore, having regard to its real nature the suit was barred from the cognizance of the Civil Court and, that being so, the plaintiff could not claim relief under Sec. 6 (new), Specific Relief Act, which could only be granted by the Civil Court.

In *Lal Bahadur Singh* v. *Surajpal Singh*,[2] a suit was instituted in the Civil Court under Sec. 6 (new), Specific Relief Act, for possession over certain plots of land, presumably tenancy land, and the defence was that the Civil Court had no jurisdiction to try the suit, as it was barred from the cognizance of that Court in view of the provisions of Sec. 242, Tenancy Act. It was held that "the summary cause of action provided by Sec. 9 (now Sec. 6), Specific Relief Act" was not the same thing "as the cause of action, which is really a cause of

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1. Ram Lakhan *v.* Mst. Tulsha, A.I.R. 1954 All. 199 at p. 200.
2. 1946 A.L.J. 201 : A.I.R. 1946 All. 486.

action based on title, covered by the relevant sections of the U.P. Tenancy Act" and that the relief claimed in a suit "under the Specific Relief Act was not such as might have been claimed in any suit or application based on a cause of action under the machinery of the U.P. Tenancy Act," so the suit was cognizable by the Civil Court.[1]

In the next case, *Beni Madho Singh* v. *Prag*,[2] in which the question came up for consideration. Bhargava, J., has distinguished the case of *Lal Bahadur Singh* v. *Surajpal Singh*,[3] on the ground that the plaint allegations in the presen suit were based not merely on the summary cause of action provided by Sec. 6 (new), Specific Relief Act, and that the cause of action, which was said to have arisen entitled the party to sue under Sec. 180, Tenancy Act, and observed further : "Apart from it, the cause of action for a suit for possession under Sec. 6 (new), Specific Relief Act, as well as for a suit for ejectment under Sec. 180, Tenancy Act, is based on possession and subsequent dispossession. Moreover, the factor which determines forum in suits for possession over land is not merely the cause of action but also the nature of the subject-matter of the suit and the fact whether relief can be obtained in the Civil or Revenue Court. Under Sec. 242 of the Tenancy Act certain classes of suits for possession of tenancy land are expressly barred from the cognizance of the Civil Court, except by way of appeal or revision as provided in the Act. The suit of the present naure being barred from the cognizance of the Civil Court, it seems to me that, no relief could have been granted under Sec. 6 (new), Specific Relief Act by the Civil Court."

75. Appeal.—The section itself says that there is no appeal against the decree in the suit : it follows there can be no second appeal.[4] The term "suit" in this section includes execution proceedings of a decree passed under the present section. Consequently no appeal is competent from an order passed in execution proceedings.[5] An application in execution proceedings was included in the term "suit" in Sec. 9. (now Sec. 6), Specific Relief Act, and an appeal to the District Judge from an order of the executing Court was incompetent.[6]

Under the last clause of Sec. 6 (new), Specific Relief Act, no appeal lies in proceedings in a suit under that section. It was held in *Kanai Lal Ghose* v. *Jatindra Nath Chandra*,[7] that no appeal lies from an order made ine xecution proceedings in a suit under Sec. 6 (new), Specific Relief Act.[8]

The High Courts in India have jurisdiction to deal with the matter under Sec. 115, C.P.C. which is not excluded by Sec. 6 (new), Specific Relief Act. The question is whether the compromise such as it was, lay beyond the scope

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1. Beni Madho Singh *v.* Prag, A.I.R. 1949 All. 510 at pp. 510-11. : 1949 A.L.J. 24.
2. 1949 A.L.J. 24.
3. 1946 A.L.J. 201.
4. Brijlal *v.* Mahadeo, A.I.R. 1954 All. 19 at p. 20; Govind Ram *v.* Mewa, A.I.R. 1953 Pepsu 188 at p. 189; Abdul Bari *v.* Asraf Ali, A. I. R. 1953 Assam 158 at p. 159.
5. Kanai Lal Ghose *v.* Jatindra Nath Chandra, I.L.R. 45 Cal. 519 42 I.C. 711 : 26 C.L.J. 325 : 22 C. W.N. 446; *see* Thomas Souza *v.* Ghulam Modieen, I.L.R. 26 Mad. 438; Waris *v.* Fateh Din, 68 I. C. 760 : A.I.R. 1923 Lah. 105; Mohfuz Ali *v.* Birjinand, 45 P.I.R. 1915: 201 P.W.H, 1915: 28 I.C. 282; Jahangir Singh *v.* Hira, 39 I.C. 375 : 21 P.L.R. 1917 : 4 P.W.R, 1917; Zakir Ali *v.* Syed Israr Husain I.L.R. (1946) Nag. 649 : 1945 N.L.J. 531 : 225 I.C. 499 : A.I.R. 1947 Nag. 53: Brijlal *v.* Mahadeo, A.I.R. 195: All. 19.
6. This authority has been followed in 4 decision in Munshi Ram *v.* Amin Chand, A.I.R. 1928 Lah. 539 ; Tota Ram *v.* Shibban Lal, A.I.R. 1932 Lah. 416 at p. 416 : I.L.R. 13 Lah. 798.
7. I. L. R 45 Cal. 519 : 26 C.L.J. 325 : 42 I.C. 711 :22 C.W.N. 446.
8. Munshi Ram *v.* Amin Chand, A.I.R 1928 Lah. 539 at p. 539.

of Sec. 6 (new), Specific Relief Act. The conditions embodied in the compromise were not beyond the scope of Sec. 6 (new), Specific Relief Act. and that the decree was unexecutable. Secton 9 (now Sec. 6) provides summary and speedy remedy for restoration of possession a party in peaceful possession when he is dispossessed by another otherwise in due course of law. It does not bar any suit to establsh title and it has nothing to do with the title fro the contents. The consent decree passed by the Lower Court does not puport to effect the title of either party but only prescribes the conditions on which both are to remain in possession.

It is a universal rule of construction that when an instrument is susceptible of two meanings, one of which is reasonable and probable and the other which leads to absurdity and frustration, the latter must be avoided. To apply this rule onehas to find in what relation the two material clauses stand to each other. They may be either independent of each other, or in some way interrelated. If they are wholly independent, then Cl. (*i*) becomes inoperative on account of its vague and uncertain terms. It has consequently to be left out of consideration. If the two clauses are interrelated, one has to see which one of them governs the other.[1] But a claim registered as a suit under Sec. 331 of old Civil Procedure Code (O. XXI, R. 99, C.P.C., 1908) arising from proceedings in execution of a decree under this section has been treated as a fresh suit and order passed in such a proceeding has been held to be appealable.[2]

76. Review.—The section itself bars a review of a decision passed under it.[3] But an application for setting aside of an *ex parte* decree and rehearing the case is not a review within the meaning of this section.[4]

77. Revision.—The section does not bar the remedy of an aggrieved party by way of revision as it does in the case of appeal or review. The trend of authority, however, on the point is by no means uniform.[5] There can be no doubt that as a matter of law revision would be under Sec. 115, C.P.C., from any decree or order that may be passed under the present section by any subordinate Court and the High Courts have entertained revisions not infrequently.[6] Finally, it was argued that plaintiff was not entitled to separate maintenance for the few weeks during which she lived with her mother when her husband was away in England. It was contended that when her husband was away in England, she ought to have lived in the *tarward* house. Their Lordships however agree with the Lower Court that her living, during those few weeks, with her mother and brother was proper in the circumstances. Their Lordships have on the whole come to the conclusion that the plaintiffs had been living away from the *tarward* house for proper cause and that they were entitled to claim separate maintenance.[7] But the courts have generally refused to entertain revisions on the ground that

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1. Zakarali *v.* Israr Hussain, A.I.R. 1947 Nag. 53 at pp. 54-55 : I.L.R. (1946) Nag. 649 : 1946 N.L.J. 531.
2. Nasir Ali *v.* Mehar Ali, I.L.R. 22 Cal. 830
3. Chidapatri Sommayya, *In re*, 31 I.C. 307 : 2 L. W. 1067.
4. Andrew *v.* Depont, I.L.R. 4 Mad. 217; Umar Chand, 12 W.R. 229.
5. Badarul Zaman *v.* Haji Faizullah Abdullah, 178 I.C. 709: A.I.R. 1938 All. 635 : 1938 A.L.J. 864: 1938 A.L.R. 887 ; 1988 A,W.R. (H.C.) 588; 11 R.A. 314; Mst. Rajwanta *v.* Mahabir, I.L.R. 53 All. 414 : 129 I.C. 559: A.I.R. 1931 All. 205.
6. *Ibid;* Ram Dayal *v.* Upendra, 17 C.W.N. 50; Rudrappa *v.* Narsingh, I.L.R. 29 Bom. 213:7 Bom. L.R. 12; Moore *v.* Monoranjan, 12 C.W.N. 696 : 7 C.L.J. 547; *see* also 12 C.W.N. 694 : 12 C.L.J. 615; 13 C.W.N. 835; 13 C.W.N. 305.
7. Ammalu Kutti Amma *v.* Ramunni Menon, A.I.R. 1934 Mad. 508 at p. 511: 67 M.L.J. 470,

aggrieved party has another remedy open to him by way of a regular suit.[1] Although as a matter of practice courts refuse to exercise their discretionary power of revision, they will exercise their powers in cases of very exceptional nature,[2] or where grave injustice is being done,[3] or when no other remedy is open to the petitioner.[4] It certainly cannot be that there is no remedy when there has been a grave abuse of jurisdiction or material illegality or irregularity. Revision does lie and it will be in the discretion of the High Court to decide whether or not it is expedient to interfere in the particular case.[5] The question is whether in these circumstances interference in revision would be justified in a case covered by Sec. 9 (now Sec. 6), Specific Relief Act. An order under this section is not appealable and is also not open to review. These remedies are not allowed to an aggrieved party. The aggrieved party can institute a suit on the basis of title. Interference in revision, therefore, has been generally declined even though the section does not exclude the remedy by way of revision altogether. Interference is normally restricted to cases where there has been no proper trial of the case at all or the suit has been dismissed under a misapprehension as to the scope of Sec. 6 (new) or there is some defect of jurisdiction or other defect of a like nature.

In *Ajodhiya Prasad* v. *Ghasiram Prem Sai*,[6] the suit was dismissed on a mistaken view of the law and interference was considered justified.

In *Badridas* v. *Mst. Dhanni*,[7] the view that prevailed was that when a suit under Sec. 6 (new), Specific Relief Act, is decreed the remedy oft he defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession.

In *Ramamanemma* v. *Basavayya*,[8] it was held that in a suit under Sec. 9 (now Sec. 6), Specific Relief Act, the plaintiffs have their remedy by way of suit and hence the High Court will not ordinarily interfere by way of revision. But if the remedy is clear, the parties will not necessarily be driven to another suit. In this case the Court of first instance had found in favour of the plaintiff on the merits of the case but had non-suited her on the ground that she could not bring a suit as the tenants were in occupation. It was found that a suit by a landlord for possession under Sec. 6 (new) in which the tenants-in-possession have not joined is not maintainable.

In *Bhojraj Krishnarao* v. *Seshrao Diwakarrao*,[9] it was laid down that remedy of a person aggrieved by the decree passed in a suit under Sec. 9 (now Sec. 6)

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1. U Kyawa Lu *v.* U Shwe So, I.L.R. 6 Rang. 667:114 I.C. 543: A.I.R. 1929 Rang. 21; Shamser Khan *v.* Abdul, 94 I.C. 70 : A. I. R. 1926 Nag. 290 : 22 N.L. R. 30; Safder *v.* Shanker, 13 P.R. 1903 57 P.L.R. 1903; Jwala *v.* Ganga Prasad, I.L.R. 30 All. 331:5 A.L.J. 297:1903 A.W.N. 142; *see* also I.L.R. 33 All. 647: 8 A.L.J. 791; 5 A.L.J. 181: 96 I.C.251; A.I.R. 1926 Nag. 472; A.I.R. 1934 Mad. 609; Bhioraj *v.* Sheshrao, I.L.R. 1948 Nag. 422 : 1948 N.L.J. 337; Badridas *v.* Mst. Dhanni, A.I.R. 1934 All. 541-2; Suraj Bali *v.* Kandhaiya Bakhsh, A. I. R. 1932 Oudh. 39 at p. 40.
2. Rajai Singh *v.* Suraj Bali, A.I.R. 1942 Oudh 149 at p. 180 : 1941. O.W. N. 1237: 1941 O.A. 940 : 1941 A.W.R. (Rev.) 1062 : 197 I.C. 554 :
3. Ramamanemma *v.* Basavayya, 67 M.L.J. 470.
4. Mst. Rajwanta *v.* Mahabir, I.L.R. 53 All. 414:129 I.C. 559 : A.I.R. 1931 All 205.
5. Babu Ram *v.* Bashiruddin, 1946 A.M. L.J. 30; Ajodhia *v.* Ghasiram Prem Sai, A.I.R. 1937 Nag. 326 at p. 327; Hari Mohan *v.* Khalil, 48 I.C. 433 at p. 435; Nabin Chandra *v.* S.k. Amir, 9 I.C. 132 at p. 133.
6. A.I.R. 1937 Nag. 326.
7. A.I.R. 1934 All. 541.
8. A.I.R. 1934 Mad. 558 : 151 I.C. 990.
9. A.I.R. 1949 Nag. 126: I.L.R. (1948) Nag. 422.

is by way of a suit based on title and the High Court will not, except in a very extreme case, interfere by way of revision as a separate remedy is available to the aggrieved party.

The same view was expressed in *Rajai Singh* v. *Suraj Bali*.[1] It was held in this case that an order or a decree passed under Sec. 9 (now Sec. 6), Specific Relief Act, has not been made the subject of any appeal or review, and although the High Court is not precluded from interfering with such orders in revision under Sec. 115, C. P. C., etc. such interference should be confined to cases of very exceptional nature.

The conclusion which may be drawn from the authorities referred to above may be stated thus. Whether interference in a particular case is justified would depend on the circumstances of each particular case. The rights of the aggrieved party may be so clear that it may not be desirable to force him to institute another suit. The case may have been disposed of on an obvious misapprehension as to the legal position. There may be some defect of jurisdiction. But where no exceptional circumstances are brought out and the only contention raised is that the finding on a question of fact is not based on adequate evidence or is erroneous, interference would not be justified for, if a petition of revision is entertained on the ground that the finding on a question of fact is erroneous or based on evidence which is not adequate, it would be going against the spirit of Sec. 9 (now Sec. 6); its effect would be to convert a petition of revision into an appeal which the law expressly disallows.[2]

The finding of the Trial Court is that the person dispossessed from the land in suit was the tenant of the plaintiff and not the plaintiff himself. The plaintiff being not in possession at the time of dispossession was not competent to bring this suit and thus the suit under Sec. 9 (now Sec. 6), Specific Relief Act, was not maintainable. The Trial Court for this reason dismissed the suit.

The object of this enactment is to provide a summary and speedy remedy for the recovery of possession of property to a person dispossessed without his consent and otherwise than through a process of law. In fact this legislation discourages people to take law in their own hands. A person claiming certain property must get its possession either with consent of the person in possession or by other legal means. The question of title in such a case is irrelevant; but the Court is to look to the possession at the time the person is dispossessed without his consent and by illegal means. In *Govind Ram Jamna Das* v. *Mst. Mewa*,[3] the Trial Court has found that the tenant of the plaintiff was in actual physical possession of the suit land at the time he was forcibly dispossessed by the defendant. The question for determination, therefore, is whether possession of the tenant can be considered to be the possession of his landlord, the plaintiff. It cannot be doubted that the plaintiff was in possession of the suit land through his tenants; in other words, he was not in actual physical possession of the land but as in its constructive possession. The word used in Sec. 9 (now Sec. 6) is "dispossessed". There is nothing in this section to show that the possession is confined only to actual physical possession. *Held* that a suit is competent by the landlord, even if he is not in actual physical possession of the land but in its possession through a tenant at the time of illegal dispossession. This conclusion is further strengthened by the words "he or any person

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1. A.I.R. 1942 Oudh 179:197 I.C. 554.
2. Abdul Bari v. Asrab Ali, A.I.R. 1953 Assam 158 at p. 159.
3. A.I.R. 1953 Pepsu 188.

claiming through him may, by suit, recover possession thereof" used in the section. The language of this section, therefore, clearly indicates that besides the person dispossessed, any person claiming through him can seek his remedy provided in this section for the recovery of possession. It necessarily follows that the person seeking relief under Sec. 9 (now Sec. 6) need not himself be in actual physical possession of the property. A contrary veiw to this will defeat the aims and objects of this enactment. Supposing a landlord is incompetent to sue and his tenant who is dispossessed refuses to institute a suit under Sec. 9 (now Sec. 6) of the Act, the landlord would be put in a very awkward situation and would be forced to file a regular suit. In such a case a wrong-doer will naturally be placed in an advantageous position. To accept this position it would be putting a premium on a wrong act of trespasser. This position is not contemplated by the relevant legislation. On the other hand, Sec. 9 (now Sec. 6) provides for a speedy and summary remedy to recover possession taken away by unlawful means. The object of the legislation besides this, is to place the parties in their original position. Trespasser, if he so likes, can bring a regular suit to prove his title. A contrary construction would result in protracted litigation for person ousted from lawful possession by unlawful means on the part of a trespasser.

It is no doubt true that there is conflict of authorities as to whether a landlord can bring a suit for possession under this section when his tenant has been dispossessed; but the weight of authorities is in favour of competency of such a suit. A similar question came for consideration before a Bench of the Patna High Court and the learned Judges took the view that the landlord could institute the suit when his tenant was dispossessed. In *Sailesh Kumar* v. *Rama Devi*,[1] it was held :

> "Where a tenant is dispossessed by a trespasser, his landlord can maintain a suit under Sec. 9 against the trespasser for possession even when at the date of dispossession the property is in occupation of the tenant entitled to its exclusive use."

The learned Judges followed the decision given in *Jadunath Singh* v. *Bishunath Singh*,[2] *Ratanlal Ghelabhai* v. *Amarsingh Rupsingh*,[3] and dissented from a judgement in *Veeraswami* v. *Venkatachala;*[4] *Sita Ram* v. *Ram Lal*[5] was distinguished. During the course of judgment, the learned Judges observed :

> "In support of his contention, he placed reliance on the case of *Sita Ram* v. *Ram Lal*,[6] and *Veeraswami* v. *Venkatachala.*[7] It is sufficient to state that the Allahabad case was not one under Sec. 9 (old), Specific Relief Act, and it is beside the point in issue before us. The Madras case, however, supports the contention. The case is a single Judge case and it appears that in Madras High Court there are conflicting decisions on this point."

Same view of the law is taken by Oudh, Lucknow Bench of Allahabad High Court in *Jado Nath Singh* v. *Bishunath Singh.*[8] In *Veeraswami* v. *Venkatachala*,[9] a contrary view is taken. As already observed by the learned Judges in the Patna case, decisions of the Madras High Court on this point are conflicting.

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1. A.I.R. 1952 Pat. 339. I.L.R. 31 Pat. 353.
2. I.L.R. (1951) 2 All. 16 : 1950 A.L.J. 288.
3. A.I.R. 1929 Bom. 467 : I.L.R. 53 Bom.773.
4. A.I.R. 1926 Mad. 18 : 92 I.C. 20.
5. I.L.R. 18 All. 440 (F.B.): 1896 A. W.N. 162.
6. *Ibid.*
7. A.I.R. 1926 Mad. 118 : 92 I.C. 20.
8. 1950 A.L.J. 288 : I.L.R. (1951) 2 All. 16
9. A.I.R. 1926 Mad. 18 : 92 I.C. 20.

The view adopted by the learned Judges in *Sailesh Kumar* v. *Rama Devi*[1] is quite sound and thus the suit by landlord under Sec. 9 (now Sec. 6) of the Act is competent when his tenant has been dispossessed without his consent and by unlawful means.

In *Govind Ram Jamna Das* v. *Mst. Mewa*,[2] the Trial Court dismissed the suit on the ground that the plaintiff not being in possession was not competent to institute the suit. If the plaintiff is entitled, as he is, to institute such a suit under Sec. 9 (now Sec. 6) of the Act, the finding of the Trial Court to the contrary deprives him of his right to relief provided by Sec. 9 (now Sec. 6) of the Act and the Trial Court thus failed to exercise jurisdiction which it ought to have exercised. Courts are, therefore, competent to interfere in such circumstances. Section 9 (now Sec. 6) itself shuts out the remedy by way of appeal or review. If the intention of the Legislature was to shut out a remedy by way of revision also it could have been similarly and specifically mentioned. But the Legislature has not done so.

The remedy by way of revision petition whether it be under Sec. 115, C. P. C., or Sec. 34, N. W. F. P. Courts Regulation, 1931, is conspicuous by its absence from this section. It, therefore, naturally follows that if the Legislature intended to bar the remedy by way of revision petition, it should have specifically mentioned it along with "appeal" and "review". Its very absence shows that the Legislature did not want to restrict the High Court's power of supervision over the courts trying suits under Sec. 9 (old), Specific Relief Act.

If a revision satisfies the conditions laid down in Sec. 34, N. W. F. P. Courts Regulation, 1931, it cannot be rejected merely because another remedy is open to the aggrieved party by way of suit. Consequently the preliminary objection was overruled.

Faizullah Khan in his statement admitted that he had two wives, one of whom was the mother of Mohd. Ayaz and was living in the *kotha* in dispute, while the other was living in Mohallah Hayatullah. It is also clear from his statement that he himself was living with his second wife in Mohallah Hayatullah. Mohd. Ayaz also stated that it was he and his mother, who were forcibly ejected from the room in question and not the plaintiff. "Under the circumstances I fail to see what cause of action the plaintiff had to institute a suit under Sec. 9 (old), Specific Relief Act. The proper person who should have instituted this suit was either Mohd. Ayaz or his mother. Even if Mohd. Ayaz and his mother were living in this house on behalf of the plaintiff, still the plaintiff could only institute the suit if the persons actually dispossessed were not willing to sue. The principle laid down in *Ratan Lal Ghelabhai* v. *Amarsingh Rupsingh*[3] supports the view."[4] Applications in revision though not legally barred are not lightly entertained.[5]

In *Narayana Rao* v. *Dharamachar*,[6] a Bench of the Madras High Court consisting of Bhashyam Ayyangar and Moore, JJ., held that possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 (old) of the Specific Relief Act is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months

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1. A.I.R. 1952 Pat. 339 : I.L.R. 31 Pat. 353.
2. A.I.R. 1953 Pepsu 188 at pp. 189-90.
3. A. I. R. 1929 Bom. 467 : I. L. R. 53 Bom. 773.
4. K. S. Abdullah Khan *v.* Faizullah Khan, A I. R. 1950 Pesh. 9 at p. 10.
5. Surajbali *v.* Mandhauja, 105 I. C. 890 : A. I. R. 1932 Oudh 39 : 8 O. W. N. 1341; Abdul Bari *v.* Ashraf Ali, A. I. R. 1953 Assam 158 at p. 159.
6. I. L. R. 26 Mad. 514.

after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The same view was taken by the Bombay High Court in *Krishnarao Yeshwant* v. *Vasudev Appaji Ghotikar.*[1] That was also the view taken by the Allahabad High Court.[2] In *Subodh Gopal Bose* v. *Province of Bihar,*[3] the Patna High Court adhered to the view taken by the Madras, Bombay and Allahabad High Courts. The contrary view taken by the Calcutta High Court in *Devi Churn Boldo* v. *Issur Chunder Manjee,*[4] *Estraza Hossein* v. *Bany Mistry,*[5] *Purmeshur Chowdhry* v. *Birjo Lall Chowdhry,*[6] and *Nissa Chand Gaita* v. *Kanchiram Bagani,*[7] does not lay down the law correctly.[8]

78. Court-fee on revision.—In proceedings under Sec. 6 (new) it cannot be said that no decree is passed when the suit is decreed or dismissed. Therefore, *ad valorem* court-fee should be paid on the memorandum for revision under Art. 13 of Sch. 1 read with Art. 1 of Sch. 1 of Court-fees Act.[9]

Court-fee ought to be paid under Sch. 1, Art. 2, Court-fees Act, i.e. half the *ad valorem* fee prescribed on the amount or value of the subject-matter where the suit is exclusively based on possessory title under Sec. 6 (new).[10]

79. Limitation.—Section 6 of the Specific Relief Act (47 of 1963) provides a period of six months for a suit contemplated by Sec. 6 of this Act. The present Limitation Act provides limitation of six months from the date of dispossession.

Whether sub-section (2) *of Sec. 6 excludes the applicability of Sec. 4 of the Limitation Act.*—Specific Relief Act, 1963, is a special law within the meaning of that expression used in Sec. 29 (2) of Limitation Act, 1963, inasmuch as Sec. 6 thereof prescribes its own period of limitaion for suits to be filed thereunder. Secondly, there is nothing in that Act which expressly excludes the applicability of Sec. 4 of the Limitation Act, 1963. Therefore, Sec. 4 read with Sec. 29 (2) of the Limitation Act, 1963 applied to the present suit. The suit was therefore instituted within time.

It is not possible to say that the period of limitation prescribed by Sec. 6 of the Specific Relief Act, 1963, is not the period of limitation properly so called but is the condition precedent to the maintainability of the suit. It is not possible to discover any real difference between the aforeasid two expressions—one used in Sec. 6 of the Specific Relief Act, 1963 and another used in Sec. 3 of the Indian Limitation Act, 1908. In one case, no such suit can be brought after the expiry of the period of six months from the date of dispossession. If, therefore, such a suit has been brought, it shall have to be dismissed. In another case, any suit instituted after the expiry of the said period of limitation shall have to be dismissed. When analysed in these terms, the effect of both the expressions is the same. Different expressions are certainly used to convey different meaning. But it is not unknown that different expressions are used in different contexts in order to produce the same result."

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1. I. L. R. 8 Bom. 371.
2. *See* Umrao Singh *v.* Ramjc Das, I. L. R. 36 All. 51 : A. I. R. 1914 All. 54 (2); Wali Ahmad Khan *v.* Ajudhia Kandu, I. L. R. 13 All. 537.
3. A. I. R. 1950 Pat. 222.
4. I. L. R. 9 Cal. 39.
5. I. L. R. 9 Cal. 130.
6. I. L. R. 17 Cal. 256.
7. I. L. R. 26 Cal. 579.
8. Somnath Berman *v.* Dr. S. P. Raju, A. I. R. 1970 S. C. 846 at pp. 849-50.
9. Walaiti Ram *v.* Govind Ram, A. I. R. 1954 Punj. 45 at p. 46.
10. Anoopchand *v.* Amerchand, A. I. R. 1951 Mys. 101 at p. 102 : (1955) 6 D. L. R. Mys. 19.
11. Bai Dahi *v.* Amulakhbahi Gambhirbhai Barot, A. I. R. 1974 Guj. 106 at pp. 107-8 : 14 Guj. L. R. 801.

New

7. Recovery of specific moveable property.—A person entitled to the possession of specific moveable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

Explanation 1.—A trustee may sue under this section for the possession of moveable property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2.—Aspecial or temporary right to the present possession of moveable property is sufficient to supprot a suit under this section.

Old

(*b*) *Possession of moveable property*

10. Recovery of specific moveable property.—A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure V of 1908.

Explanation 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Illustrations

(a) A *bequeaths land to* B *for his life with remainder to* C. A *dies.* B *enters on the land, but* C, *without* B's *consent, obtains possession of the title-deeds.* B *may recoves them from* C.

(b) A *pledger certain jewels to* B *to secure a loan.* B *disposes of them before he is entitled to do so.* A, *without having paid or tendered the amount of the loan, sues* B *for possession of the jewels. The suit should be dismissed, as* A *is not entitled to their possession, whatever right he may have to secure their safe custody.*

(c) A *receives a letter addressed to him by* B. B *gets back the letter without* A's *consent.* A *hass uch property therein as entitleshim to recover it from* B.

(d) A *deposits books and papers for safe custody with* B. B *loses them and* C *finds them, but refuses to deliver them to* B *when demanded.* B *may recover them from* C, *subject to* C's *right (if any) under Sec.* 168 *of the Indian Contract Act,* 1872.

(e) A, *a warehouse-keeper, is charged with the delivery of certain goods to* Z, *which* B *takes out of* A's *possession.* A *may sue* B *for the goods.*

SYNOPSIS

1. Legislative changes.
2. Sdope.
3. Plaint must allege that the defendant is in possession of specific moveable property.
4. Person entitled to possession.
5. Manner provided by Civil Procedure Code.
6. Explanation 1—Trustee.
7. Explanation II—Special or temporary right.
8. Bailments.
9. Specific moveable property.
10. Special or temporary right.
11. Lien.
12. Limitation.
13. Appeal.

1. Legislative changes.—This section corresponds to the old Sec. 10. The following changes have been made in the previous section. The words "the same" have been substituted for the word "it" and the word "prescribed" has been replaced by the word "provided". Under the Explanations I and II the word "moveable" has been added before the word "property" in the new section. Illustrations under the old section have been omitted.

These changes are merely verbal and not substantial and do not effect the scope, the substance and the subject-matter of the section, which essentially remains the same.

2. Scope.—This section reproduces *verbatim* the language of the repealed Sec. 10. It prescribes the procedure to be followed in suits for recovering specific moveable property, filed by a person entitled to it. To such suits the provisions laid down in the Code of Civil Procedure would apply. It may be seen here that while Sec. 5 of this Act prescribes procedure for suits to recover specific immoveable proporties, this section covers cases of specific moveable properties. Explanation I provides for the suits filed by the trustees. It says that a trustee may file a suit under this section for the recovery of specific moveable property for the benefit of the person interested in it and entitled to it.

Explanation II prescribes that person possessing a special or temporary right in the specific moveable property would be considered interested in or entitled to it within the meaning of this section and that the special or temporary right in it should be considered sufficient to support a suit under this section. Sections 7 and 8 (old Secs. 10 and 11) embody the English rules as to detinue. It is in substance and form an action for a wrong independent of contract, the injury complained of being not the taking or the use and appropriation of the goods as it would in the common law actions of trespass or trover or conversion but detention, i. e. withholding without authority which, however, may not necessarily be wrongful unless there has been a refusal to deliver on demand or something amounting to it.[1]

An action in detinue, namely, for the possession of specific moveable property would not lie for moveables which were mixed up and not ascertained. It would only lie for some particular article of moveable property capable of being seized and delivered up to the winning party.[2]

In *Murugesa* v. *Jetha Ram*,[3] the goods attached were sold to third person during the pendency of the title suit by the objector claimant and it was held, "the goods not being in the possession or under the control of the defendant, plaintiff was not entitled to a decree for their recovery *in specie* and his only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendant and that the suit being framed for the recovery of specific moveable property was governed by Art. 94 of Sch. II of the Limitation Act, 1877,

1. Dr. Banerji's *Tagore Law Lectures*, p. 68.
2. *See* Fadu Jhela *v.* Gour Mohan Jhela, I. L. R. 19 Cal. 544 at p. 566 (F. B.).
3. I. L. R. 22 Mad. 473.

and was, therefore, not barred by limitation. The alternative prayre for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to Sec. 208, C. P. C. and did not alter the character of the suit or bring it within any other category of the Schedule.

3. Plaint must allege that the defendant is in possession of specific moveable property.—In order to entitle the plaintiff to obtain delivery of specific moveable property by suit and enforce the decree so obtained by the stringent method provided in O. XXI, R. 31, C.P.C., it must be alleged in the plaint that the defendant is in possession of the specific property of which possession is prayed for. Where in a suit against a carrier, the plaint asked for the recovery of one plank of wood that was not delivered to the consignee and also for compensation for loss of interest, but contained no allegation that the defendant was in possession of the plank in question and it was obvious from the correspondence that he was not in possession of the same; held that in so far as the suit could be regarded as a suit for the return of the specific plank, the case did not come within Sec. 11 (now Sec. 8) of the Specific Relief Act and the suit must be dismissed.[1]

An action in detinue would only lie for some specific article of moveable property capable of being recovered *in specie* and of being seized and delivered up to the winning party.[2] Where the goods have ceased to be recoverable or are not in possession or control of the defendant the plaintiff is not entitled to a decree for recovery *in specie*, his only remedy being compensation or damages instead.[3]

4. Person entitled to possession.—In order to attract the application of the section it is not necessary that the plaintiff should have been previously in possession, or that the goods should have been removed from his possession. To maintain an action it is sufficient that he has acquired a right to present possession.[4] The plaintiff may be entitled to possession by reason of a right of ownership or may have a special or temporary right to present possession.[5] A factor, for instance to whom goods have been consigned, but by whom they have not been received has a right to present possession.[6] So also a purchaser of goods who has paid the price or has bought on credit, payment of price being deferred.[7] It is noteworthy that all the illustrations appended to the section are all cases of special or temporary right to immediate possession.

A person may be *entitled to possession* either by right of ownership or by virtue of special or temporary right.

5. Manner provided by Civil Procedure Code.—The form of a plaint for specific moveable property is Form No. 32 given in Sch. 1, App. A, C. P. C. The provision regarding a decree in a suit for recovery of specific moveable property is embodied in O. XX, R. 10, C. P. C., which says that where the suit is for moveable property, and the decree is for the delivery of such property the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had. A person entitled to the delivery of moveable property from another is not bound to sue for the delivery of the property itself, he may

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1. Jaidu Venkata Subarao *v.* A. S. N. Co., Ltd., I. L. R. 39 Mad. 1 (F. B.) : 30 I. C. 840 : 29 M. L. J. 342 : 2 L. W. 805 : 18 M. L. J. 236 (F. B.).
2. Fadu Jhela *v.* Gour Mohan Jhela, I. L. R. 19 Cal. 544 (F. B.) : Murugesa *v.* Jetha Ram, I. L. R. 22 Mad. 478.
3. Jaldu Venkata Subarao *v.* A. S. N. Co. Ltd., *supra;* Murugesa *v.* Jetha Ram, *supra*,
4. Section 10.
5. White *v.* Morris, (1852) 21 L. J. C. P. 185.
6. Fowler *v.* Down, (1796) 1 B. & P. 47.
7. Section 47, Sale of Goods Act; Naw *v.* Swain, (1828) 34 R. R. 767.

sue for its va'ue.[1] Even if he does for the recovery of the specific moveable property the decree need not alwaos be for the delivery of the property in the first instance. The Court may in proper cases decree only the value of the property as damages.[2] Thus where the defendant is not in possession of the property claimed the Court need not decree delivery thereof but may award decree for ts money valuation[3] But the goods must be delivered if capable of delivery[4]. Where, however, the Court consders it proper to direct a restoration of the preoperty the decree should also state the amount of money to be paid as an alterntative if delivery connor be had.[5] Besides the actual vale of 1oe goods the laniff can claim special damages, if any, for the detention. At the same time the decree-holder cannot execute the money portion of his decree without taking recourse to the procedure laid down in O. XXI, R. 31, C. P. C.[6]

6. Explanation 1.—Trustee.—"Unlike the provisions of the English Act, Sec. 10 does not state that the plaintiff ought to be a beneficiary whilst, according to Sec. 437 (now Or. XXXIX, R. 1) of the Code of Civil Procedure, trustee represents the persons beneficially interested when the suit is concerning property vested in a trustee and the contention is between the persons beneficially interested and a third party."[7]

7. Explanation II—Special or temporary right.—A special or temporary right may either arise (1) by an act of the owner of the goods, e.g. bailment, pawn, or lien,[8] or (2) not by act of the owner, e. g. unauthorised pledge or sale, or finding of lost goods.[9] Where the owner loses a thing and another finds it, the latter is entitled to its possession as against all the world except the owner, who has such a right even against its finder.

8. Bailments.—The Bailments are of two kinds :

(*i*) *Simple bailments*, i.e. loan, custody, carriage and agency. In this class of bailments the bailor (owner) is entitled to possession and the bailee has legal possession which does not deprive the bailor of his right. Therefore either of the two may obtain possession from a third person.

(*ii*) *Pawn, and hire.* In this class of bailments the bailor has got no right to possession. Such right vests in the pawnee or hirer as long as bailment exists. He is the only person entitled to possession.

In order to entitle the plaintiff to obtain delivery of specific moveable property by suit and enforce the decree so obtained by the stringent method provided in O. XXI, R. 31, C. P. C., it must be alleged in the plaint that the defendant is in possession of the specific property. of which possession is prayed

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1. Bhonajee *v.* Mst. Saraswati, A. I. R. 1924 Nag. 176 at pp. 177-78 : 75 I. C. 33 : *see* also Shiva Prasad Singh *v.* Prayag Kumari Debee, I. L. R. 61 Cal. 711 : A. I. R. 1933 Cal. 39; *contra* Murugesa *v.* Jetha Ram, I. L. R. 22 Mad. 478.
2. Bhonajee *v.* Mst. Saraswati, *supra* : Mst. Rukman *v.* Ganga Ram, 81 P. R. 1880; *contra* I. L. R. 61 Cal. 711 : A. I. R. 1935 Cal. 39.
3. Jaldu Venkata Subarao *v.* A. S. N. Co. Ltd., I. L. R. 39 Mad. 1 (F. B.) : 30 I. C. 840 : 1915 M. W. N. 40 : 18 M. L. T. 236 : 2 L. W. 805 : 29 M. L. J 342; Murugesa *v.* Jetha Ram, *supra.*
4. Kasinath *v.* Debkristo, 16 W. R. 240.
5. *Ibid.*; Mst. Rukman *v.* Ganga Ram *supra.*
6. Balmukunda *v.* B. N. Railway : A. I. R. 1927 Cal. 652 at p. 653 : I.L.R. 55 Cal. 26 10. I. C740 : 31 C. W.N. 850; *see* also I.L.R. 61 Cal.711 : A.I.R. 1935 Cal. 39.
7. Sathianama *v.* Sarvemabagi, I. L. R. 18 Mad. 266 at p. 272.
8. *See* Sec. 47, Sale of Goods Act.
9. *See* Sec. 71, Indian Contract Act.
10. William's *Personal Property.*

f.r. Where in a suit against a carrier, the plaint asked for the recovery of one plank of wood that was not delivered to the consignee and also for compensation for loss of interest, but contained no allegation that the defendant was in possession of the plank in question and it was obvious from the correspondence that he was not in possession of the same; *held* that in so far as the suit could be regarded as a suit for the return of the specific plank, the case did not come within Sec. 11 (old) of the Specific Relief Act and the suit must be dismissed.[1]

An action in detinue would only lie for some specific article of moveable property capable of being recovered *in specie* and of being seized and delivered up to the winning party.[2] Where the goods have ceased to be recoverable or are not in possession or control of the defendant the plaintiff is not entitled to a decree for recovery *in specie*, his only remedy being compensation or damages instead.[3]

9. Specific moveable property.—"Property of every description except immoveable property" is moveable property.[4] Specific goods means goods ascertained and ascertainable.[5] Specific property is the property which is recoverable *in specie*, i. e. the very property itself and not equivalent or reparation and capable of being seized and delivered.[6] An action for detinue will not lie for money, corn or the like for that cannot be distinguished from other money or corn unless it be in a bag or sack, for then it is distinguishably marked.[7] Where the plaintiff a *patnidar* sued the defendant who was the *darpatnidar* for recovery of *thoka* and otheer papr of the *darpatni mahal* on the basis of the contract in a registered *kabuliat* and failing such recovery claimed Rs. 100 for compensation, it was held that the suit was one for recovery of specific moveable property under the present section and not an ordinary money suit cognizable by a Court of Small Causes.[8] Where a suit was brought for the enforcement of a maintenance agreement under which certain amount of grain is deliverable, the Court under the provisions of O. XX, R. 10, C. P. C. is not bound to grant decree for delivery of such property and in the alternative for its value in money. In such a case where grains agreed to be given were not specific grains a decree for cash payment only should be granted.[9] There cannot be any property in a dead body and corpse cannot be regarded as a moveable property. Therefore a suit for possession of a corpse is not maintainable under this section.[10]

10. Special or temporary right.—A special or temporary right may either arise (1) by an act of the owner of the goods, e.g. bailment, pawn, or lien, [11] or (2) not by act of the owner, e.g. unauthorized pledge or sale or finding of lost goods.[12] Where the owner loses a thing and another finds it, the latter is entitled to its possession as against all the world except the owner, who has such a right even against its finder.

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1. Jaldu Venkata Subarao *v.* A.S.N. Co. Ltd., I.L.R. 39 Mad. (F.B.) 1:30 I.C. 840: 29 M.L.J. 342 : 2 L.W. 805:8 M.L.J. 236 (F.B.).
2. Fadu Jhela *v.* Gour Mohan Jhela, I.L.R. 19 Cal. 544 (F.B.); Murugesa *v.* Jetha Ram, I.L.R. 22 Mad 478.
3. Jaldu Venkata Subarao *v.* A.S.N. Co. Ltd., *supra;* Murugesa *v.* Jetha Ram, *supra.*
4. *See* General Clauses Act, Sec. 3 (4). For definition of "immoveable property", *see* notes under Sec. 6, *supra.*
5. Murugesa *v.* Jetha Ram, *supra.*
6. Sankumary *v.* Govinda, I. L. R. 37 Mad. 383; Fadu Jhela *v.* Gour Mohan Jhetha' *supra.*
7. 3 Stephen Com. 437.
8. Najibulla Sardar *v.* Harimohan Mitra A.I.R. 1932 Cal. 481 at p. 481. I.L.R. 50 Cal. 352 : 139 I.C. 640.
9. Bhonajee *v.* Mst. Saraswati, A.I.R. 1924 Nag. 176 at pp. 177-78 : 75 I.C. 833:
10. Ma kin *v.* U Ba, A.I.R. 1930 Rang. 143 (2) at p. 144 : 121 I.C. 775.
11. *See* Sec. 47, Sale of Goods Act.
12. *See* Sec. 71, Indian Contract Act.

The bailments are of two kinds :

(*i*) Simple bailments, i. e. loan, custody, carriage and agency. In this class of bailments the bailor (owner) is entitled to possession and the bailee has legal possession which does not deprive the bailor of his right. Therefore, either of two may obtain possession from a third person.[1]

(*ii*) Pawn and hire. In this class of bailments the bailor has got no right to possession. Such right vests in the pawnee or hirer as long as bailment exists. He is the only person entitled to possession.

11. Lien.—The vendor has a right to possession of the thing sold until he is paid the purchase money.[2] Such right to temporary possession is called lien.

12. Limitation.—A suit for the recovery of specific moveable property under this section will be governed by Art. 91 (B) or 69 of the Limitation Act, 1963, according to the allegation of the plaint on the facts found and the period of limitation is three years under the appropriate article of the Limitation Act, 1963. Previously such suits were governed by Art. 49 of the Indian Limitation Act, 1908, which corresponds to new Arts. 91 (B) and 69 of the Limitation Act of 1963.

13. Appeal.—An order under this article is a decree within the meaning of Sec. 2 of the Code of Civil Procedure, 1908, and as such it is appealable under Sec. 96 of the Civil Procedure Code which applies to the proceedings under this section.

New	Old
8. Liability of person in possession, not as owner to deliver to persons entitled to immediate possession.—Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:	**11. Liability of person in possession, not as owner to deliver to person entitled to immediate possession.**—Any person having the possession or control of a particular article of moveable property of which he is not the owner, may be compelled specifically to deliver it to the person, entitled to its immediate possession, in any of the following cases:
(*a*) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff;	(*a*) when the thing claimed is held by the defendant as the agent or trustee of the claimant;
(*b*) when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed;	(*b*) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed;

1. Williams' *Personal Property*.

2. *See* Sec. 47 of the Sale of Goods Act.

New

(*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Explanation.—Unless and until the contrary is proved, the Court shall, in respect of any article of moveable property claimed under Cl. (*b*) cr Cl.(*c*) of this section, presume—

(*a*) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;

(*b*) that it would be extremely difficult to ascertain the actual damage caused by its loss.

Old

(*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the claimant.

Iltustrations

Of clause (*a*)—A, *proceeding to Europe, leaves his furniture in charge of* B *as his agent during his absence.* B *without* A's *authority pledges the furniture to* C, *and* C *knowing that* B *had no right to pledge the furniture, adverties it for sale.* C *may be compelled to deliver the furniture to* A *for he holds it as* A's *trustee.*

Of clause (*b*)—*Z has got possession of an idol belonging to* A's *family and of which* A *is the proper custodian.* Z *may be compelled to deliver to* A.

Of clause (c)—A *is entitled to a picture by a deal painter and a pair of rare China vases.* B *has possession of them. The articles are of too special a character to bear an ascertainable market value.* B *may be compelled to deliver them to* A.

SYNOPSIS

1. Legislative changes.
2. General note.
3. Scope.
4. Possession or control.
5. Sections 7 and 8—Distinction.
6. Action in detinue.
7. Detinue and conversion.
8. Whether a judgment in conversion passes property to defendant.
9. Clause (*a*).
10. Gratuitous bailment—Liability of Purchaser from bailee.
11. Clause (*b*) and illustration.
12. *Pretium affectionis*.
13. Damages as inadequate relief.
14. Clause (*c*) and illustration.
15. Delivery of deeds and papers.
16. Damages, award of.
17. Clause (*d*).
18. Legitimate extension of doctrine.

1. Legislative changes.—This section corresponds to old Sec.11. The word "claimant" occurring under Cls. (*a*), (*b*) and (*d*) of the old Sec. 11 has been substituted by the word "plaintiff" Illustrations have been omitted and an explanation has been newly added.

2. General note.—This section confers a right to a relief which is not given by any other provision of the Act.

First, specific delivery under this section is to be distinguished from specific performance of a contract inasmuch as the right of recovery in Sec. 8 (now Sec. 5) is not based on contract but on the right to possess.

Secondly, this section is to be distinguished from Sec. 7 (now Sec. 4). The distinction between the two kinds of action is fully explained in Banerji's *Tagore Law Lectures*.[1] Under Sec. 7 (old), the suit is, *in reality*, a suit for recovery of moveable property or damages in the alternative and the decree and its execution are governed by the provisions of Order XX, rule 10 and Order XXI, rules 30-31. Plaintiff himself is obliged to state in his plaint the estimated value of the moveables (*vide* Form No. 32, Sch. I, App. A of the Civil Procedure Code), which would be paid to him if delivery cannot be had [Order XXI, rule 31 (2), C. P. C.].

Under this section, the plaintiff seeks recovery of the articles *in specie* and has not to state in his plaint the estimated money value of the article : on the other hand, he states that no pecuniary compensation can be assessed or will be adequate relief to him (*vide* Form 39 of Sch. I, App. A of the Civil Procedure Code). Of course, even in such a case, in default of compliance with the decree, the Court has the power, *inter alia*, to attach and sell the judgment-debtor's property and pay compensation to the decree-holder out of such sale-proceeds. But in this case, the amount of compensation need not be equivalent to any estimated value of the article; it is compensation in the proper sense of the term, the amount being left to the discretion of the Court [Order XXI, rule 31 (2), C. P. C.]. In short, "The amount of legal coercion, which can be brought against a defendant to enforce a decree for specific delivery under this section is, therefore, clearly greater than that which can be employed to enforce a decree under Sec. 7 (now Sec. 4)."[2]

In fact, both Secs. 7 and 8 (now Secs. 4 and 5) relate to what is called an action of detinue in England, but while Sec. 7 (now Sec. 4) represents the common law rule, Sec. 8 (now Sec. 5) represents the equitable gloss upon it. As Pollock and Mulla[3] put it briefly :

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1. *Law of Specific Relief*, 2nd Ed., pp. 74-75.
2. Nelson, *Specific Relief Act*, p. 115, quoted in Banerji's *Law of Specific Relief*, 2nd. Ed.,p. 75.
3. *Specific Relief Act*, 8th Ed., pp. 756-57.

"In England a person entitled to the immediate possession of a specific chattel was in principle entitled to recover it by an action of detinue. The writ in that action demanded specific delivery. But owing to the defective procedure for the execution of common-law judgments, this could not in practice be enforced. Then a court of equity, when applied to for relief, had to be satisfied that the remedy in damages to be value of the goods, which alone was available for the plaintiff at common law, would not be adequate, or that some specially equitable right of the plaintiff under a trust, for example, was involved."

The equitable gloss, however, applied only to cases where damages could not afford adequate relief,[1] or where there was a fiduciary relationship between the parties,[2] by reason of which the defendant would be bound, in conscience, to make specific delivery. These special cases are specified in this section.

However, it is necessary to clarify the question of the burden of proof under the section. Regarding it, it has been held by the Madras High Court,[3] that in order to obtain relief under the section, the plaintiff must allege and prove not only that the defendant is in possession of the property but that the plaintiff's case is covered by any of the four clauses of the section. This view has been criticised by Pollock and Mulla,[4] as unjust and this criticism has met with judicial approval.[5] Now, since in an action of detinue courts in England direct a restitution *in specie* whenever there exists a fiduciary relationship between the parties, it should be for the plaintiff in cases falling under Cl. (*a*) to establish such relationship. In cases falling under Cl. (*d*) also, it should be incumbent upon the plaintiff to establish that the possession of the defendant originated in a wrongful transfer of possession. But so far as cases falling under Cls. (*b*) and (*c*) are concerned, it should be for the defendant to establish that the article in respect of which possession is claimed by the plaintiff is an ordinary article of commerce having no special value or interest to the plaintiff or that the damage is assessable in money. The principle followed in an action of detinue, as explained by Swinfer Eady, M. R.,[6] is that :

> "The power vested in the Court to order the delivery up of a particular chattel is discretionary and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate."

The foregoing principle has been incorporated into the section, as an explanation.[7]

3. Scope.—In order to enable a person to obtain delivery of specific moveable property by suit and enforce the decree obtained by the stringent methods provided in Order XXI, rule 31, C. P. C. he should allege and prove facts which give him a right to compel the delivery of the specific moveables under this section because unless he does so he cannot have a decree for the return of the specific moveable property.[8]

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1. *Vide* Winfield on *Tort*, 6th Ed., p. 415.
2. *Cf.* Wood *v.* Rowcliffe, (1847) 2 Ch. 382 at p. 383.
3. Jadu Venkata Subbarao *v.* A.S.N. Co. Ltd., I.L.R. 39 Mad., 42 (F.B.).
4. *Specific Relief Act*, 8th Ed., p. 757.
5. Subbarayalu *v.* Annamalai, I.L.R. (1946) Mad. 174 at. p. 179.
6. Whitley Ltd. *v.* Hill, (1918) 2 K. B. 808 at p. 819.
7. Law Commission of India, Ninth Report on *Specific Relief Act*, 1877, pp. 6 to 8.
8. Jaldu Venkata Subbarao *v.* A.S.N. Co.Ltd. Calcutta, A.I.R. 1916 Mad. 314 at p. 311: I.L.R. 39 Mad. 1 (F.B.) : 1915 M.W.N. 644 : 29 M.L.J. 342:2 L. W. 805:30 I.C. 840:18 M.L.T. 236.

4. Possession or control.—The relief under this section can only be granted against a person having the possession or control of particular article claimed by the plaintiff. It is, therefore, necessary to clearly allege and prove the factum of possession and control of the defendant.

A person cannot be said to be in control of moveable property when he can only obtain its possession with the assistance of a court of law. The word "control" in the section means control exercised when the property in question is in the physical possession of an agent or bailee, who is reasonably certain to carry out the directions of the principal or bailor.[1]

5. Sections 7 and 8—Distinction.—(1) Under Sec. 8 (old Sec. 11) a suit is not competent against the owner of the moveable property while under Sec. 7 (old Sec. 10) a person having a temporary or special right to possession can maintain an action against the owner of the article.

(2) In a suit under Sec. 7 (old Sec. 10) the decree framed being under Order XX, rule 10 (old Sec. 11) it is for the return of moveable property or for money value thereof in the alternative whereas it is for return of the article under Sec. 8 (old Ssec. 11).

6. Action in detinue.—An action in detinue contemplated by the section can be successful on very limited grounds, one of which is that the article of moveable property in question is of such a nature that money compensation in respect of the same would not afford adequate relief to the plaintiff ; such an action can also succeed in a case where it would be extremely difficult to assess the actual damage caused to the plaintiff by the loss of the moveable property in question. It is not difficult to visualise the nature of articles contemplated by this section. They may be a rare piece of art or a rare painting of a celebrated artist in respect of which it would not only be extremely difficult to assess the actual damage caused to the plaintiff by loss of the article, but it would also be impossible to afford adequate money compensation to the plaintiff for the loss of such a rare article.

The substantial case sought to be made by the plaintiff will in no case be changed merely on the ground that the plaintiff wants to seek an alternative relief in the event of the ingredients of Sec. 8 (old Sec. 11) of the Specific Relief Act not being established.[2]

7. Detinue and conversion.—Schwabe, C. J., in *Sinnam Chetty* v. *G.S. Alagiri Aiyar*,[3] while delivering the judgment on behalf of the Full Bench of the Court, pointed out the legal implications and their effects of detinue and conversion of goods and other moveable properties. He says at pages 440 and 441 : "It is worth calling attention to the fact that there are two distinct forms of action which could be brought against a defendant who has or should have moveable property of the plaintiff in his possession. They are known as detinue and conversion, the latter being in the old law also called trover. In the former the suit is primarily for the return of the chattel to which is usually added a claim for its value in default of its return. The decree in such an action takes two alternative forms with the same effect. One is for the return to the plaintiff

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1. Lal Chand *v.* Hari Chand, 43 C.W.N. 903.
2. Mahabir Prasad Singh *v.* Narmedeshwar Prasad Singh, A.I.R. 1967 Pat. 326 at p. 327.
3. A.I.R. 1924 Mad. 438 at pp. 440, 441 : I.L.R. 46 Mad. 852 (F.B.): 77 I.C. 580 : 45 M.L.J. 516:18 L.W. 545:1924 M. W.N. 6; *see* also I.L.R. 4 Cal. 116.

within a limited time of the chattel or its value together with damages, if any, for its detention and the other is for a sum, being the value plus the damages for its detention to be reduced as to the damages, only if the chattel is returned in a certain time. In either case the option to return or to pay is in the defendant, but the Court may in proper cases order the specific delivery of the chattel which the defendant must comply with on pain of contempt, or it may order the issue of a writ of delivery to the Sheriff directing him to seize the chattel. The action for conversion or trover is for damages only and is as a rule for the value of the chattel and is based on an allegation that the defendant has converted the chattel to his own use by some wrongful dealing with it, one instance of which is the refusal to deliver upon demand, and on a decree of this kind the defendant has no option to deliver up the chattel nor has the plaintiff a right to demand it.

8. Whether a judgment in conversion passes property to defendant.—The question then arises whether a judgment in conversion passes the property to the defendant unless and until it is satisfied. This matter was exhaustively dealt with in a Full Bench judgment of the Madras High Court in *Subbarayalu v. Annamalai Chettiar.*[1] Their Lordships observed thus :

> "As we have already indicated, the appellate decree was based on the wording of the plaint but this does not mean that it must be read as giving an option to the appellants. The question whether the appellants were entitled to retain the projector on payment of the value fixed by the Court was never raised before us. The main question urged was whether the respondent was entitled to forfeit the deposit and insist on the return of the projector with hire at the rate agreed upon. It was not suggested that if we decided this question in favour of the respondent he could not insist on the machine being delivered back to him and would be compelled to rest content with its value. We consider that the decree must be read as giving the plaintiff the right to delivery of the projector if this form of relief is under the law of India open to him. The answer to the question really turns on the meaning to be given to Cl. (*a*) of Sec. 11, Specific Relief Act."

It is hard to see on principle why the right should be confined to special categories. The framers of the Act seem to have forgotten that the Indian courts are not merely courts of English equitable jurisdiction. In England a person entitled to the immediate possession of a specific chattel was in principle entitled to recover it by an action of detinue. The writ in that action demanded specific delivery. But owing to the defective procedure for the execution of common law judgments, this could not in practice be enforced. Then a court of equity, when applied to for relief, had to be satisfied that the remedy in damages to the value of the goods, which alone was available for the plaintiff at common law, would not be adequate, or that some specially equitable right of the plaintiffs under a trust for example, was involved. Under a more rationally developed system the burden would be on the defendant to show cause why it should not be just and equitable to avoid specific restitution.

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1. A.I.R. 1945 Mad. 281

In *Venkata Subbarao* v. *Asiatic Steam Navigation Co. of Calcutta*,[1] a Full Bench of the Madras High Court said this :

> "But in order to entitle the plaintiff to obtain delivery of specific moveable property by suit and enforce the decree so obtained by the stringent methods provided in Order XXI, rule 31, C.P.C., it is necessary that he should allege and prove facts which entitled him to compel the delivery of the specific moveable under the provisions of Sec. 11, Specific Relief Act, because unless he does so, he cannot have a decree for the return of the specific moveable property. There is no allegation in the plaint that the defendant is in possession of the plank in question and it is obvious from the correspondence that he is not. That being so, the case does not come within Cl (*a*) of Sec. 11, Specific Relief Act, and it certainly does not come within Cl. (*b*), (*c*) or (*d*)."

There the claim was for the return of a plank and it was held that as the suit did not fall within Sec. 11 (old), it could not be maintained. The effect of this judgment is that a plaintiff cannot obtain specific restitution of a chattel unless his claim falls within Sec. 11 (old), Specific Relief Act. It is obvious that Cls. (*b*), (*c*) and (*d*) of Sec. 11 (old) do not apply to the present case and, therefore, courts have only to consider Cl. (*a*). If the appellants are in the position of agents or trustees within the meaning of that clause, the Court can direct them to deliver over the projector to the respondent. Mr. Braddell on behalf of the respondent has conceded that the appellants cannot be regarded as agents; but he says that they are trustees within the meaning of Cl. (*a*). The word "trustee" here does not mean a trustee within the meaning of the Trusts Act. Section 3 (old), Specific Relief Act, says the word "trustee" includes every person holding, expressly, by implication or constructively, a fiduciary character, Therefore, if the appellants held the projector in a fiduciary capacity after the respondent had demanded the return of his machine, as he had the right to do, he will be entitled to an order directing its delivery to him. In *Hallett's Estate*, *Knatchbull* v. *Hallett*,[2] Thesiger, L.J., said:

> "It has been established for a very long period, in cases at law as well as in cases in equity, that the principles relating to the following of trust property are equally applicable to the case of a trustee, using the term in the narrow and technical sense which is applied to it in the Court below, and to the case of factors, bailees, or other kinds of agents."

This statement clearly recognizes that a bailee holds a fiduciary character. In *Ramaswami Gupta* v. *Kamalammal*,[3] a Bench of the Madras High Court, while holding that a bailee is not a trustee within the meaning of the term in the Trusts Act, recognized that he may in some respects be in a fiduciary position as regards his bailor and the observations of Thesiger, L.J., in *In re Halletts Estate*, *Knatchbull* v. *Hallett*,[4] quoted above, were referred to. *Held* that the appellants held the projector in a fiduciary capacity

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1. A.I.R. 1916 Mad. 314: I.L.R. 39 Mad. 1 : 30 I.C. 840 (F.B.).
2. (1879) 13 Ch. D. 696 at p. 722.
3. 42 M.L.J. 32 :A.I.R. 1922 Mad. 44 : I.L.R. 45 Mad. 173 : 70 I.C. 448.
4. (1879) 13 Ch. D. 696.

within the meaning of Cl. (*a*) of Sec. 11 after the respondent had terminated the contract and demanded its return. But without authority courts consider that this must be the decision when the facts are borne clearly in mind. The property in the article had never passed to the appellants. When the contract was terminated they had no right to deal with it or even use it. They held it on behalf of the respondent and it was their duty to deliver it up to him. They were not trustees in the technical sense, but they held the article in a fiduciary character sufficient to satisfy Sec. 11 (old), Specific Relief Act. It would indeed be remarkable if in the circumstances of this case, especially when the Court holds the article on behalf of the party entitled to it, it could not direct delivery to be given to the true owner.[1]

It is settled law that a judgment for the recovery of goods or their value or for the value of the goods to be reduced if the goods are delivered, does not of itself transfer the property to the defendant but only if and when it is satisfied by actual payment of the value.[2]

9. Clause (a).—This right to be protected in the use or beneficial enjoyment of property *in specie* is not confined to articles possessing any peculiar or intrinsic value.[3] In cases under this clause there is a fiduciary relationship subsisting between the parties and equity will fasten up the conscience of the defendant and compel him to make specific delivery. "Where a fiduciary relationship subsists," observed Lord Cottenham, "between the parties whether it be the case of an agent or trustee or a broker, or whether the subject-matter be stock or cargoes or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods or by a person claiming under him through an alleged abuse of power."[4]

A servant entrusted by his mistress with the custody of goods, pawned them during her absence. The mistress sued the trover for goods. It was held that the custody of the servant was not "possession" within the meaning of Sec. 178 of the Contract Act, and that if he was to be regarded as having taken the goods into his possession for the purpose of pawning them, the case came within the second proviso to that section, and that accordingly the action would lie.[5]

It may, however, be noticed that the illustration to Cl. (*a*) postulates that *C* had notice that *B* had no authority to pledge the furniture. But if *C* had no such notice, then the pledge would be valid under Secs. 178 and 178-A, Contract Act and Sec. 30, Sale of Goods Act. But before these sections can come into operation it must be proved that the pledgor was in juridical possession of the goods and not only a custody of them.[6]

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1. Subbarayulu *v.* Annamalai Chettiar, A.I.R. 1945 Mad. 281, at pp. 282-83.
2. Brinsmead *v.* Harrison, (1871) L.R. 6 C.P. 584: 40 L.J. C.P. 281: 24 L. T. 798:10 W.R. 956; *In re* Gunsburg *Ex parte*, (1920) 2 L.B. 426:89 L.J. K.B. 725: 123 L.T. 353 : 64 S.L. 498 : 36 T.L.R. 455; *see* also Subbarayalu v. Annamalai, A.I.R. 1945 Mad. 281 : (1945) 1M.L.J. 424 (F.B.).
3. (1946) 3 Hare 304.
4. Wood *v.* Rowcliffe, (1847) 2 P. L. 382; *see* Biddomoye Debi *v.* Sitaram, I.L.R. 4 Cal. 497.
5. Biddomoye Debi *v.* Sittaram, *supra*.
6. Kattaramaswami *v.* Kamalammal, I.L.R. 45 Mad. 173:A.I.R. 1922 Mad. 44:70 I.C. 448: 42 M.L.J. 32: 30 M.L.T. 156 : 14 L.W. 599 : 1921 M.W.N. 801; Sushippier *v.* Subramania, I.L.R. 40 Mad. 678:34 I.C. 751:19 M.L.T. 386 : 30 M.L.J. 587.

10. Gratuitous bailment—Liability of purchaser from bailee.—In gratuitous bailment the bailee is not a trustee for the bailor, within the meaning of Chapter IX of the Indian Trusts Act. A purchaser in good faith for consideration from such bailee is not protected by the provisions of Sec. 96 of the Indian Trusts Act or Sec. 108 or Sec. 178 of the Indian Contract Act. There are three positions: (1) A purchaser from a person who has only the custody of the property of another is not protected; (2) a purchaser from a person who has got possession of the property of another with notice that the seller has got no authority is not protected; and (3) a purchaser without notice that the seller who has got the possession of the property of another has no authority to sell is protected.

In the instant case the plaintiff lent certain jewels to one Meenakshi Ammal for the purpose, as the plaintiff said of decking the latter's daughter for a prospective bridegroom. Meenakshi Ammal took the jewels and pledged them with Thangavelu Mudali and Chinnaswami Sah. The defendant after redeeming the jewels from the pledgees bought them from Meenakshi Ammal. The plaintiff brought the suit against the defendant for the recovery of the value of the jewels which was decreed to her. The defendant appealed against this judgment. The defence was that the defendant was a purchaser for value without notice of any defect in the title of Meenakshi Ammal to these jewels and he is therefore protected either as falling within the Trusts Act or secondly by the provisions of Secs. 108 and 178 of the Contract Act. Although a bailee may be in some respect in a fiduciary position as regards his bailor it is very different thing from saying that a bailee is a trustee pure and simple. Where the bailee by a wrongful dealing with the chattel, has determined the bailment, all third persons, however innocent, who purport in any way to deal with the property in chattel are guilty of conversion and liable to the bailor.[1]

Thus a servant in custody of goods on behalf of his master[2] or a wife in custody of her husband's jewellery on his behalf,[3] or a gratuitous bailee, [4] or a person who has hired a jewel from its owner,[5] or a person in possession of an article under the hire-purchase system,[6] or a person who has obtained the jewels from the owner on fraudulent representation,[7] cannot pass title by an unauthorized pledge. A commission agent employed to sell goods can make a valid pledge.[8] So also a seller who has been left in possession of the goods sold.[9] Similarly, where a person who had authority to sell, endorse and assign Government promissory notes borrowed money from a bank on the security of the notes and deposited the same with the bank, it was held that the bank was entitled to retain the notes.[10] Where *A* delivered to *B* a cinematograph projector under an agreement to pay the price in instalments and there was a provision, in case of

1. Kattaramaswami *v.* Kamalammal, A.I.R. 1922 Mad. 44 at pp. 44,45 : I.L.R. 45 Mad. 173 : 70 I.C. 448 : 42 M.L.J. 32 : 30 M.L.T. 156: 14 L.W. 599: 1921 M.W.N. 801; Sushippier *v.* Subramania, I.L.R. 40 Mad. 678:34 I.C. 751:19 M.L.T. 386: 30 M.L.J. 587.
2. Biddomoye Debi *v.* Sittaram, I.L.R. 4 Cal. 497.
3. Seager *v.* Hukmakessa, I.L.R. 24 Bom. 459.
4. Shanker *v.* Mohan, I.L.R. 11 Bom. 704.
5. Nagauana *v.* Bappu, I.L.R. 27 Mad. 424.
6. Greenwood *v.* Holquette, 12 B.L.R. 42, *contra* Abdul Hassan *v.* Rangi Lal, 34 P. R. 1902.
7. Kartik *v.* Gopal, I.L.R. 3 Cal. 264.
8. Sushippier *v.* Subramania, *supra*; King-Emperor *v.* Nga Po Chit, A.I.R. 1923 Rang. 227 at p. 229 : I.L.R. 1 Rang. 199 : 74 I.C. 1050; Profulla Kumar Bose *v.* Nobo Kishore Rai, 23 C.W.N. 907 : 54 I.C. 224; Durgabai *v.* Saraswatibai, 118 I.C. 796 : 31 Bom. L.R. 414.
9. Haji Rahim Bux *v.* Central Bank of India, I.L.R. 56 Cal. 367 : 119 I.C. 23: A.I.R. 1929 Cal. 497.
10. Bank of Bengal *v.* Mcleod, 5 M.I.A. 1

default in payment of an instalment, empowering *A* to terminate the contract and take possession of the projector, it was held that property under the agreement did not pass to the purchaser, and a decree passed in favour of *A* in a suit for the recovery of the projector filed on default and in the alternative for the price did not entitle *B* to retain the projector and pay the price, as *B* held the projector in a fiduciary capacity within the meaning of this clause.[1]

11. Clause (b) and illustration.—It is now well settled that it is within the power of a court having equitable jurisdiction to compel the delivery of heirlooms or chattels of peculiar value to the owner. To quote Lord Ellenborough, "in all cases where the object of the suit is not capable of compensation by damages it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it."[2] The ground of jurisdiction is the same as that upon which the specific performance of an agreement is enforced, viz. that the specific thing is the object and damages will not afford an adequate compensation.[3] The actual value of an heirloom may possibly in some cases be easily calculated but its value to the members of the family will not be capable of valuation for it has a *pretium affectionis* which it is impossible to value in sordid gold or silver.[4]

12. Pretium affectionis.—An article may not have much intrinsic value, but, by reason of peculiar associations or some special considerations it may have obtained in the eyes of its holder a value that cannot be estimated in any ordinary medium of exchange. Take the illustration put by the Legislature, the case of a family idol. The stone or metal of which it is composed by no means represents its value. Non-Hindus may call the value that the family puts upon their idol sentimental or fictitious or anything they please. But there can be no doubt that if the proper custodian of the idol is deprived of its possession no monetary consideration will afford him adequate relief.[5] In the leading English case—*Pusey* v. *Pusey*,[6] an heir instituted a suit to recover a horn which bore an inscription and which had from time out of mind been the token by which the family estate had been held and the suit was decreed. Other instances of successful suits are in respect of an old altar piece made of silver bearing.[7] Greek inscription and dedication to Hercules, dresses, decorations, books and papers of a masonic lodge,[8] heirloom,[9] private letters,[10] a college momento in the shape of a wooden bowl,[11] a cup won as prize,[12] wampum bells belonging to Red Indians[13] and slaves in America.[14] As was urged in *Duke of Somerset* v. *Cookson*,[15] where the thing sued for was a matter of curiosity and antiquity, it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it, which is like a trespasser's forcing the rightful owner to part with a curiosity, or matter of antiquity or ornament, *nolens volens*. Talbot, L.C.,

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1. Subbarayalu *v.* Annamalai, A.I.R. 1945 Mad. 281: (1945) 1 M.L.J. 460 (F.B.).
2. 2 Wh. & T.L.C., 8th Ed. at p. 462.
3. Fells *v.* Read, 3 Ves 70 at p.71:2 Scotts 37.
4. Duke of Somerset *v.* Cookson, 3 P.W. 390: 3 Wh. & T., 8th Ed., p. 459.
5. Dr. Banerjee's *Tagore Law Lectures*, p. 72.
6. (1684) 2 Wh. & T., 8th Ed. 458; 1 Ver. 273 at p. 278.
7. Duke of Somerset *v.* Cookson, *supra*.
8. Llyod *v.* Loring, (1802) 6 Ves. 773.
9. Maeclesfield *v.* Davis, (1814) 3 V.& B. 18.
10. Dock *v.* Dock, 108 Pa. 14.
11. Beasley *v.* Allyn, 15 Philla. 97.
12. Wilkinson *v.* Still, 175 Mass. 581.
13. Onondoga Nation *v.* Thacker, 61 NY. Supp. 107, affd. 65 N.Y. Supp. 1014.
14. Murphy *v.* Clark, 9 Miss. 221.
15. (1735) 3 P. W. 390 : 1 Ames 40 : 3 Wh. & T., 8th Ed., p. 459.

upheld the broad contention that in itself nothing can be more reasonable than that the man who by wrong detains any property, should be compelled to restore it again *in specie*.[1]

13. Damages as inadequate relief.—"There are cases in which the offer of money is not a satisfaction but an insult. Shall a lover take money as the price of his mistress's portrait of which a rival has robbed him."[2] Again in an American case,[3] the suit was for specific delivery of maps, plans, and surveys prepared and used by the plaintiff in his business as a surveyor together with his instruments and office furniture all of which were left in the possession and custody of the defendant, his clerk, under the express understanding that they were to be redelivered whenever the plaintiff wanted them. The suit for delivery of the chattels was decreed by the Court. In this case Bell, J., delivered himself as follows:

McGowin *v.* Remington.

"By what standard would you measure the injury the plaintiff may sustain in future from being deprived, even for a brief period of the use of papers essential to the prosecution of his business? Their intrinsic value might, perhaps, be ascertained by an estimate of the labour necessary to their reproduction, admitting the means to be at hand, and within the power of the plaintiff. But how could a tribunal ascertain the probable loss which in the meantime might be sustained? The present pecuniary injury might be little or nothing, and so possibly of the future; or it might be very great depending upon the unascertainable events of coming time, as these may be influenced by the misconduct of the defendant. These considerations show, I think, the case is not one for damages. Besides as many of the maps, plans, surveys and calculations are copies of private papers, we are by no means satisfied they could be replaced at all, certainty not without the permission of the owner—a risk to which the plaintiff ought not necessarily to be exposed. If to those reflections we added the fact that some of the documents are the original work of the plaintiffs, of value as being predicated upon data possibly no longer accessible, a wrong is perpetrated which a chancellor ought not to hesitate in relieving."[4]

The scope of enquiry in the American case noted above, has been stated thus:

> "The enquiry must be whether the law affords adequate redress by compensation in damages when the complaint is of the detention of personal chattels. If not the aid of a Court of Chancery will always be extended to remedy the injury by decreeing a return of the thing itself. The precise ground of this jurisdiction is said to be same as that upon which the specific performance of an agreement is enforced, namely, the fruition of the thing, the subject-matter of the agreement is the object, the failure of which would be but ill-supplied by an award of damages.[5] In the application of this rule some difficulty has been experienced. The examples afforded by the English books are usually those cases, where, from the nature of the thing sought after, its antiquity or because of some peculiarity connected with it, it cannot easily or at all be replaced. Such articles as these are commonly esteemed not altogether, or perhaps at all, for their

1. Dr. Banerjee's *Tagore Law Lectures*, pp. 72, 73.
2. Bentham, *Legislation*, p. 290.
3. McGowin *v.* Remington, 12 Ph. St. 2 Jones 56.
4. *Ibid.*
5. Lowther *v.* Lowther, 13 Ves. 95.

intrinsic value, but as being objects of attachment or curiosity and therefore not to be measured in damages by a jury who cannot enter into the feelings of the owner; so, too, the impossibility, or even great difficulty of supplying their loss, may put damages out of the question as a medium of redress. But these are not the exclusive reasons why Chancery interferes, for there may be cases where the thing sought to be recovered is susceptible of reproduction, or substitution, and yet where damages could not be so estimated as to cover present loss or compensate its future consequent inconvenience. And I take it, this is always so where, from the nature of the subject-matter or the immediate objec; of the parties, no convenient measure of damages can be ascertainedt or where nothing could answer the justice of the case but the performance of the contract *in specie*."

14. Clause (c) and illustration.—This clause applies to articles of unusual beauty, rarity and distinction such as artistic productions, the value of which it is impracticable to assess. Clauses (*b*) and (*c*), it must be noted, are by no means exclusive and cases will be found which will be covered by both the clauses. The clause applies to a chattel "whose principal value consists in antiquity, or its being the production of some distinguished artist; or its being a family relic, ornament or heirloom, such as, for instance ancient gems, medals and coins; ancient statues and busts, paintings of old and distinguished masters, and even those of modern dates, having a peculiar distinction and value such as family pictures and portraits and ornaments and things of a kindred nature.[1] Just as there may be moveable articles of special value to their owner, but of no general pecuniary value to themselves, so there may be other moveable articles of such great rarity and value that they cannot be replaced by money.[2] Any damages allowed in such cases must be in a great measure conjectural.[3] Instances of such articles are a box of jewels,[4] or finely covered cherrystone,[5] family pictures,[6] valuable paintings,[7] pen and pencil sketches,[8] and extraordinarily wrought pieces of plate,[9] silver altar piece,[10] certificates of registry of ship,[11] chattel of a peculiar value on account of use in business,[12] stock on farm without which the work cannot proceed,[13] tobacco box of a club,[14] and certificates of title to Government stock.[15] Other instances of such articles are to be found under the heading "Pretium affectionis" under Cl. (*b*). In cases like these the owner is entitled to insist that the value of none of these articles should be left to the estimate of a jury,[16] or to people who have not his feelings.[17]

Application of Cl. (*c*).

Instances of articles in respect of which it is extremely difficult to ascertain actual damages caused by their loss.

15. Delivery of deeds and papers.—In a suit for return of deeds and other instruments in writing, courts of equity will decree their delivery since damages afford an inadequate relief.[18] Such would be the case where the papers are of

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1. Story's *Equity Juris.*, 709.
2. Dr. Banerjee's *Tagore Law Lectures*, pp. 73-4; Pomeroy's *Equity Juris.*, Sec. 1402.
3. Story's *Equity Juris.*, 722.
4. Seville *v.* Tancred, (1748) 1 Ves. Ser. 101.
5. Pearne *v.* Lisley, (1749) 3 Amb. 75.
6. Lady Arundell *v.* Philips, 10 Ves. 139.
7. Lowther *v.* Lowther, 13 Ves. 95.
8. Long *v.* Thatcher, 48 N.Y. App. Div. 343.
9. Pearne *v.* Lisley, *supra;* 1 Scott. 88.
10. Duke of Somerset *v.* Cookson, (1735) 3 P.W. 390: 2 Wh. & T., 8th Ed., p. 459.
11. Gibson *v.* Ingo, (1847) 6 Hare 112.
12. North *v.* G.N. Railway, (1800) 2 Giff. 64.
13. Nut Brown *v.* Thornton, (1804) 10 Ves. 159.
14. Fells *v.* Read, (1796) 6 Ves. 71.
15. Dlocret *v.* Rothschild, (1824) 1 Sim. & St. 500.
16. Dowling *v.* Berjermann, (1862) 2 J.& H. 544.
17. Fells *v.* Read, (1796) 6 Ves. 71.
18. Pomeroy, Sh. C.S. 13; McGowin *v.* Remington, 12 Ph. St. 2 Jones 56; Pattison *v.* Skillman, 34 N. J. Eq. 344; *see* also W.T.L.C., Vol. 1, p. 462.

considerable value to the plaintiff for establishing his claim as an heir,[1] or where the papers are maps, plans, and surveys prepared and used by the plaintiff in his business as a surveyor and cannot be replaced.[2]

16. Damages, award of.—Even in case of an unique chattel a party may by his own acts put a certain value on it which can be recovered at law and which being his own estimate[3] will be taken as a sufficient compensation.

17. Clause (d).—To attract the application of this clause it is not necessary that there should be any fiduciary relationship between the parties, or that the article be incapable of valuation, or that damages will not afford adequate relief. The application of the clause depends upon the manner in which the party liable to return has obtained possession of it. All that is necessary is that the possession must have been transferred wrongfully by a tort under such circumstance that no property therein could pass.

18. Legitimate extension of doctrine.—The doctrine embodied in this clause should not be extended capricioulsy. As observed in *Lining* v. *Geddes*;[4] "There are cases referring to old English decisions such as (*Pusey* v. *Pusey*[5]) which have their foundation in the refinement of society and those affections of the heart which it would be a reproach to the country not to indulge. But still they depend as the plain tangible principle that there is no adequate remedy at law, and the principle must not be extended to cases founded in weakness and folly. It would, therefore, be a perversion of the rule to apply it to the delivery of a favourite spaniel or lady's lap dog." In this connexion the observations of Bentham regarding a suit in the French Parliament for return of a pet canary bird are worthy of perusal. He observes: "Is not the imagination which gives a value to the object as esteemed most precious ? As laws are made only out of deference to the universal sentiments of men, can they show too much anxiety to guard everything which makes a part of human happiness, and should they not acknowledge and protect the sensibility which attaches us to creatures we have raised and familiarized and who in their turn are attached to us."[6]

Lining v. Geddes.

CHAPTER II

SPECIFIC PERFORMANCE OF CONTRACTS

New

9. Defences respecting suits for relief based on contract.—Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

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1. Pattison *v.* Skillman, 34 N. J. Eq. 344.
2. McGowin *v.* Remington, 12 Ph. St. 2 Gones 56.
3. Pomeroy, Sh. C S. 13
4. 16 Am. Dec. 606: 6 R.C. 646.
5. (1684) 1 Vern. 273.
6. Bentham's *Legis.*, p. 290.

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1. Legislative changes.—This section has been newly enacted. It provides for all available defences open to the defendant in a suit for specific performance of contract.

2. General note.—In England[1], and in America,[2] one finds that text books on specific performance deal with the defences open under the law of contract as well as the defences available in equity courts in proceedings to enforce a contract by way of specific performance. In India, the defences that are available under the law of contract, such as, incapacity of parties, the absence of a concluded contract, the uncertainty of the contract, coercion, fraud, misrepresentation, mistake, illegality or want of authority to enter into the contract, have all been dealt with in the Contract Act. Further, under Sec. 2 (*h*) of the Contract Act only "an agreement enforceable in law is a contract". An agreement which is not a valid contract under the Contract Act is not specifically enforceable. Hence, a repetition in the Specific Relief Act of the defences available under the law of contract has been avoided by inserting in the Act a specific provision to the effect that all defences open under the law relating to contracts shall be open to a defendant in a suit for specific performance. Therefore a new section has been inserted to the above effect and Cl. (*a*) of previous Sec. 4 which had become redundant has been omitted.[3]

This section prescribes in a compendious way all the defences that are open to the defendant, and incidentally makes old Sec. 4 (*a*) which has now been omitted all the more unnecessary.

3. Enforceability of a contract; decree for specific performance.—In order to enable the Court to decree specific performance the terms of the contract must be clear, definite, certain and complete. The contract must be free from doubt, vagueness and ambiguity so as to leave nothing to conjecture or to be supplied by the Court.

Where the contract specifies a way of ascertaining the price which is essential, the contract is conditional till the ascertainment, and is absolute only when the price has been determined in the manner agreed upon. In case of default in this respect the contract remains imperfect and incapable of being enforced: for the Court will never direct the payment of such a sum as *A* may fix.[4]

4. Agreement void for uncertainty.—In *Vasant Sakharam Sanas v. Chabildas Sobhagchand*,[5] the allegations on which the plaintiff-respondent's suit for specific performance of an agreement to lease and for possession was founded were these : In city Survey No. 122 of Bhavani Peth, Poona, there was a building which was originally owned by one Kamlabai Harilal Pandya. The entire structure being burnt down, the said property was purchased by the

1. Fry's *Specific Performance*, 6th Ed., p. 125, *et seq;* Halsbury, 2nd Ed., Vol. 31, p. 345.
2. *American Jurisprudence*, p. 24, *et seq.*
3. Law Commission of India—Report on the Specific Relief Act, 1877, at pp. 8-9.
4. Nair Service Society *v.* R.M. Palat, A.I.R. 1966 Ker. 311 at p. 314 : 1966 Ker. L. J. 644 : I. L. R. (1966) 2 Ker. 54 : 1966 Ker. L. T. 476.
5. 76 Bom. L. R. 584 at pp. 585. 586.

defendant. The defendant thereafter constructed a four-storied building on the said open site. He secured the completion certificate from the Corporation of Poona on 12th April, 1963 and let out some shops to other persons. On 19th February, 1965, the plaintiff-respondent filed the suit giving for specific performance of an alleged agreement to lease two *galas* from the said building and for possession. The plaintiff alleged that he was a tenant of one of the shops in the former building when it was owned by Kamalabai and was burnt down. He alleged that the defendant having purchased the property and asked him to vacate the burnt portion of the shop, he declined to do so. Thereafter he alleged that with the intervention of one Manikchand, he vacated the premises on the defendant having executed an agreement dated 26th July, 1960 to lease two *galas* to him. According to this agreement, after the reconstruction of a new building on the original site, the defendant was to lease to the plaintiff two *galas* of his choice after securing the completion certificate of the Corporation, on a rent which might be mutually agreed upon between the parties. The suit was resisted by the defendant-appellant. The defendant denied the plaintiff's case *in toto*. He contended that the suit agreement being void for uncertainty it could not be specifically enforced. The Civil Judge held that the suit agreement was binding on the defendant. Dealing with the contention that the terms of the agreement are uncertain and incapable of being enforced, he held that though the terms were wide and incomplete, in certain respects, they did indicate a concluded agreement inasmuch as, although it was left to the lessor to lease the *galas* of his choice, and the rent was not specified, the structure from which the two *galas* were to be leased was specified, and in the absence of agreement, since the rent payable was the standard rent, the same could be fixed under Sec. 11 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. He decreed the plaintiff's suit for specific performance of the suit agreement to lease and also for possession of two shop *galas*. Aggrieved by that judgment and decree the defendant preferred an appeal to the District Court, Dealing with the contention about the contract being void for uncertainty, the District Judge substantially adopted the reasoning of the Trial Court, for repelling that contention of the defendant. He dismissed the appeal. Aggrieved by that judgment and decree, the second appeal is preferred by the defendant. *Held* : Since the rent was not at all agreed upon and it had been specifically provided that the rent would be mutually agreed upon in future, it was not at all a concluded contract which could be specifically enforced.[1]

5. Party denying factum of contract is precluded from raising the legality or validity of contract.—Rule 8 of Order VI of the Code of Civil Procedure lays down that where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied and not as a denial of the legality or sufficiency in law of such contract. Rule 2 of Order VIII requires that the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality. These provisions

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1. Vasant Sakharam Sanas *v.* Chabildas Sobhagchand, 76 Bom. L.R. 584 at pp. 586-87.

leave no doubt that the party denying merely the factum of the contract and not alleging its unenforceability in law must be held bound by the pleadings and be precluded from raising the legality or validity of the contract.[1]

CHAPTER II

OF THE SPECIFIC PERFORMANCE OF CONTRACTS

CONTRACTS WHICH CAN BE SPECIFICALLY ENFORCED

(A) CONTRACTS WHICH MAY BE SPECIFICALLY ENFORCED

New

10. Cases in which specific performance of contract enforceable.—Except otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

(*a*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(*b*) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.—Unless and until the contrary is proved, the Court shall presume—

(*i*) that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money; and

(*ii*) that the breach of a contract to transfer moveable

Old

12. Cases in which specific performance enforceable.—Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

(*b*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

(*c*) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

Explanation.—Unless and until the contrary is proved, the Court shall presume, that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer immoveable property can be thus relieved.

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1. *See* Kalyanpur Lime Works *v.* State of Bihar, A. I. R. 1954 S. C. 165 ; Bhupal *v.* Mam Chand, A. I. R. 1973 All. 543 at p. 546: 1973 A.L.J. 639.

New

property can be so relieved except in the following cases:

(*a*) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consist of goods which are not easily obtainable in the market;

(*b*) where the property is held by the defendant as the agent or trustee of the plaintiff.

Old

Illustrations

Of Cl. (*b*)—A *agrees to buy, and* B *agrees to sell, a picture to a deal painter and two rare China vases.* A *may compel* B *specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.*

Of Cl. (*c*)—A *contracts with* B *to sell him a house for Rs.* 1,00. B *is entitled to a decree directing* A *to convey the house to him, he paying the purchase-money.*

In consideration of being released from certain obligations imposed on it by its act of incorporation, a railway company contracts with Z *to make an archway through their railway to connect lands of* Z *served by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road and also to construct a siding and a wharf as specified in the contract.* Z *is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.*

A *contracts to sell, and* B *contracts to buy a certain number of railway shares of a particular description.* A *refuses to complete the sale.* B *may compel* A *specifically*

to perform this agreement , for the shares are limited in number, and not always to be had in the market, and their possession carries with it the status of a shareholder which cannot otherwise be procured.

A *contracts with* B *to paint a picture for* B, *who agrees to pay therefor Rs.* 1,000. *The picture is painted.* B *is entitled to have it delivered to him on payment or tender of the Rs.* 1,000.

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1. Legislative changes.—This section corresponds to the old Sec. 12 of the Specific Relief Act, 1877, with the following changes. In the marginal note of the present Sec. 10 the words "of contract" have been inserted before the word "enforceable". In the enacted provisions of this section the words "sub-sections (*a*) and (*b*)" have been enacted for the sub-sections (*b*) and (*c*) of the repealed Sec. 12 respectively, sub-section (*a*) of the old Sec. 12 has been enacted in the new Sec 11 (1). Sub-section (*a*) of the present Sec. 10 is a verbatim reproduction of the repealed sub-section (*b*) while the present sub-section (*b*) to the new Sec. 10 is the reproduction of sub-section (*c*) of the repealed Sec. 12 with the change that for the words "pecuniary compensation" the words "compensation in money", have been substituted, while sub-section (*d*) of the repealed section has been deleted. The Explanation of the new section, sub-clauses (*i*) and (*ii*) correspond to the Explanation of the repealed Sec. 12, while sub-clauses (*a*) and (*b*) of the new Explanation (*ii*) provide important exceptions to the operation and effect of the new Explanation. The change in the new Explanation is that the whole of the old Explanation has been split up in sub-clauses (*i*) and (*ii*) ; that sub-clause (*i*) of the Explanation reproduces the language of the first part of the old Explanation; that the latter portion of the old Explanation has been divided in sub-clauses (*a*) and (*b*) ; that in Cl. (*ii*) of the present Explanation the words "except in the following cases" have been added and that sub-clauses (*a*) and (*b*) of Cl. (*ii*) in the Explanation have been newly inserted. All the illustrations of the old section have been deleted.

2. Reasons for the change.—Giving reasons for the suggested recommendations in respect of the old Sec. 12, the Law Commission in their Ninth Report on the Specific Relief Act, 1877, at pages 9 and 10 write :

"Clause (*a*) of old Sec. 12 related to an obligation arising out of a trust. Some jurists consider such an obligation as appertaining to the law of contracts but, in view of the definition of a trust in the Indian Trusts Act, such an obligation arose out of an executed contract. The relief by way of specific performance was, on the other hand, available only in respect of executory contracts,[1] to which the other clauses of Sec. 12 (old) related. It seems to us, therefore, appropriate to delete Cl. (*a*) from (old) Sec. 12 and to place all the provisions relating to trusts together in one section. The

1. Banerji's *Law of Specific Relief*, 2nd Ed., p. 84

only references to trusts, so far as specific performance is concerned are in (old) Secs. 12 (*a*) and 21 (*e*). We propose to include both of them in a new section."[1]

"Clause (*d*) of the previous Sec. 12, as pointed out by Banerji,[2] seems to sanction the doubtful doctrine that insolvency of the defendant is a ground for decreeing specific performance. The ability of the defendant to pay damages never entered into the consideration of Courts of Equity. 'Such a rule,' as observed by Pomeroy, 'makes one under such a contract a preferred credition.' Further, the inadequacy of the legal relief, which is the basis of equitable remedies, is ordinarily in the nature of that relief in cases of a certain type, not in the difficulty of recovery of damages in the individual instance. 'It is the contract itself', said Andrews, C. J., 'which gives to or takes away from the Court its jurisdiction;n ot the wealth or property of the party defendant.[3] In short, this clause is totally inconsistent with the basic principle followed by the Courts of Equity in England in granting specific performance, namely, the non-existence or inadequacy of the remedy at law, but not merely the impracticability of enforcing such a remedy. Therefore, this clause has been omitted. As regards the Explanation to (old) Sec. 12, the presumption relating to moveable property is somewhat misleading in its present form and it would be conducive to a better understanding of the law if the exceptional case where the presumption of adequacy of damages is not applied by the courts, are also specified. We, therefore, propose to split up the Explanation into two independent matters, one relating to immoveable and the other relating to moveable property. While no change is necessary as to the presumption relating to immoveable property, we propose to specify the exceptional cases where courts in England and India grant specific performance of contracts to transfer moveable property, on the presumption that damages would not in such cases give an adequate relief. These are:

(*a*) Where the property is not an ordinary article of commerce or is otherwise of special value or interest to the plaintiff.[4]

(*b*) Where the property is held by the defendant as agent or trustee of the plaintiff.[5]

(*c*) Where the property consists of goods not easily procurable in the market.

"The last exception has been specially developed in the United States.[6] Courts have enforced specific performance of contracts to furnish gas, water or other necessary materials to a manufacturing establishment where the thing contracted for is not immediately available from other sources and a breach of the contract would stop the operations of the plaintiff's establishment. The same principle is applied where the goods are such that they can be supplied by no one except the defendant. A contract to furnish stone from a certain quarry for building was enforced where the stone was of a peculiar colour and the building was

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1. Vide Sec. 12, App. I.
2. *Law of Specific Relief*, 2nd Ed., p. 129.
3. *Ibid*, p. 130.
4. *Cf.* Pusey *v.* Pusey, (1684) 1 Vern. 273; Flacke *v.* Cray, (1859) 4 Drew 65.
5. Wood *v.* Rowcliffe, (1844) 3 Hare 304.
6. 49 Am. Juris., Secs. 126, 128, pp. 149, 152.

partially constructed from the stone already furnished. Even a contract for the delivery of a motion-picture film to an exhibitor has been enforced.

"In view of the vast economic developments which are taking place in India, we would recommend the adoption of this exception from the American law."

In the notes on Cl. 9 (old Sec. 12) it has been stated : Clause (*a*) for existing (i.e.old) Sec. 12 which refers to an obligation arising out of a trust is now being incorporated in Cl. 10 (now Sec. 10) with the other provision relating to trusts now to be found in (old) Sec. 21 (*c*).

Clause (*d*) of the existing (old) Sec. 12 seems to sanction the doubtful doctrine that insolvency of the defendant is a ground for decreeing specific performance. It is totally inconsistent with the principle followed in the grant of specific relief, namely, the non-existence or inadequacy of the remedy at law, but not merely the impracticability of enforcing such a remedy. It is, therefore, being omitted.

The Explanation is being amended so as to specify the exceptional cases where courts in India and in England grant specific performance of contracts to transfer moveable property on the presumption that damages would not in such cases give adequate relief. The exception as respects goods not easily obtainable in the market has been engrafted from American law where courts have enforced specific performance of contracts to furnish gas, water or other necessary materials to a manufacturing establishment where the thing contracted for is not immediately available from other sources and a breach of contract would stop the operations of the plaintiff's establishment.

3. Clause 10.—The principle embodied in Sec. 12 of the old Act have been incorporated in Sec. 10 of the Specific Relief Act of 1963. The provision relating to trusts found in (old) Sec. 12 (*a*) and (old) Sec. 21 (*e*) are being grouped together. (Old) Sec. 12 (*a*) is out of place as that section relates to executory contracts whereas in the case of an obligation arising out of a trust it arises out of an executed contract.

This section provides that in cases where there exists no standard for the ascertainment of damages for the non-performance of the act agreed to be done or where compensation in money would give no adequate relief to the aggrieved party for the non-performance of the act, the Court may. in its discretion, enforce the specific performance of the contract.

The Explanation to this section lays down a rule of presumption and enacts that in cases of breach of contract to transfer of moveable or immoveable property, where the goods or articles are of special value or interest to the plaintiff or are such which are rare curios and are not easily obtainable from the market or whether the property is held by the defendant as the agent or trustee of the plaintiff—the Court shall presume that the breach of such contracts cannot be adequately compensated in terms of money and may, in its discretion, enforce specific performance of such contracts. But this presumption is rebuttable and is open to challenge.

4. Applicability.—This section applies to completed contracts which should be valid in law and capable of enforcement. It does not apply to

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1. M.L. Davender Singh *v.* Syed Khaja, A.I.R. 1973 S.C. 2457 at p. 2459

mere promises which are not equivalent to valid and complete contracts. Iqbal Ahmed, J., while dealing with this question in *Ambika Prasad* v. *Mst. Naziran Bibi*,[1] said :

> "But it is contended that as the agreement was valid in law the plaintiff was entitled to a decree for specific performance of a contract of sale on the basis of that agreement. There are two answers to this contention. In the first place a decree for specific performance of a contract of sale can be passed only on proof of fact that there was a completed agreement of sale between the plaintiff and the defendant. In the case before me it is not alleged that there was any completed agreement of sale between the plaintiff and defendant. All that is relied upon is promise by defendant 2 to sell his share to the plaintiff if and when defendant decided to transfer his share. Such a promise is not equivalent to a completed agreement of sale. A decree for specific performance of the nature prayed for by the plaintiff-appellant could not therefore be passed in his favour."

Where there is an agreement to transfer certain properties, moveable or immoveable, but subject to sanction by the sanctioning authority, such an agreement is not a completed contract but an inchoate agreement which cannot be specifically enforced under this section. In *Ram Ditta* v. *Dhaniram*,[2] the Court said : "Having regard to the statutory prohibition of exchanges (without the previous sanction of the Mandi Darbar) any agreement between the parties as to exchange of their land, would be only an inchoate agreement." The Court then discussed the rulings cited before it,[3] and then said, "It is obvious from the above that till such time as the contract is sanctioned by the Court, it is an inchoate contract. In *Tarini Kumar* v. *Srishchandra*,[4] it was held by a Division Bench of that High Court that a decree for specific performance of a contract to sell would not be granted in favour of the person contracting with the guardian of the minor proprietor, who entered into the contract without the previous sanction of the Court. It is, therefore, clear that, in the absence of the previous sanction of the Darbar, the transaction in question would not amount to a completed agreement for exchange." The Court held that such an agreement could not be specifically enforced.[5]

In *P. S. Durai Kannoo* v. *M. Saravana Chettiar*,[6] the terms of the auction impose condition laid down by the mortgagee himself for the sale of the property—conditions to ensure prompt payment of the purchase price and also forfeiture of money in case there was no prompt payment. Those conditions are for the benefit of the mortgagor as well as for the mortgagee. Having regard to the amplitude of the powers of a mortgagee in whom a power of sale is vested, he may no doubt have power to extend time for payment by the purchaser or even enter into a fresh contract. But while doing so, he must act as a prudent man. If it appears that, to take advantage of a default by a purchaser, would result in a better price at a second sale of the property, he should not extend the time. An extension of time or variation of the contract of sale must be judged on the same touchstone of *bona fides* and prudence as the sale itself will be. In the present case, what are the

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1. A.I.R. 1939 All 64 at p. 66.
2. A.I.R. 1955 H.P. 23 at p. 24.
3. Ambika Prasad *v.* Mst. Naziran Bibi, A.I.R. 1939 All. 64 and Goberdhan Lal *v.* Sheo Narain, A.I.R. 1929 Pat. 202.
4. A.I.R. 1925 Cal. 1160.
5. Ram Ditta *v.* Dhani Ram, A.I.R. 1955 H.P. 23 at pp. 23, 24.
6. A.I.R. 1963 Mad. 468.

circumstances ? That the property did not fetch a proper price at the auction is evident. The mortgagee knew it. But, there having been no fraud or other invalidating circumstance, the mortgagor could not successfully challenge the slae. But an opportunity presented itself for annulling the sale by reason of the default of the purchaser. It was also evident that a fresh sale even by private treaty would fetch a better price. It was the duty of the mortgagee under the circumstances to consider whether he would be justified in extending the time to the appellant. What would he have done, had it been his own property ? The mortgagee was under no legal obligation to extend the time; his own interests even did not demand it as the mortgagor was co-operating by bringing him a better offer. When under those circumstances the mortgagee decided to refuse to extend the time for payment he was doing what was fair and just and what any prudent man would have done. He was fair to the auction-purchaser also; he did not take advantage of the forfeiture clause contained in the terms of the auction notice. The claim of the appellant for specific performance will, therefore, have to fail. In this view, the would not be entitled even to the relief by way of damages.[1]

The term "hardship on the defendant" in Sec. 22 (2) (old) is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on English law clearly show this and the term hardship is used in the same sense as it is used in English law. It is very desirable that persons in the position of defendant 1 firm should carry out their contracts and should not be allowed lightly by courts to break their given word on the ground of mere technical pleas or imaginary hardship.[2]

Section 10 would apply mainly in the case of a purchaser. It does not come in case of a seller. It is not quite that sure when the sub-clause (*a*) speaks of property which is not an ordinary article of commerce, it did not contemplate an article manufactured or prepared at the instance or specification of a contracting party. But it really meant or spoke of certain rare things which could not be produced or manufactured even at the specification or at the behest of the party.[3]

5. Specific performance of contract.—"Specific performance consists in ordering a party to do the very act which he is under an obligation to do." "Obligation includes every duty enforceable by law. Consequently whenever a man finds himself under a liability to do or forbear from doing anything, he lies under an obligation. The liablility may spring out of either a contract or a tort. But an obligation to do as distinguished from an obligation to forbear is a positive duty generally imposed by contract. It is when one undertakes to do something that an obligation results which finds its solution in action; it is ordinarily by agreement that one becomes bound to perform acts in the law. This form of specific relief, therefore, may be briefly, if loosely, described as the specific performance of contract, and the granting of it constitutes a jurisdiction that is at once extensive, important and beneficent."[4] The specific performance, to put it in another form, is equitable relief given by the

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1. P.S. Duraikannoo *v.* M. Saravana Chettiar, A.I.R. 1963, Mad. 468 at pp. 470-71.
2. Pichai Moideen Rowther *v.* Chathurbuja Das Kushal Das and Sons, A.I.R. 1933 Mad. 736 at. p. 742.
3. Maheshwar & Co. Pvt. Ltd. *v.* Corporation of Calcutta, A.I.R. 1975 Cal. 165 at p. 169.
4. Dr. Banerji's *Tagore Law Lectures*, p. 95.

Court in cases of breach of contract in the form of a judgment that the defendant do actually perform the contract according to its terms and stipulations.[1]

In *Dr. Govinddas* v. *Smt. Shantibai*,[2] one Seth Goverdhandas purchased the property from Dagdoo. Goverdhandas had an express notice of the erroneous agreement to sell between Smt. Shantibai and Dagdoo. Shrimati Shantibai brought a suit for specific performance of the agreement. It was held that she was entitled to a decree.

Jainarain Ram Lundia v. *Surajmull Sagarmull*,[3] was a case in which an agreement was entered into between the plaintiff and four other persons who were entitled to 350 shares in a sugar mill and were also owners of a share in a partnership. The facts as gathered from the said judgment are these : One hundred out of these 350 shares belonged to one Gobardhandas and his brother Badri Prasad, another 150 shares belonged to Jainarain Ram and the other 100 shares belonged to Biseswarnath. The case of the plaintiff was that there was an agreement to sell these 350 shares by all these four persons who were entitled to the same. It was actually found that Badri Prasad who along with his brother Gobardhandas was entitled to 100 shares did not join the agreement at all. The suit for specific performance was instituted against all the four of them and even before the Trial Court the suit against Badri Prasad was withdrawn and was dismissed against him. The plaintiffs also gave up their claim against Gobardhandas, who was impleaded as defendant No. 1. Ultimately the question for consideration was, whether the plaintiffs were entitled to obtain a decree for specific performance, against the other two persons, namely, Jainarain Ram and Biseswarnath who had 250 shares belonging to them. An argument was advanced before the Federal Court that the agreement was an incomplete one, since it was entered into for the purchase of the entirety of the 350 shares from all the four persons and since the plaintiffs had given up their claim against two defendants who owned 100 shares, the suit could not be decreed against the other two defendants for the sale of the other 250 shares. The Federal Court noticed the law in this behalf as stated in Halsbury's *Laws of England*, 2nd Ed., Vol. 7, p. 72 and as laid down by the courts in England in *Luke* v. *South Kensington Hotel Co.*[4] and *Naas* v. *Westminster Bank Ltd.*[5] and proceeded to state :

> "When parties enter into an agreement on the clear understanding that some other person should be a party to it, obviously no perfected contract is possible so long as this other person does not join the agreement. This would be the position in law apart from any rule of equity. The proposition laid down by Sir George Jessel goes much further than this. . .He speaks of two persons executing a deed on the faith that a third will do so and if this is known to the other party, equity will refuse to fasten any liability on the executing parties if the third party does not join in the act. It has been pointed out in the judgments of the various Law Lords who decided the case *Naas* v. *Westminster Bank Ltd.*,[6] that there is much that is indefinite and vague in the words of the learned Master of Rolls. The word 'faith' cannot be taken to refer to a mere subjective expectation or intention in the mind of a particular party. It must be a matter not of conjecture but of positive proof; and in order that a relief might be claimed in equity, it is necessary to prove that

1. Nelson 8, R.A.S. 12.
2. A.I.R. 1972 S.C. 1520 at p. 1521.
3. A.I.R. 1949 F.C. 211.
4. (1879) 11 Ch. D. 121 at p. 125.
5. 1940 A.C. 366.
6. 1940 A.C. 366 : (1940) 1 All E.R. 485.

substantial injustice would result if the deed is enforced unconditionally against the executing parties. Relief, therefore, could be given in those cases where the strict enforcement of law would lead to the executing parties being saddled with heavier liability than they otherwise would incur or would make the transaction substantially different from what it would have been if all the parties had joined.

Having made the above observations with regard to the legal position, the Federal Court proceeded to deal with the case before it, inthe following terms :

"Whether Gobardhandas thought rightly or wrongly that he had authority to dispose of the shares standing in the name of his brother as well, is not material for our present purpose. All that we can say is this that there is nothing in this letter which would show that it was the intention of the signatories that they would sell their shares and interests to the plaintiffs if and only if Badri Prasad sold his. Badri Prasad was not in the picture at all and although Gobardhandas pparently agreed to sell his shares as well, there is no evidence of any understanding, either cxp ess or implied, even amongst the defendants *inter se* that unless Badri Prasad actually came and joined the agreement, the contract would not be perfect or complete. None of the defendants or even their solicitor was examined as a witness in this case and no questions on this poiont were put to the plaintiff's witnesses during their cross-examiuation. The letter of 28th December, 1940, if it shows anything shows unmistakably that the vendors were anxious to dispose of their shares by any means possible and they did not care whether the shares were purchased by Khaitans or anybody else. The letter of both the appellants written to Himatsinga on 5th January, 1941, practically clinches the matter and proves conclusively that the promise to sell their shares and interests in the business was not in any way dependent upon any body else's joining with them in the transaction. Thus there was no intention on the part of the defendants that the contract would not be binding unless Badri Prasad became a party to it and there has been no suggestion made on behalf of the appellants either here or in the courts below that any injustice would be done to them if they are compelled to perform the agreement which they made."

The principles deducible from the above decisions can be now stated as follows :

1. Where a document is proposed to be executed by several parties and only some of them execute and others do not, whether the document is binding on those at least who have executed it depends upon the intention of the parties, and

2. The intention that the document would be incomplete and would not be enforceable against the executing parties has to be established by the executing parties by showing that they would not have executed the agreement if the other party had not joined in the agreement or that they did not intend to be bound by the agreement until and unless the others who were proposed to be parties to the agreement joined in the execution.

The Federal Court held in the above noted case that unless the defendants who executed the agreement could show that there was no intention on

their part to be bound by that agreement without the others joining the same, the agreement could be enforced as against them.

In *Sethu Parvathy Ammal* v. *Bajji K. Srinivasan Chettiar*,[1] the plaintiff instituted a suit for specific performance of a contracl to sell cerain immoveable property under an agreement. That agreement was executed by the first defendant on behalf of himself and as a guaidian of his minor children defendants 2 to 4. The agreement mentioned the name of the mother of the first defendant as one of the parties to the agreement. But the agreement itself did not indicate what exactly was the nature of the interest the mother of the first defendant had in the suit property. The agreement proceeded to state that the property belonged to the first defendant absolutely having been allotted to his share in a partition between him and his brothers. It was, however, found that the mother had a charge over the property for maintenance payable by the first defendant. It was held that though the mother of the first defendant did not execute the agreement, the agreement was not such that it was incapaple of being enforced even against defendants 1 to 4 who had executed the document. The plaintiff was entitled to decree for specific performance against defendants in the suit in respect of property proposed to be conveyed by defendants 1 to 4 in favour of the plaintiff herein.[2]

In cases of specific performance of a contract the rights of the parties are governed by the principles of equity and of law. In enforcing specific performance of a contract, courts should see not only to the letter but to the real substance behind the agreement in order to ascertain the real intentions of the parties. Viscount Haldane in *Jamshed Khodaram Irani* v. *Burjorji Dhanjibhai*,[3] says :

> "Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v. *Napper*,[4] which was adopted by Knight Bruce, L. J., in *Roberts* v. *Berry*.[5] The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v. *Thomas*,[6] and by the House of Lords in the recent case of *Stickney* v. *Keeble*.[7] Their Lordships are of opinion that this is the doctrine which the section of the Indian statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley* v. *Thomas*[8] :
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> "The construction is, and must be, in equity the same as in a court of law. A court of equity will indeed relieve against, and enforce,

1. A. I. R. 1972 Mad. 222.
2. Sethu Parvathy Ammal *v.* Bajji K. Srinivasan Chettiar, A.I.R. 1972 Mad. 222 at pp. 226-27.
3. A. I. R. 1915 P. C. 83 at pp. 84-85.
4. (1802) 2 Sch. & Lef. 682.
5. (1853) 3 De G. M. &. G. 284 : 22 L. J. Ch. 398 : 98 R. R. 139 : 20 L. T. (O. S.) 215.
6. (1867) 3 Ch. 61 : 6 W. R. 66 : 17 L. T. 422.
7. (1915) A. C. 386.
8. (1867) 3 Ch. 61 : 6 W. R. 66 : 17 L. T. 422.

specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry*),[1] there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds .....mentioned by Lord Justice Turner, "express stipulation" requires no comment. The "nature of property" is illustrated by the case of reversions, mines, or trades. The "surrounding circumstances" must depend on the facts of each particular case.'

"Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time-limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time-limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the plaintiff as regards the time-limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

"But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such case, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. In *Tilley* v. *Thomas*,[2] where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

"Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in

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1. (1853) 3 De G.M. & G. 284 : 22 L.J. Ch. 398 : 98 R. R. 139 : 20 L.T. (O.S.) 215.
2. (1867) 3 Ch. 61 : 6 W. R. 66 : 17 L. T. 422.

> the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold was such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the plaintiff bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so."

It is now well settled by the Judicial Committee in the case reported as *Jamshed Khodaram* v. *Burjorji Dhanjibhai*,[1] that equity which governs the rights of the parties in cases of specific performance of contracts to sell real estates looks, not at the letter but at the substance of the agreement, in order to ascertain whether the parties, notwithstanding that they named a specific time whhin which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. This doctrine is in full accord with what has been formulated by Lord Cairns in *Tilley* v. *Thomas*,[2] and by the House of Lords in *Stickney* v. *Keeble No. I.*[3] The evidence in the present case shows that the documents could not be executed and registered on the 6th owing to the default of the defendant and that on the 17th, when the plaintiffs were quite ready to have the contract completed, the defendant left the station without assigning any valid reason for the non-performance of his part of the contract.

There is no doubt that Sec. 20 (old) has nothing to do with alternative contracts, which stand on an entirely different footing from contracts in which a sum is named as the amount to be paid in case of a breach. Alternative contracts are as fully performed by the payment of the money as by the doing of the act and therefore there is no gound for proceeding against a party having the election to compel the performance of the other alternative. But the question whether a contract is alternative or not is a question of construction, and consequently each case depends upon its own circumstances, though the guide is always the primary intention of the parties. The general rule of equity is that it a thing is agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. On the other hand, it is certainly open to parties entering into contracts to agree that in case of a breach of the contracts a fixed sum of money shall be paid by way of compensation. In the instant case it is clear from the evidence that the intention of the parties was that the contract should be specifically enforced. In the case of *Hukam Chand* v. *Nikka Singh*,[4] an agreement to sell executed by the vendor contained understandings to execute a deed of sale in favour of the vendees, to get it registered, receiving the balance of purchase money at the time of registration, to put the vendees into possession, and, on failure to do so, to pay them a certain sum of money as damages and to refund the earnest money. It was held that as there was no condition that the vendees should abandon their rights to specific performance and there was no understanding by them to accept a certain sum of money in lieu of their rights as purchasers, the contract could be specifically enforced.[5]

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1. A. I. R. 1915 P. C. 83 : I. L. R. 40 Bom. 83 : 43 I. A. 26 (P. C.).
2. (1867) 3 Ch. 61 : 17 L. T. 422 : 16 W. R. 166.
3. (1915) A. C. 386 : 84 L. J. Ch. 259 : 112 L. T. 664.
4. (1908) 15 P. R. 1908 : 27 P. W. R. 1908 : 97 P. L. R. 1908.
5. Sadiq Hussain *v.* Anup Singh, A. I. R. 1924 Lah. 151 at pp. 153-54.

The limited effect of Sec. 19 (old) was not long left in doubt, wide as are apparently its terms. In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit in which the Court had granted specific performance, so the power to give damages as an alternative to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible. In the present instance, their Lordships are disposing of a case in which the plaintiff had debarred himself from asking at the hearing for specific performance, and in such circumstances, notwithstanding Lord Cairns' Act, the result still was that with no award of damages—the Court could award none—the order would be one dismissing the suit with no reservation of any liberty to proceed at law for damages.[1] In other words, the plaintiff's rights in respect of the contract were at an end. It enabled every Division of the High Court to give both legal and equitable remedies, but it did not alter the construction or effect of a claim framed under Lord Cairns' Act,[2] nor the principles upon which the systems now combined were, before the Act, separately administered. Accordingly, an order dismissing an action for specific performance which before the Act would have been unqualified, remained after the Act a decree which excluded the possibility of legal relief. And here their Lordships would draw attention for convenience sake, to the definiteness with which that position is retained for India by Sec. 29 (old), Specific Relief Act.

Bearing in mind this statement of the existing operation of the English system at the time of the passing of the Specific Relief Act, their Lordships now proceed to an examination of the relevant provisions of that statute.

And, first, very notable is the fact that in the Act, the distinction between the two kinds of action is maintained, a distinction obvious in England where originally they had to be brought in different courts, but not necessarily called for, when, as in India, both legal and equitable relief may be obtained in one. The distinction, however, is clearly indicated in Sec. 24 (*c*) (old), which enacts that specific performance of a contract cannot be enforced in favour of a person who has already chosen his remedy and obtained satisfaction for the alleged breach of contract; and even more directly is it manifested in Sec. 29 (old) already referred to which enacts that the dismissal of a suit for specific performance of a contract.....shall bar the plaintiff's right to sue for compensation for the breach of such contract.

Although so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England[3] it seems invariably to have been recognized, and, on principle their Lordships think rightly, that the Indian and the English requirements in this matter are the same.[4] And with this fact in view, Sec. 19 (old) of the Act becomes in the present investigation all important.

Now the close correspondence of the terms of this section with those of Sec. 2 of Lord Cairns' Act, coupled with the presence in the Act of Sec. 24 (*c*) and Sec. 29 (old) already noted, indicating that the old distinction in case of

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1. *See* per Lord Selborne Hipgrave *v.* Case, (1885) 28 Ch. D. 356 : 54 L. J. Ch. 399 : 52 L. T. 242.
2. *Ibid*
3. Section 24 (*b*) is the nearest.
4. *See* e. g. Karsandas *v.* Chhotalal, A. I. R. 1924 Bom. 119 : I. L. R. 48 Bom. 259.

breach of contract between the equitable and the legal form of reamedy is still maintained and that the old conditions under which each could be asked for are being preserved, leaa their Lordships to the conclusion that, except as in the case provided for in the Explanation—as to which there is introduced an express divergence from Lord Cairns' Act as expounded in England[1] the section embodies the same principle as Lord Cairns' Act, and does not, any more than did the English Statute, enable the Court in a specific performance suit to award "compensation for its breach" where at the hearing the plaintiff has debarred himself by his own action from asking for a specific decree.[2]

In a specific performance of contract, the plaintiff is to prove that he wants to rely upon the contract and that for the performance of the contract, he made a demand for such performance by the defendant. Mere demand, for execution and registration of the lease made to the *durwan* of the defendant cannot in law be a demand from the defendant himself.[3]

The suit for specific performance can only be founded on a contract. If there is no contract the party cannot come to enforce that contract. The position of law cannot be doubted that a suit for specific performance must allege a concluded contract. Where the offer made by the defendant to sell the plot is a mere offer and cannot be termed as concluded agreement it cannot be enforced and it is not open to the Court to make out a new contract for the parties. A contract to be specifically enforced by the Court must, as a general rule, be mutual. That is, it must be capable of being enforced by either of the parties against other. The Specific Relief Act does not anywhere repudiate the doctrine of mutuality. To grant a decree for a plot other than the one contracted, is contrary to the very notion envisaged by the expression "specific performance of the contract". Such a decree cannot be sustained in law.[4]

6. Any contract.—Section. 2 (*b*), Contract Act, defines contract as an agreement enforceable by law. Section 10 of the Contract Act says that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void. Sections 11 to 30 of that Act deal with the questions of persons competent to contract, lawful consideration and object, and void contracts. The present Chapter dealing with specific performance of contracts presupposes that the agreement is between the parties competent to enter into it and is with their free consent and is founded upon consideration that is not unalwful. Contracts that are merely voidable are not excluded from the operation of the Chapter, but then the party entitled to avoid it, must treat it as a valid contract. The Legislature requires that there must always be a contract before the Court and it must be a complete contract to both.[5] Consequently it has been held that in an action for specific performance the plaintiff has necessarily to prove the existence of a concluded contract between himself and the defendant and also that he was ready and willing at all material dates to

Requisites of a contract.

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1. *See* Ferguson *v.* Wilson, (1867) 2 Ch. 77 15 W. R. 27.
2. Ardeshir H. Mama *v.* Flora Sassoon, A. I. R. 1928 P. C. 208 at pp. 217-18.
3. Manick Lal Seal *v.* K. P. Chowdhury, A. I. R. 1976 Cal. 115 at p. 117.
4. Narain Singh *v.* Dalip S8ngh, A. I. R. 1973 Raj. 45 at pp. 47-48 : 1972 W. L. N. 766.
5. Koylash Chunder Doss *v.* Tariney churn singhee I.L.R. 10 Cal. 588; Maya Ram *v.* Prag Dut, I. L. R. 4 All. 44.

perform his part of the contract.[1] As pointed out in *Abdullah Bey* v. *Tenenbaum*,[2] the onus about readiness and willingness in the absence of evidence to the contrary may be easily discharged. After the other side had repudiated the bargain, all that was necessary was that the plaintiff should be still ready and willing to carry it out.[3]

Plaintiff must prove (*i*) concluded contract and (*ii*) that on his part he was ever ready and willing to perform it.

7. Distinction between negotiation and concluded contract.—In a suit for specific performance it is of importance to distinguish between negotiation and contract and to ascertain what the contract is, when, how and by whom it was made and who the parties are who are bound by it.[4] Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape.[5] But the question whether what passed between the parties in a concrete case was a negotiation only or a concluded contract is often attended with difficulty particularly where there is much correspondence and the question is whether the correspondence evidences a complete contract or preliminary negotiation. There is a further complication introduced when there is reference to the drawing up of a formal document in future. The question in such cases always is, did they mean to contract by their correspondence or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound.[6] The question is primarily one of intention and whatever may be the difficulty in practice in finding it out, in theory the law on the point is well settled both by English and Indian decisions. If the material ingredients of the agreement are ascertained and if there is a distinct offer on one side and a distinct acceptance on the other, a contract arises notwithstanding that the parties may have recorded their intention that it will be put into a more formal shape by a solicitor. But, on other hand, if on the true construction of the correspondence and evidence it appears to have been the intention of the parties that they are not to be bound till the agreement has been put into a formal shape and approved by them, then parties ought not to be bound till that formal document has been executed.[7]

"Intention" is the test.

8. Parties agreeing to execute formal document subsequently.—When there is a concluded agreement but a document is to be executed embodying

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1. Sankhi Sha *v.* Maha Maya Prasad Singh, A. I. R. 1934 Pat. 518 at. p. 519 : 156 I. C. 588 : 15 Pat. L. T. 469.
2. A. I. R. 1934 P. C. 91 at p. 92 : 149 I. C. 816 (P. C.).
3. Shriram Rupram *v.* Madangopal Gowardhan, I. L. R. 30 Cal. 865 at p. 871 : 8 C. W. N. 25 (P. C.); Brijmohan Mathulal Marwadi *v.* Chandrabhagabai, A. I. R. 1939 Nag. 173 at p. 175 : 1939 N.L.J. 315.
4. Moulvi Mohammad Iqramal Haq *v.* Wilkie, 11 C. W. N. 916 : 4 A. L. J. 470 : 6 C. L. J. 682 : 2 M. L. T. 448 : 17 M. L. J. 454 (P. C.).
5. Harichand Mancharam *v.* Govind Lakshman, I. L. R. 47 Bom. 335 : 71 I C. 763 : 50 I. A. 25 : 28 C. W. N. 73 : 44 M. L. J. 608 : 37 C. L. J. 440 : 25 Bom. L R. 531 (P. C.) ; Bijoyakanta Lahiri *v.* Kailash Chandra, I L. R. 46 Cal. 771 at pp. 776-77.
6. Lymon *v.* Robinson, 14 Allen 254.
7. Koylash Chuander Doss *v.* Tariney Chunr singhee, I.L.R. 10 Cal. 588 (Ridgway *v.* Whartton, 6 H.L.C. 268 : 108 R.R. 88 : 27 L.J. Ch. 46 : 10 ER. 1287 : 5 W.R. 804 ; Rossitor *v.* Miller, L. R. 3 App. Cas. 1124 ; Bonnewell *v.* Jenkins, L. R. 8 Ch. D. 170; Crossley *v.* Maycock, L. R. 18 Eq. 180; Chinnack *v.* Marchioness Ely, 4 De. J. & S. 638 relied on.

its terms, the contents of the document have to be approved by both the parties before the document is executed, but merely from the point of view whether the document correctly and formally gives effect to the settled terms of the agreement, a reference to the pleader in this connexion does not alter the position.[1] The fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement.[2] Where an agreement for the sale of certain property contains the condition that the bargain paper in respect of the sale shall be made through a vakil, does not mean that it is a condition to which the bargain is subject but that it is only one of the terms of the contract.[3] It appears to be well settled by the authorities that if he documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.[4] It is essentially a question of intention between the parties.[5] Where by a written agreement the defendant had agreed with the plaintiff to take the lease of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract" and no other contract was ever entered into between the parties, it was held by Sir George Jessel, M. R., that there was no final agreement of which specific performance could be enforced against the defendant.[6] The principle underlying cases of this class was thus laid down by the Master of the Rolls : "I take it the principle is clear. If in the case of a proposed sale or lease of an estate two persons agree to all the terms and say 'we will have the terms put into form', then all the terms being put into writing and agreed to, there is contract. If two persons agree in writing that up to a certain point the terms shall be the terms of the contract, but that the minor terms shall be submitted to a solicitor and shall be such as are approved by him, then there is no contract, because all the terms have not been settled."

Determination as to whether there is concluded agreement.

In *Nyman* v. *Gubbey*,[7] Mukerji, J., delivered himself as follows : "It is well settled that the fact that the parties intended to embody the terms of their contract in a formal written agreement is strong

Nyman v. *Gubbey.*

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1. Bijoyakanta Lahiri v. Kailash Chandra, I. L. R. 46 Cal 771 : 52 I. C. 575 : 23 C. W. N. 563; Harichand Mancharam v. Govind Luxman Gokhale, 71 I. C. 763 at p. 766: 50 I. A. 25 : I. L. R. 47. Bom. 335 : A.I.R. 1923 P. C. 47
2. Harichand Mancharam *v.* Govind Luxman Gokhale, I. L. R. 47 Bom 335; 71 I. C. 763 : 50 I. A. 25 : 28 C. W. N. 73 : 44 M. L. J. 608 : 73 C. L. J. 440 : 25 Bom. L. R. 531 (P. C.) [Ridgway *v.* Wharton, 6 H. L. C. 268 : 108 R. R. 88 : 27 L. J. Ch. 46 : 10 E. R. 1287 : 5 W. R. 104 relied on; Von Hatzfeldt Wildenburg *v.* Alexander, (1912) 1 Ch. 284 : 81 N. J. Ch. 184 : 105 L. T. 434 dist.].
3. Harichand Mancharam *v.* Govind Luxman Gokhale, *supra.*
4. Von Hatzfeldt Wildenburg *v.* Alexander, *supra*; referred to in 71 I. C. 776 (P. C.) *supra.*
5. Harichand Mancharam *v.* Govind Luxman Gokhale, *supra;* Bijoyakanta Lahiri *v.* Kailash Chandra, I. L. R. 46 Cal. 771 at p. 782.
6. Winn *v.* Bull, (1878) 7 Ch. D. 29 : 26 W. R. 830 : 47 L. J. Ch. 139; *per* Farwell J., Caney *v.* Leith, 156 L. T. 483 : 53 T. L. R. 596 : (1937) 2 All E. R. 532; for full discussion, *see* Sanjivarao's *Contract Act* (1964 Ed.).
7. 20 C. W. N. 66 at p. 94 : 32 I. C. 35.

evidence that the negotiations prior to the drawing up of such writing are merely preliminary and not understood or intended to be binding. If it is definitely expressed and understood that there is to be no contract until the formal writing is executed, there is plainly no binding agreement formed until this provision is complied with. It is also true that if all the terms of the agreement have not been settled and it is understood that these unsettled terms are to be determined by the formal contract there is no binding obligation until the writing is executed. But if the oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the formal writing a binding obligation fixed on the parties unless it is understood and intended that such contract shall not become operative until reduced to writing."

9. Unless there is a legal contract there can be no specific performance.—As already stated where the law does not recognize a contract there can be no specific performance of it. A prospecting licence is only ancillary to the mining lease, it is merely a contract to execute the lease if and when the lessee requires it to be executed. A mere agreement, therefore, to grant a prospecting licence is not a contract which is enforceable in law, because the law does not recognize a contract to enter into a contract.[1] Where a promise to convey properties contained in a letter is not supported by any consideration no claim for specific performance can be founded on it.[2] So also, a mere promise by *A* to convey his share in a certain property as and when he thinks of doing so could not form the subject-matter of specific performance.[3] In an Allahabad case of a subsequent date, however, it has been held that an agreement to convey the property cannot be ignored as *nudum pactum* and as such void of any legal effect. The reciprocity between the parties is evidence of consideration. An agreement of this description is not without consideration and is capable of being enforced specifically.[4]

Agreement to convey.

See also notes under "Executory agreement", *infra*.

10. Oral contract.—An agreement may be oral or in writing and the provision of Sec. 10 applies to both kinds of contracts, i. e. oral and written. In *Gokul Chandra* v. *Haji Mohammad*,[5] Nasim Ali, J., delivering the judgment of the Division Bench of the Court said : "If, therefore, the law permits an oral agreement to lease, there is no reason why it cannot be enforced specifically. In *Baranashi Dassi* v. *Papat Velji Rajdeo*,[6] Woodroffe, J., observed as follows :

> "The next question is then whether there can be an oral agreement to lease. It has been so held, Sec. 107, Transfer of Property Act, refers to leases, that is, actual transfers of property and not to agreements to lease. Under the Registration Act, "lease" includes "agreement to lease". It is not necessary to discuss the law as to registration of written agreement for leases or written and unregistered leases, for the agreement before us was a verbal one. It is enough to say that Sec. 49, Registration Act, only provides that no unregistered and registrable document shall affect any immoveable property comprised therein

1. Rudra Das *v.* Kamakhya Narayan Singh, A. I. R. 1925 Pat. 259 at p. 274. : I. L. R. 3 Pat. 968 : 84 I. C. 178.
2. Balram *v.* Naktu, A.I.R. 1928 P.C. 75 at p. 76 : 108 I.C. 11 : 30 Bom. L. R. 821 : 54 M. L. J. 462 ; 47 C. L. J. 418 : 24 N. L. R. 59 : 27 L. W. 807.
3. Ambika Prasad *v.* Naziran Bibi, A. I. R. 1939 All. 64 at p. 66.
4. Ram Das *v.* Bindaban Ram, A. I. R. 1941 All. 113 at p. 120 : 129 I. C. 719 1931 A. L. J. 571.
5. A. I. R. 1938 Cal. 136 at pp. 138, 139, 140.
6. A. I. R. 1919 Cal. 710 : 63 I. C. 118 : 25 C. W. N. 220.

> or be received as evidence of any transaction affecting such property. What is precluded in either case is the affecting of the property. It by no means follows that an agreement to lease, that is, an obligation to transfer is a transaction affecting the property. However, I need not discuss what, having regard to the facts and to my finding that an oral agreement for a lease is valid, is unnecessary'.

"Sanderson, C. J., observed in the same case :

> 'This involved an implied agreement (oral) to do everything necessary to make the agreement effective in law, which would include a right in the plaintiff to sell for a formal lease.'

"In *Sanjib* v. *Santosh*,[1] this Court observed :

> 'Oral agreements for leases are allowed by the law. If any such concluded agreement.....is not followed by any more formal and effective transfer.....there would seem to be no difficulty.....in the way of applying the rule in *Walsh* v. *Lansdale*[2] and *Bibi Javahir Kumari* v. *Chatterput Singh*,[3] by granting a decree for specific performance of the original agreement.'

"There cannot be any doubt, therefore, that an oral agreement to lease could be enforced specifically before the introduction of (old) Sec. 27A, Specific Relief Act, by Act 20 of 1929.

"And then the learned Judge continued :

> 'A contract to lease may be oral or in writing. It may create a present demise or it may not. If an agreement to lease creates a present demise and operates as a lease, it is required to be in writing and registered.[4] If it does not create a present demise it is not required to be in writing or registered.'

"The learned Judge then concluded :

> 'If there is a valid oral agreement to lease, and it has not been followed by a formal or effective transfer, it can still be specifically enforced. But if the agreement to lease is not oral but is as indicated in (old) Sec. 27-A, in order to enable the lessor to claim specific performance, he must show that the contract on which he relies fulfils all the requirements of (old) Sec. 27-A, in my opinion, does not abrogate the right to the specific performance of an oral agreement which is given by (old) Sec. 12, Specific Relief Act'."

Any agreement between the parties, residents of Mandi, as to the exchange of their land will be only inchoate agreement in the absence of the previous sanction of the Darbar under Sec. 3 of Mandi Regulations No. 11 of 1975 and such an incomplete agreement of exchange cannot form the basis of a suit for specific performance; for this proposition of law reliance has been placed on *Ambika Prasad* v. *Mst. Naziran Bibi*,[5] *Gobardhan Lal* v. *Sheo Narayan Sahu*[6] and *Tarini Kumar Dutta* v. *Srish Chandra Das*.[7]

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1. A. I. R. 1922 Cal. 436 : 69 I. C. 877 : I. L. R. 49 Cal. 507 : 26 C. W. N. 329.
2. (1882) 21 Ch. D. 9 : 52 L. J. Ch. 2 : 46 L. T. 858 : 31 W. R. 109.
3. (1905) 2 C. L. J. 343.
4. *See* Sec. 107, Transfer of Property Act, 1882 and Sec. 17 and Sec. 2 (7), Registration Act.
5. A. I. R. 1939 All. 64.
6. A. I. R. 1929 Pat. 202.
7. A. I. R. 1925 Cal. 1160 ; Ram Dutta v. Dhani, A.I.R. 1955 H.P. 23 at pp. 23, 24.

11. Contract with penal or compensatory clause.—The general rule of equity that if a thing is agreed to be done the very thing ought to be done must apply even though there is a penalty annexed to secure its performance or a sum is named in the contract to be paid in case of the breach. It is no doubt true that it is open to the parties who are entering into a contract to stipulate that on failure to perform what has been agreed to be done a fixed sum shall be paid by way of compensation. The question which therefore arises in such a case is the interpretation of the contract. Where there is a contract containing a clause for payment of money in the event of non-performance the Court has to determine whether it is a contract stipulating that one certain act shall be done with a sum annexed to secure the performance of this very act or it is a contract stipulating that one of the two things shall be done at the election of the party who has to perform it, e.g. either performance or payment in money. Where the contract is of the latter type it is called an alternative contract and the provisions of Sec. 23 (Sec. 20, old) of the Specific Relief Act do not apply to it. They however apply to contract of the former type.[1]

12. Incomplete contract.—Unless a contract has been concluded or in other words unless a contract has been completed a suit for specific performance is not maintainable.[2] There is no concluded contract where the person to whom the proposal has been made refuses to accept it.[3] Similarly, a contract cannot be said to have been completed where the proposer withdraws the offer before it has been accepted.[4] So also, where the correspondence discloses that the contract has not been concluded and that the plaintiff, up to the conclusion of the negotiations has been still trying for terms more favourable to himself, no suit for specific performance can be maintained by the plaintiff.[5] For cases in which the contract remains unconcluded for want of drawing up of a formal document, *see* notes under the heading "Any contract", at page 163, *supra*.

13. Contingent contract.—A contingent contract can be said to be concluded only on the happening of the contingency in question. Therefore in the case of such a contract unless the contingency has happened no suit for specific performance can lie.[6] With regard to this last point, that no specific performance could be ordered of an agreement to execute a lease at a future date, it is sufficient to cite the case of *Brilliant* v. *Michaels*,[7] in which it was held that a contract for a lease was enforceable notwithstanding that the commencement of the term was expressed by reference to the happening of a contingency which was at the time uncertain, provided that at the time the contract was sought to be enforced the contingency had occurred.

Such contract can be enforced after the happening of contingency.

The entire law with regard to this point has been very fully dealt with in *New Mofussil Co. Ltd.* v. *Shankerlal Narayandas*.[8] It was pointed out in this case, after an exhaustive review of the authorities, that in a contract where

1. Narayan Nagarao *v.* Amrit Hari Bhau, A. I. R. 1957 Bom. 241 at p. 242.
2. Fry on *Specific Performance*, 6th Ed., p. 128; Chinnock *v.* Marchioness of Ely, 4 De J. & S. 638; Koylash Chandra *v.* Tarincy Churn, I. L. R. 10 Cal. 588.
3. Hyde *v.* Wrench, 3 Beav. 334.
4. Thombury *v.* Bevill, 1 Y. & C. C. C. 584.
5. Harvey *v.* Perry, (1953) 1 S. C. R. 233 at p. 243 of Canada, *per* Estley, J.
6. Kalidassi *v.* Nobo Kumari, 36 I. C. 655 : 23 C. L. J. 606 : 20 C. W. N. 921 ; Narain *v.* Akhoy, I. L. R. 12 Cal. 153 ; Sorbesh Chandra *v.* Khetrapal, 14 C. W. N. 451 : 11 C. L. J. 345 [(1945) All E. R. 121 and A. I. R. 1941 Bom. 247 considered].
7. (1945) 1 All E.R. 121.
8. 43 Bom. L.R. 293 : A.I.R. 1941 Bom. 247 : I.L.R. (1941) Bom. 361 : 196 I.C. 146.

it was part of the bargain that a written contract would be drawn up and executed later, a distinction had to be drawn between (*i*) cases where there was a completed agreement at the time when the bargain was made, although the bargain contained a clause expressing an intention or the desire on the part of the parties as to the manner in which the transaction already agreed upon was to be carried through where the essential matters to be incorporated into the agreement had been agreed upon, which, however, it was intended to incorporate in a formal document to be later executed, and (*ii*) agreements where it was a condition or term of the bargain itself, that it was to be subject to a document being further drawn up, agreed to and executed by the parties, to which the principle in *Coope* v. *Ridout*[1] applied, where it was clear that it was an essential condition of the bargain made between the parties that the agreement was to be subject to, and dependent upon, a final agreement being drawn up and executed; where, therefore, until the final agreement was formally executed there was no concluded agreement intended to be binding on the parties, according to the very terms of the bargain. Although the Privy Council have reversed the actual decision in *Shankerlal Narayandas* v. *New Mofussil Co. Ltd.*,[2] the legal position has been affirmed, and in fact stated in a manner even more favourable to the plaintiff in the present case. It is clear that in the present case all the essential terms of the lease had been agreed upon. The evidence of Mr. Tikamdas shows that it was agreed that a lease similar to the draft lease referred to in Ex. 8 was to be drawn up, incorporating the terms in that draft, with the necessary modifications, required by the terms stated in Ex. 8. The period of the lease was stated in Cl., the rent and commencement of the lease in Cl. 2 and other essential terms were stated in Cls. 4, 5, 6 and 8 of Ex. 8. It is quite clear that it was not a term of the bargain agreed upon in Ex. 8, that the agreement was to be conditional upon the execution of any further document. It is clear that the document Ex.8 contains the complete contract, setting out all the terms thereof, which, it was intended, was to be acted upon as a concluded contract. The Privy Council's decision in *Shankerlal Narayandas* v. *New Mofussil Co. Ltd.*,[3] goes much further than the decision of the Bombay High Court in the same case to support the plaintiff's contention here.[4] After a contract for the sale of certain houses was completely made, the parties entered into a verbal agreement whereby the vendors who were Hindu widows were to apply for letters of administration and obtain the sanction of the Court to the intended alienation under Sec. 90 of the Probate and Administration Act. On the application being made, the Court granted Letters of Administration but the Court declined to sanction the sale at the agreed price. Is sanctioned a sale, however, at a higher price to some other persons who then purchased the property with notice of the contract for sale. Thereupon the intending purchasers brought a suit for specific performance of the contract and in the alternative for damages for breach thereof. It was held that by subsequent agreement of the parties the original contract was transformed into a contingent one dependent upon the consent of the Court being obtained to the sale and as the contingency had not happened the plaintiffs were not entitled to specific performance, nor to damages for breach of contract since there had been no breach of the modified contract.[5] As held in the above cited case where the contingency does not happen it is

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1. (1921) 1 Ch. 291 : 90 L. J. Ch. 61 : 124 L.T. 409.
2. A.I.R. 1946 P.C. 97 : 224 I.C. 598 (P.C.).
3. *Ibid.*
4. L. C. Sitlani *v.* Viroosing, A. I. R. 1947 Sind 6 at pp. 10, 11, 12.
5. Kalidassi *v.* Nobo Kumari, 36 I. C. 655

immaterial that the third party entering into contract had notice of the previous contract.[1]

14. Lease sanctioned by Commissioner of ward's property is binding even if final document not sanctioned.—Under Sec. 15, Bengal Court of Wards Act, power is given to the Commissioner to sanction or not a lease of the property of the ward. Where in a case of a lease of the property of the ward it is affirmatively established that the transaction in all its essential particulars has obtained the sanction of the Commissioner and when it is requistite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. In administrative and departmental action it must necessarily be the case that the formal details may have to be entered upon in order to carry it into practical effect and put into legal shape the arrangement to which sanction was exhibited.[2]

15. Agreement dependent upon assent of another can be enforced only after the assent has been obtained.—When the agreement or contract is dependent upon the promisor obtaining the assent of another to the arrangement proposed, the promisee is not entitled to sue for specific performance of the agreement as long as the assent is not obtained. Section 53-A of the Transfer of Property Act would not apply to such a case.[3]

Now it appears it is the case for the respondents that the agreement cannot be enforced for it is a contingent contract dependent upon the acts of others or it is a contract at present impossible of performance. So far as it is a contract dependent upon the acts of others for its prformance it is argued there must be taken to be an implied term that the *zamindar* will sell the land when his joint owners agree to partition and give him the 800 acres adjoining the land of the appellants. This argument is borne out by the words of the argeement itself :

> "I shall get my land (sold hereby) measured out separately from the other shareholders in the land and shall get the 800 acres cut out as a separate piece and hand over the same to the purchaser so that he shall have the said land adjoining and bordering on his own land."

Looked at in this way the contract is dependent on a contingency which has not yet happened, the allocation to him by agreement with his joint owners or by an order of the Court of his 800 acres. The suit is, as is contended in the written statement, premature and as yet unenforceable. Under Sec. 21 (old), Specific Relief Act, specific performance cannot be granted.[4]

16. Contract subject to conditions.—In *Cleadon Trust Ltd.* v. *Davies*,[5] the question arose whether specific performance could be decreed where a contract for sale of building sites were subject to certain building restrictions. In this case the vendors agreed to sell to *B* a piece of land for the purpose of building flats. The contract also contained an option of purchase over another piece of land. Both pieces of land were subject to certain building restrictions. Clause 5 of the contract provided that it was conditional upon the vendors obtaining

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1. Kalidassi v. Nobo Kumari, 36 I. C. 655; Shendaparshad *v.* Sikandar, 34 I. C. 461 : 12 N. L. R. 69.
2. Rudra Das *v.* Kamakhya Narain Singh, I. L. R. 3 Pat. 968 : 84 I. C. 178 : A. I. R. 1925 Pat. 259.
3. Kuchwar Lime & Stone Co., Ltd. *v.* Secretary of State, A.I.R. 1936 Pat. 374 at p. 376 : I.L.R. 15 Pat. 460 : 163 I.C. 50 : 17 Pat. L.T. 217 : 1936 Pat. W. N. 252.
4. Kirpal Das Jivraj Mal *v.* Manager, Encumbered Estates, A. I. R. 1936 Sind 26 at pp. 27-28.
5. C. A. (1940) 1 Ch. 940 : 56 T. L. R. 1003 : 109 L. J. (Ch.) 471 : (1910) 3 All E. R. 648.

a licence fom the persons entitled to the benefits of the restrictions releasing the covenant and permitting the purchaser to erect flats on the sites. One year after the first contract the purchaser exercised his option to purchase the second piece of land. A few days thereafter the Town Planning Authorities decided that the sites should be kept as open spaces. The vendors thereupon informed the purchaser that Cl. 5 of the contract was no longer applicable. The purchaser refused to complete the purchase. Judgment was given to the vendors in their suit for specific performance.

17. "Doctrine of frustration"—What it is ?—When the parties have entered into an agreement, unforeseen contingencies might occur which prevent the attainment of the object and the fulfilment of the purpose, the parties had in mind. The question is whether this discharges them from further liability. The law is that when a man enters into an agreement to do certain thing absolutely. he is bound to perform the contracts under all circumstances and if any unforeseen contingencies arise, which make the performance by him impossible he cannot escape liability for damages by proof as events turn out, performance is futile or even impossible. The reason is that a party to a contract can always guard himself against unforeseen circumstances orcontingencies by clear and express stipulation but if he voluntarily with his eyes open undertakes an unconditional and absolute obligation he cannot be heard to say that unforeseen events, that turned out subsequently made it impossible to carry out the contract but if he is unable to perform the contract for no fault of his he is excused for non-performance and the contract is discharged. The doctrine of frustration is the rule evolved by courts of law to mitigate the rigour and lessen the pinch of the rule of absolute contracts. In *Denny, Mott and Dickson Limited* v. *James B. Fraser Co. Ltd.*,[1] the rule has been specifically stated to mean that if further fulfilment of the contract is brought to an abrupt end by some irresistible cause for which neither party was responsible the contract shall terminate and the parties are discharged. Instances may be cited to illustrate the rule, for example where the subject-matter of the contract is physically destroyed before performance falls due[2], where the subsequent change in law renders the performance of a contract illegal. These are the typical illustrations of the operation of the doctrine of frustration. What the courts have been attempting to lay down is that where some supervening catastrophe happens for which neither party is responsible as a result of which the subject-matter is destroyed and the parties are committed to a situation which is basically different from the one which was in contemplation of the parties, then the contract is forthwith discharged.[3]

Here it must be noticed that mere hardship or inconvenience to parties is not sufficient to justify discharge. There must be as well such a change in the significance of the obligations that the thing undertaken would, if performed, be a different thing from that contracted for.[4] Two illustrations will suffice to explain the catastrophic effects on the contracts which brought about significant

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1. 1944 A. C. 265 at pp. 272, 274 : (1954) 1 All E. R. 678 at pp. 681, 683.
2. Taylor *v.* Coldwell, (1863) 3 B. & S. 826.
3. Parkinson (Sir Lindlay) & Co. *v.* Works and Public Building Commissioners, (1949) 2 K.B. 632 at p. 663 : (1950) 1 All E. R. 208 at p. 227, *per* Asquith, L. J.; Crickleworth Property and Investment Trust Limited *v.* Leighton's Investment Trust Ltd., (1945) A. C. 221 at p. 228: (1915) 1 All E. R. 252 at p. 255, *per* Lord Simon; Davis Contractors, Ltd. *v.* Farham U.D.C., (1956) A.C. 696 at pp. 728 and 739, *per* Lord Radcliffe.
4. Davis Contractors Ltd. *v.* Farham U. D. C., (1956) A. C. 696 at p. 729, *per* Lord Radcliffe.

changes in the nature of basic obligations of the parties. In *Krell* v. *Henry*,[1] the plaintiff had agreed to let out a room to the defendant for the purpose of viewing the Coronation procession of Edward VII which event never occurred. On an action brought by the plaintiff for the breach of the contract, it was held that the cancellation of the Coronation procession due to illness of the King discharged the parties from all contractual obligations. The same effect was produced in the case illustrated by *Tatam Ltd.* v. *Gamboa*,[2] where the facts were these : In 1937 when the Civil War in Spain was going on in full fury a ship was chartered by the plaintiff to the Republican Government for aperiod of 30 years, from 1st July, 1937, for express purpose of evacuating civilians from the North Spain ports toFrench Bay ports. The hire was at the rate of £ 250 a day until actual delivery of the ship. This rate was about three times higher than that prevailing in the market for equivalent ships not trading with Spanish ports. After a successful voyage the ship was seized by the Nationalists on 14th July, 1937 and was detained up to 7th September, 1937. It was then released and redelivered ultimately to the plaintiffs on 11th September, 1937. The hire had been paid in advance up to 31st July, but the Republican Government refused to pay for the period from 1st August to 11th September, on the ground that the common venture of the parties had been frustrated by the seizure of the ship. Goddard, J., held that the seizure had destroyed the very foundation of the contract and that Republican Government was not liable. He said: "If the foundation of the contract goes, either by the destruction of the subject-matter by reason of such long interruption or delay that the performance is really in effect that of a different contract and the parties have not provided what in that event is to happen the performance of the contract is to be regarded as frustrated."

18. Various theories considered.—There are various theories in the field which , according to the jurists of note, provide the basis of the doctrine of frustration. But only two of them have received judicial support and recognition and it is necessary to examine them in some details. The most important theory that has drawn the continued attention of the courts is the theory of implied term. This was the theory most commonly favoured in the past by courts. The theory of implied term can be fully stated in the following words : "If it must necessarily be presumed that both parties would have regarded themselves as totally discharged from further liability should performance be prevented or stultified by the events or, by the change of circumstances which has in fact occurred then and tacit condition to that effect is read into the contract."[3] Lord Loreburn in *F.A. Tamplin S.S. Co. Ltd. v. Anglo-Mexican Petroleum Product & Co. Ltd.*,[4] stated the principle of the implied term in the following words: "No court has an absolving power but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted...." Where the altered conditions are such that had they thought of them , they would have taken their chance of them, or such that as sensible men they would have said, "If that happens, it is all over between us." Another current theory is that the Court imposes just and reasonable solutions where unexpected contingencies happen, and which the parties could not foresee and did not provide for such contingencies in their contract. Thus, if in the opinion of the Judge, the happening of the unexpected event brought about a situation which was basically inconsistent with the further

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1. (1903 K. B. 740.
2. (1939) 1 K. B. 132 : (1931) 3 All E.R. 135.
3. Cheshire and Fifoot, *Law of Contract*, (5th Ed.), p. 464.
4. (1916) 2 A. C. 397 at p. 404.

prosecution of the common venture of the parties to the contract it should grant proper relief to them. For if in such contingencies the contract is insisted upon and enforced they would be bound to a contract that they did not bargain for. Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.*,[1] stressed the circumstances in which the doctrine of frustration operates. He says that the doctrine of frustration operates, "irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device by which the rules as to absolute contracts are reconciled with a special excep, tion which justice demands." Lord Wright in *Denny, Mott and Dickson, Ltd. v. Fraser (Fames) & Co. Ltd.*,[2] expressed his view on the doctrine of frustration in the following words: "Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, Court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are on the one hand the terms and construction of the contract read in the light of the then existing circumstances and on the other hand the events which have occurred. It is the Court which has to decide what is the true position between the parties", and then again, "The event is something which happens in the world of fact and has to be found as a fact by the Judge. The effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed experienced minds'. In the opinion of Lord Wright the doctrine of frustration has been invented by the Court to get over and supplement the defects of the actual contract. In other words, the Court supplements its own contracts in order to do justice between the parties. Here it must be stated that the theory of implied term played a very valuable part in the evolution and development of the doctrine of frustration in the past. For more than half a century it held the field and was considered indispensable for the development of this branch of law. It had served its historical purpose very admirably in the past. But then there were serious objections to the theory and in the modern context it is no longer regarded as an adequate explanation of the doctrine of frustration." Dealing with the implied term theory and its adequacy in explaining the doctrine of frustration in all its implications Cheshire and Fifoot in *The Law of Contracts*[3] observed : "The doctrine of frustration is required because the parties have failed to provide for an unforeseen contingency. If, then, the theory is accepted that the Judge fills this gap by inferring what the parties would have provided had their minds been directed to the contingency, the nebulous ground upon which he must base his reasoning is only too painfully apparent. An impossible feat of speculation is demanded of him. He is expected to infer the intention of the parties not from what they have said, but from what they have omitted to say, a task that has been described by a learned writer as 'preposterous'.[4] The hypothesis becomes even more fanciful when it is realized that the theory assumes 'not merely the existence of something unsaid but unsaid by each of the parties to the contract and the position becomes still further involved, if, as generally happens, one of the parties at the hearing of the case, repudiates the suggested interpretation of his silence. The Judge, indeed, may dictate what each party should have said, but on such scanty materials he can scarcely dogmatize upon what each would have said." But there is something of

1. (1926) A. C. 497 at p. 510.
2. (1944) A. C. 265 at pp. 274 and 275; (1944) 1 All E. R. 678. at p. 683.
3. 5th Ed. at p. 466.
4. J.J. Gow., 3 International and Comparative Law Quarterly, p. 303.

a logical difficulty in seeing how the parties could even impliedly have provided for something which *ex hypothesis* they neither expected nor foresaw."

19. Executory agreement.—An action for specific performance is appropriate only to the enforcement of obligation of an executory as distinguished from an executed contract. For this purpose an executory contract is an agreement which is not intended between the parties to be the final instrument regulating their mutual relations under their contract; an executed contract, on the contrary, is a contract in which all has been already done to settle finally the relative postition of the parties.[1] Later in the same book instances are given of "kindred but distinct remedies," i. e. remedies which do not fall within the purview of "specific performance," and the opinion is expressed that an action for the delivery of a specific chattel, if the right to delivery flowed from contract, differs from an action for specific performance, since it is based on an allegation not that a contract to deliver has not been performed but that the chattel is the property of the plaintiff and is being wrongfully detained by the defendant.[2]

There may no doubt be provisions of the contract which from their nature or from the terms of the contract, survive after completions.[3]

See also notes under the heading "Any contract" at page 109, *supra*.

20. Title when passes.—So long as the agreement remains as an executory contract or even when there is a decree for specific performance the title does not pass to the purchaser, because such a decree merely declares the rights of the decree-holder; title passes to the decree-holder only when the Court executes the sale-deed on behalf of the defendant. The title does not relate back to the date of the agreement to sell.[4]

21. Specific terms in contract.—Where by the terms of the mortgage-deed the mortgagee was entitled to have the deficiency in the mortgage land made good from other lands of the mortgagor and no specific *khasra* numbers were mentioned in the original mortgage-deed it was held that specification of land for making good the deficiency is not essential for the maintenance of the suit for specific performance. The contract between the parties was that the deficiency was to be made in a specified manner and a suit for the performance of the contract in that manner is a suit for specific performance.[5]

22. Uncertain contract.—Section 29, Contract Actl, lays down that agreements, the meaning of which is not certain or capable of being made certain are void. Therefore it has been repeatedly held that specific performance of a contract, the terms of which are not certain cannot be granted.[6] Under the agreement the vendor had to make out such a title "to the satisfaction of the purchaser's attorneys". The legal effect of this stipulation has been considered before in English and Indian cases. Davar, J. in *Treacher Co. Ltd.* v. *Mahomedally Adamji Peerbhoy*,[7] came to the conclusion that in view of such a stipulation it was incumbent upon the vendor to establish either that the solicitors approved of the title or that there

Agreements void for uncertainty cannot be specifically enforced.

1. Halsbury's *Laws of England*, Vol. 27, para. 3, p. 3.
2. Singer Sewing Machine *v.* Mst. Begam, A. I. R. 1928 Lah. 535 at p. 536 ; Tailby v. Official Receiver, 13 A. C. 523 at pp'. 547-48.
3. Knight Sugar Co. Ltd. *v.* Alberta Railway & Irrigation Co., 173 I.C. 88 (P.C.).
4. Shewantibai *v.* Viswasrao, 1952 N. L. J. 406; I. L. R. (1926) Nag. 95; I. L. R. 2 Bom. 400; I. L. R. (1938) All. 677 ref. to4.
5. Mohan Lal *v.* Wadhawa Singh, A. I. R. 1930 Lah. 997 at p. 998.
6. Sohan Lal *v.* Atal Nath, I. L. R. 56 All. 142: 148 I. C. 229 : 1933 A. L. J. 1584; Hyman *v.* Gubbay, 32 I. C. 53 : 20 C. W. N. 66.
7. I. L. R. 35 Bom. 110 : 7 I. C. 669.

was such a title tendered as made it unreasonable not to approve of it. It has been held that the words are not merely surplusage in the sense that they express only what is implied by the law, but that they import an additional term in the agreement.

The term however does not give the solicitor arbitrary and absolute power to reject a title, however good it may be. He is the sole judge, provided the acts "reasonably and *bona fide*". The question of *bona fides* arises very rarely, if at all, but who is to determine whether the solicitor acted "reasonably", a word which has never been exactly defined, when disputes arise between the vendor and purchaser? It cannot be said that the vendor by such a stipulation entirely surrenders his right to assert and maintain that he has made out a marketable title to the judgment of the purchaser's solicitor. When however one does assert that right, the Court has to determine whether he has or has not acted reasonably. For the purpose of such determination the Court has to examine the title tendered to the solicitor to consider whether it was such as would induce the Court to hold that its rejection was reasonable or unreasonable. The Court must then examine the grounds on which the solicitor rejects the title and consider whether on the whole it would also have come to the same conclusion, even though the solicitor may have acted in respect of one or the other grounds of rejection with greater caution than the circumstances of the case reasonably required. In *Pyrke* v. *Wodingham*,[1] Turner, V. C., says in effect that a doubtful title which a purchaser will not be compelled to accept is not only a title upon which the Court entertains doubts, but includes also a title which, although the Court has a favourable opinion of it, may yet reasonably and fairly be a question for other competent persons to decide. It follows therefore that the Court cannot lightly disregard the judgment of a solicitor on the question whether the title is marketable or not; but at the same time when disputes arise. The purchaser is not entitled to maintain that his solicitor's judgment is the last word on the subject. It comes ultimately to this : that the Court must determine whether the title is or is not marketable, having due regard to the grounds of rejection put forward by the solicitor.

It is therefore for the plaintiff to show that a right of permanent occupancy of land is the same or substantially the same as a lease of land in perpetuity and he has not done so. If a person contracts to purchase one thing and does not get that thing or substantially the same thing, he can, if he chooses, refuse to accept another thing without being bound to give any reason or explanation for his refusal. If therefore a person agreed to purchase a property of one tenure, he cannot be compelled to purchase another of which the tenure or a material part of it is different, unless he is able to show to the Court that the two are substantially the same. In *Ayles* v. *Cox*,[2] a person contracted to buy copyhold and it was held that he could not be compelled to take the estate, even if a part of it turned out to be freehold. In that case there was a condition in the contract that errors in description should not vitiate the sale, but it was nevertheless held that the condition did not alter the legal position.[3]

The prospecting licence is merely ancillary to the mining lease and a draft of the lease is invariably annexed to the licence. In effect, the licence is merely a contract to execute the lease, if and when the licensee requires it to be executed.

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1. (1882) 10 Hare 1.
2. (1852) 16 Beav. 23.
3. Krishnaji Gopinath Rele *v.* Ramchandra Kashinath Mastake, A. I. R. 1932 Bom. 51 at pp. 52, 53, 54.

If this is so, then the contract sought to be enforced, viz., to grant the licence, is not a contract which is enforceable in law, because the law does not recognize a contract to enter into a contract.[1]

Where the defendants describing themselves as residents of a certain place, executed a bond and hypothecated as security for the amount and the words used in the bond describing the property were "our property with all the rights and interests", it was held that the hypothecation was too indefinite to be acted upon. The mere fact that the defendants describe themselves in the bond as residents of a certain place is not enough to indicate their property in that place as the property hypothecated. If they had described themselves the owners of certain property it would have been reasonable to refer to indefinite expression to the description.[2]

According to the terms of the mortgage deed in plaintiff's favour, the plaintiff was entitled to have the deficiency in the mortgage land made good from other land belonging to the mortgagor. It is not disputed that the land now sued for is out of that area and in the circumstances the mere fact that no specific *khasra* numbers were mentioned in the original mortgage deed does not appear to be of any consequence. In *Kanhi Ram* v. *Pir Bakhsh*,[3] to which the Lower Appellate Court has referred, the deficiency was no doubt to be made good from specific numbers but this does not appear to have been considered essential for the maintenance of a suit for specific performance. In the present case the contract between the parties was that the deficiency was to be made in a specified manner and the suit for the performance of the contract in that manner. The learned Additional District Judge has remarked that the plaintiff's mortgage was mentioned in the mortgage deed in favour of defendants. This statement of fact does not appear to be correct; but it would appear from the provisions of Sec 27 (old), Specific Relief Act, that the onus of proving that a person is a transferee for value in good faith and "without notice" would lie on that person. The general rule is that a contract can be enforced against any person who derives his title from a party to the contract, but an exception is created by that section in favour of a *bona fide* transferee "without notice". In the circumstances, the burden of proving that the case falls within the exception must lie on the transferee.[4] In the present instance, the transferees have led no evidence to prove that their case falls within the exception.[5] The contracting parties must appear in the contract or the memorandum of it in order to consititute a binding contract, but they may so appear either by name or description or reference sufficient to ascertain their identity.

23. Property agreed to be sold.—Merely because a plot bears the same number C-5, it cannot be said to be the same property agreed to be sold. A mere number determines nothing. The identity of the property, if not in all respects atleast in all material respects, must be the same. It must answer, in all material particulars, the description of the property agreed to be sold. A mere number cannot answer the description of the property agreed to be sold. Merely because some area of land which was a part of original plot C-5 is also a

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1. Rudra Das Chakrabarti *v.* Kamakhya Narayan Singh, A. I. R. 1925 Pat. 259 at pp. 269, 274.
2. Dojei v. Pitamber, I. L. R. 1 All. 275.
3. (1904) 134 P. L. R. 1904.
4. Himat Lal Motilal *v.* Wasudev Ganesh, I. L. R. 36 Bom. 446:16 I. C. 680; Baburam Bag Madhab *v.* Chandra Pillay, I.L.R. 40 Cal. 565 : 19 I.C. 9.
5. Mohan Lal *v.* Wadhawa Singh, A.I.R 1930 Lah. 997 at p. 998: 12 Lah. L.J. 26.
6. Squire *v.* Whaltan. 1 H. L. C. 333 ; Penee *v.* Gardener, (1827) 1 Q.B. 688; Williams *v.* Lake 2, Ed. & E 1. 349; Champion *v.* Plummer, 1 N. R. 253; Werner *v.* Wiilington, 3 Drew 523,

part of reconstituted plot C-5 now it cannot be said that the reconstituted plot C-5 answers the description of the original plot C-5. Supposing *A* and *B* enter into an agreement of sale in respect of a plot of land which bears no. 10. The plots are subsequently renumbered. Plot no. 25 comes to be renumbered as plot no. 10 and plot no. 10 comes to be renumbered as plot no. 19. If a suit for specific performance of the agreement of sale of plot no. 10 is filed, in respect of which plot shall the Court pass a decree for specific performance-plot no. 25 which is renumbered as plot no. 10 or plot no. 19 which is the original plot no. 10 ? Specific performance can only be ordered, in respect of new plot no. 19 (old plot no. 10). Therefore, merely because a plot bears the same number as it bore at the time when the parties entered into the agreement of sale it does not *ipso facto* follow that a decree for specific performance of the agreement of sale in respect of that plot must be passed.

Section 12 of the Specific Relief Act, 1877 (corresponding to Sec. 10 of 1963 Act) confers upon a court of law discretion in the matter of passing decree for specific performance. It is well settled that this discretion has to be exercised judicially and according to well-recognized principles. It cannot be exercised arbitrarily. Merely because one is able to look at the question from a slightly different angle at the appellate stage one cannot always interfere with the decree of the Trial Court in matters of specific performance. In this view of the matter the decree passed by the learned District Judge is liable to be set aside.

Whether the defendant reconstituted the plots voluntarily or under compulsion is a material question. If he did it without any compulsion from the Municipality then it is open to the plaintiff to obtain the decree for specific performance in respect of that particular piece of land which was original plot irrespective of the reconstitution of plots.[1]

24. Specific performance of agreement to grant lease cannot be enforced when no date is fixed.—The date of the commencement of a lease is a material term in a contract for the grant of the lease and if this does not appear in the contract either by express terms, or by inference the contract is incomplete.[2] It is elementary that specific performance of an agreement to grant a lease cannot be decreed unless that agreement either expressly or impliedly to be granted fixes the date from which the term is to run.[3] Where, however, oral evidence is admissible, it may be led to establish the existence of an oral agreement fixing the date for the commencement of the lease and if this is done the contract would be a concluded one.[4] But an agreement to grant a lease "hereafter" is not vague and uncertain.[5] Where there is an oral agreement to grant lease Sec. 92, Evidence Act, cannot debar a party from leading evidence that there had been agreement by implication or inferable from the circumstances regarding time. Moreover in view of Sec. 110, Transfer of Property Act, the intention of the parties must be presumed, in the absence of any contract to the contrary, that the lease would take effect from the date of the execution of the deed.[6] Where the lessee is already in possession of the property and according to the agreement the consideration is to be paid on particular date, there is an implied agreement that the lease is

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1. Shankerrao Ramrao Mairal *v.* Sumati Bhikaji Khiste, (1971) 12 Guj. L. R. 570 at pp. 574, 575 : A.I.R. 1971 Guj. 178.
2. Rudra Das *v.* Kamakhya Narayan Singh, A.I.R. 1925 Pat. 259 at p. 273. I.L.R. 3 Pat. 968 : 84 I.C. 178.
3. Smt. Giribala Dasi *v.* Kalidas Bhanja, A.I.R. 1921 P.C. 71 at p. 73 : 25 C.W.N. 320 : 22 Bom. L.R. 1332.
4. Ikramal Huq *v.* Wilkie, 11 C.W.N. 946 (P.C.); *see* also Kailas Chandra *v.* Bijoy Kanta, 23 C.W.N. 190.
5. Kalidas Bhanja *v.* Giribala Dasi, (1914) 23 I.C.360 at p. 363.
6. Ambica Prasad *v.* Galstaun, 13 C.W.N. 233.

to run from that date.[1] Where a *Patta* recites that the tenant has agreed to pay rent whatever the landlord might fix, the contract is void for uncertainty.[2] If the contract for specific performance is of such a nature as to admit of being specifically performed, then the mere fact that the other remedy has become barred by time should not deprive the plaintiff from getting the relief to which he is entitled. It is the duty of the Court to examine whether there was anything in the contract which makes it inappropriate to grant its specific performance. The only point which has been pressed before the Court is that the option given to Atal Nath was to be exercised "at any time" by him, and was accordingly indefinite in its nature.

Where the option is so worded that the exercise of the privilege may be delayed indefinitely specific performance is refused, and the refusal is sometimes based on the ground of lack of mutuality. Although it is not seen how the lack of mutuality can be regarded as the basis, the indefiniteness of time may be a ground for refusing specific performance. The language of the document was somewhat loose. But when it is remembered that the remedy to recover the amount with interest could not be exercised after the lapse of three years, there was necessarily limitation of time put on the exercise or the option. The indefiniteness of time was not as regards the right to recover the money, which was of course governed by the ordinary law of limitation, but it was with regard to the option, if any, to select one or the other remedy. As the document was unregistered it was inherent in its very nature that the option must be exercised before three years expired, and could not have been exercised after the expiry of that period.[3] If the essential terms of a contract are settled, the contract may well be regarded as complete and concluded and may be enforced or specifically performed, either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description.[4]

25. Condition vague.—A contract with a condition that it should be "subject to *force majeure* conditions" was held in a recent English case to be vague and uncertain. There were a variety of *force majeure* conditions and there was no indication whatsoever in the clause in question to what *force majeure* condition it related.[5]

26. Meaningless clause in contract.—A meaningless clause in contract will not render the whole contract bad if it is severable from the rest. Thus in a recent English case the defendants while accepting an agreement (regarding sale of goods) said : "I assume we are in agreement that the usual terms of acceptance apply." There were no "usual terms" in operation between the parties. The defendant defaulted. The plaintiff sued for damages. The Court of Appeal held that there being no such "usual conditions" the clause must be rejected as meaningless and that it was severable from the rest of the contract. The defendant was made liable for the breach committed.[6]

27. Deed of exchange not registered.—The present case however is totally different. It has already been stated that plaintiff had done his very best to obtain registration and had failed, because both before the Sub-Registrar and the

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1. Nabakishore *v.* Panchanan Mahto, A.I.R. 1930 Pat. 601 at p. 602 : 129 I.C. 81.
2. Ramaswami *v.* Rajgopal, I.L.R. 11 Mad. 200.
3. Sohan Lal *v.* Atal Nath, A.I.R. 1933 All. 846 at pp 850, 851:1933 A.L.J. 1584.
4. Srigopal Sridhar Mahdeh *v.* Sashibhushan, A.I.R. 1933 Cal. 109 at p. 111 : I.L.R. 80 Cal. 111:142 I.C. 465 : 36 C.W.N. 1108.
5. British Industries *v.* Partly Pressings, (1953) 1 All. E.R. 94 at p. 97.
6. Nicolene Ltd. *v.* Simmonds, (1953) 1 All E.R. 822 at p. 824.

Registrar defendant refused to attend and later removed himself from the jurisdiction of the Indian registration authorities. The Registrar's order of refusal was admittedly correct in the circumstances and even, if challenged by a suit, could not have been set aside, because the courts could not compel the Registrar to register a document the registration of which was contrary to the provisions of the statute. Consequently all the laches were on defendant's side. Plaintiff could not with any justice be held to be dilatory or neglectful, merely beause he failed to comply with an admittedly useless formality and to institute a suit which admittedly had no possible chance of success. In these circumstances the equities are very strongly in plaintiff's favour.

As already remarked, the exchange deed was a completed transaction duly signed by both parties. It operated to create and assign present rights in land of more than Rs. 100 in value. It therefore was liable to registiation under Sec. 17 (1) (*b*), Registration Act, and under Sec. 49, being unregistered, could not be received as evidence of any transaction effecting the property concerned. It has already been pointed out however that the Indian courts as courts of equity have constantly been entertaining suits for specific performance of contracts contained in unregistered documents.[1] Where there is an agreement to exchange lands and one of the parties perform his part the remedy of the other is to sue for specific performance.[2]

Exchange of lands.

28. Registration Act whether affects jurisdiction of Civil Court to grant specific performance.—A plaintiff who has nor presented his document for registration can maintain a suit either to get it registered or to compel his vendor and a third party to execute a new deed in his favour and register that new deed. The Registration Act does not touch or affect the equitable jurisdiction possessed by the Civil Court to pass a decree for specific performance where circumstances exist entitling the plaintiff to such a decree.[3]

29. Quaere—Whether the Registration Act affects the jurisdiction of the Court to grant specific performance of a contract.—On this question there is a difference of opinion among the various High Courts.

In *Manicka Goundan* v. *Elumalai Goundan*,[4] the Chief Justice reviewed the entire case-law on the point and summarized his conclusions in the following words : "On consideration of all the authorities it appears to us that there is no need to subscribe to either of two extreme propositions. One is that a party to an agreement has no right whatever in any circumstances to seek specific performance of the agreement once a document has been executed in pursuance of the agreement but the document is not registered. The other is that a party of an agreement is entitled to compel the other party who has duly executed a document in pursuance of an agreement to go on executing fresh documents by resorting to a suit or suits for specific performance so long as no document has been registered. The decision in *Chinna Krishna Reddi* v. *Doraiswami Reddi*[5] and *Nynakka Routhen* v. *Vavana Mohammad Natna Routhe*,[6] clearly demonstrate the untenability of the first proposition. The acceptance of the second proposition would mean that a party can take advantage of his own negligence or laches. In our opinion the correct view to take which also seems to us to be just and

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1. L. Basheshar Nath *v.* K. S. Mian Feroz Shah, A.I.R. 1935 Pesh. 12 at pp. 14-15.
2. Kishori Debya *v.* Jugunnath, 19 W.R. 269.
3. Jogendra Sahu *v.* Gunei Sahu. A.I.R. 1942 Pat. 311 at p. 21 I.L.R. : 311 Pat. 150: 201 I.C. 60 : 15 R. P. 42: 8 B.R. 776 : 23 P.L.T. 580; but *see* Madhorao *v.* Ratalba, I.L.R. (1953) Mys. 259.
4. A.I.R. 1957 Mad. 78 at p. 81: (1956) 2 M.L.J. 536.
5. 5 Mad. H.C.R. 128.
6. I.L.R. 20 Mad. 19,

equitable is this : Taking the case of an agreement to sell, it cannot be said that the contract has been fully performed till there is a properly executed document which is also registered. It cannot be said that the moment a document is executed the contract ceases to be in force. The purchaser is always entitled to insist upon his right to have a proper registered instrument. Every vendor is bound to do all that is necessary to perfect that title of the purchaser which includes the execution and registration of a proper conveyance. It is true that the purchaser can resort to proceedings under the Registration Act and the special statutory remedy under Sec. 77 of the Act to detain registration of the executed document. But if for any reason it becomes impossible to obtain registration after resort to such proceeding of because fo other circumstances which prevent any resort to such proceedings under the Act, then undoubtedly the vendee is entitled to bring a suit for specific performance of the agreement to sell in his favour. This does not, however, mean that every such suit should be decreed. Being an equitable remedy a court is not bound to grant specific performance in every case, in which an agreement has not been carried out in its entirety. Well-established equitable consideration would justify a court refusing to grant the relief of specific performance. To take an obvious case, if the vendor only executes a sale-deed and hands it over to the vendee and the vendor neglects to present it for registration within the time prescribed and therefore loses his right to have it registered a court may well say that the plaintiff has only to blame himself for not securing registration and therefore he would not be entitled to any relief because of his own negligence or if a vendee after the execution of the sale-deed fraudulently makes alteration in the document to the detriment of the vendor and therefore registration is refused he cannot obtain the relief of specific performance because of his fraudulent conduct. In *Venkata Seshayya* v. *District Board, East Godavari*[1] and *Venkata Subamma* v. *Subbiah*,[2] it was ruled that the lesser remedy provided for under Sec. 77 of the Registration Act cannot take away the larger remedy provided for under the Specific Relief Act. The Registration Act does not touch or affect the equitable jurisdiction possessed by the civil courts to pass a decree for specific performance where circumstances exist entitling the plaintiffs to such a decree. The above principle has been quoted with approval in *K. Veeran* v. *Ambalam Vellaiammal*."[3]

When the agreement is not a lease as contemplated in Sec. 2 (1) read with Sec. 17 (1) (*d*) of the Indian Registration Act, since it did not create present demise in the property inasmuch as it was to be made available after the same was being constructed and be ready and that way to take place at any later time. It did not, therefore, require to be compulsorily registered, and thus it was admissible in evidence in an action brought by the plaintiffs. Even if it was so required to be registered, since the suit was for specific performance in respect of that very agreement, falling under Sec. 12 (old) of the Specific Relief Act and that way under Chapter II thereof, it would be admissible in evidence under the proviso to Sec. 49 of the Indian Registration Act. While, however, a suit for specific performance of such a contract is tenable, the rule of law as contemplated under Sec. 12 (*c*) (old) of the Specific Relief Act is that the Court would not exercise its discretion in granting such a relief, where compensation can serve as an adequate relief . It becomes all the more so in an action brought by a lessor for the specific performance of the agreement, as he is interested in money as against the case of a lessee who may be interested in getting the property particularly when it is intended for longer period such as 10 years or so as in this case. Such a lessor

1. A.I.R. 1939 Mad. 391.
2. A.I.R. 1942 Mad. 716 : (1943) 1 Mad. L.J. 469.
3. A.I.R. 1960 Mad. 244 at p. 248.

would, however, be entitled to compensation under Sec. 19 (old) of the Specific Relief Act which is otherwise understood by the term of damages used in Sec. 73 of the Indian Contract Act. But when the question comes for determination of those damages, it has to be remembered that the burden lies on him to take wise attempt to reduce to the minimum the injury that may be caused to him by such a breach of contract, and, if he fails to do so, law debars him from claiming any part of damages which is due to neglect to take such steps on his part.[1]

30. Presence of unregistered paper.—It cannot be said that because a further step is taken by the execution of an unregistered sale-deed in pursuance of the agreement specific performance is not the remedy. An unregistered sale-deed is sufficient to suport a suit for specific performance. The document can be produced and proved.[2] Where the Sub-Registrar could not register the sale-deed by reason of the enemy occupation of the place,[3] or where he refuses to register the document for any other reason,[4] or where the vendor gets at the document and refuses to register the same[5] remedy by specific performance may be granted.

31. Doctrine of mutuality.—The doctrine of mutuality though a technical one is founded on commonsense and amounts to this that one party to a bargain should not be held bound to that bargain, when he could not enforce it against the other. In other words, the general rule is that a contract to be specifically enforced must, as a general rule, be mutual, that is to say, such that it might be enforced by either of the parties against the other of them. Now it is clear that the Specific Relief Act nowhere touches this doctrine and it is for this reason that in some of the decisions it has been held inapplicable to India,[6] and suggestion has been made for its inclusion in the Act so as to dispel all doubts on the point.[7]

But since the decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed*,[8] it is too late in the day to contend that the doctrine is inapplicable to India. A contract to be specifically enforceable must be mutual, which means that at the time of the contract it must be enforceable by either of the parties or against the other. Thus if a contract on account of certain circumstances existing at the time of the contract, e.g. personal incapacity of one of the parties or by the nature of the contract itself is incapable in law of being enforced against one party, that party should not be given the right to

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1. Vora Sirajuddin Kalimuddin *v.* Safkathassein Badruddin, 1966 Guj. L.R. 512 at pp. 521-31.
2. N.M.S.S. Subramanian Chettiar *v.* S.M. A.M. Arunachalam, A.I.R. 1943 Mad. 761 at p. 762 (F.B.) : (1943) 2 M.L.J. 425 : 1943 N.W.N. 647 : 56 L.W. 627 : 210 I.C. 389, overrruling Venkatodri Somappa V.O.R. Belary A.I.R. 1930 Mad. 801 at p. 802: (1938) 2 M.L.J. 362 : 179 I.C.240; but *see* Tribhovan *v.* Shanker, A.I.R. 1943 Bom. 431 at p.455 : 45 Bom. L.R. 866: 211 I.C. 133. where sale ifor less than Rs. (100) ; *see* also Venkata Subbamma *v.* Subbih, (1943) 1 M L.J. 469: 206 I.C. 564 : A.I.R. 1942 Mad. 719: 1942 M.W.N. 571 at p. 573 (where latte rportion of a letter reads as sale-deed but earlier portion reads as agreement to sell, the former portion can be enforced).
3. N.M.S.S. Subramanian Chettiar *v.* S. M.A.M. Arunachalam Chettiar, A.I.R. 1943 Mad. 761 at p. 763 (F.B.).
4. Jhaman Mahton, *v.* Amrit Mahton, A.I.R. 1946 Pat. 62 at pp. 64-5 : I.L.R. 24 Pat. 325:225 I.C. 541; but *see* Satyanarayana *v.* Chinna Venkatrao A.I.R. 1926 Mad. 530 at p. 532: I.L.R. 49 Mad. 302 : 100 I.C. 385 [this is no longer good law after A.I.R. 1943 Mad. 761at p. 762 (F.B.) it is submitted].
5. Chinna Krishna Reddi *v.* Dorasami Reddi, I. L. R. 20 Mad. 19 at p 20 ; but *see* Maya Ram *v.* Prag Dat, I.L.R. 5 All. 44 at pp. 51-2, *per* Stuart, C.J., *contra*. No specific performance where the purchaser has the document with him seeing that he could present it for registration and get relief; I.L.R 16 Mad 341.
6. Kewal Ram *v.* Conald, 5 S.L.R. 61; Krishnaswami *v.* Sunderappayar, I.L.R. 18 Mad. 415.
7. Dr. Stokes' *Anglo-Indian Codes*, Vol 1, 931.
8. I.L.R. 39 Cal. 232 (P.C.) : 13 I.C. 931 : 16 C.W.N. 74 : 1912 M.W.N. 22 : 9 A. L. J. 38: 15 C.L.J. 69:14 Bom. L.R. 5 : 21 M. L.J. 1156:11 M.L.T. 8 : 39 I.A.1.

enforce it against the other. A contract is not wanting in mutuality merely because it gives as part of the contract itself an option to one of the parties to refuse to be bound by it if he so chooses.[1] Where in a contract for the sale of business and lease of premises used for it, was stated that it should come to an end if the buyer failed to secure a beer and wine licence and the buyer was unable to obtain the licence because the seller had applied for renewal of his own licence for the same premises; it was held that the seller could not resist the buyer's suit for specific performance on the ground that he had not obtained the licence.[2] In order to afford a valid defence to a suit for specific performance want of mutuality must exist at the time the contract is entered into.[3]

Sale of business and lease of premises.

A contract to be specifically enforced must be such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. The same principle is re-affirmed in the opening sentence of para. 463 in the following words :

> "The mutuality of contract is, as we have seen, to be judged of, at the time that it is entered into; and at the end of that paragraph it is observed:
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> 'From the time of the execution of the contract being the time to judge of its mutuality, it further follows that the subsequent performance by one party of terms which could not have been enforced by the other, will not prevent the objection which would arise from the presence of such terms'.

Referring to *Flight* v. *Bolland*,[4] Fry, L.J., says: "an infant cannot sue because he could not be sued for specific performance"; but his obeservations in the foot-note in relation to the case of *Clayton* v. *Ashdown*,[5] and the remarks in some of the succeeding foot-notes show that even in England there have been differences of opinion in that matter but that the rule as stated in the text is in accordance with the preponderance of authority. Again, the objection on the score of want of mutuality may be waived, this indicates that this objection is not identical with a plea that the contract is void. The contradistinction is clearly brought out by the observations in the penultimate paragraph of 2, Ch. 3, Part 2, in Leake on *Contracts* (7th. Ed., p. 402) where it is stated that a contract which is voidable by an infant is binding upon the other contracting party until avoided and that the infant may therefore sue the other party but a party of equity will not in general grant specific performance of a contract at the suit of an infant. In the light of these considerations, it is instructive to note that in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[6] Lord Macnaghten took care to state the position in the following terms:

> "As the minor in the present case was not bound by the contract, there was no mutuality and the minor who has now reached his majority cannot obtain specific performance of the contract."

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1. Debendra Nath Mitra *v.* Lalit Krishna Mitra, 42 C.W.N. 1090; *see* also Zebunnissa v. Mrs. Danagher, I.L.R. 59 Mad. 942: 163 I.C. 384: A. I. R. 1936 Mad. 564 : 48 L. W. 592:1936 M. W. N. 379: 70 M.L.J. 477.
2. Rigs *v.* Sokale, 318 Mass. 337.
3. Venkatachallam Pillai *v.* Sethuramrao, A.I.R. 1933 Mad. 322 at p. 325 : I. L. R. 56 Mad. 433 : 142 I. C. 315: 64 M.L.J. 354; Debendra Nath Mirtra v. Lalit Krishna Mitra, 42 C.W.N. 1092.
4. (1828) 4 Russ. 298.
5. 9 Vin. 393.
6. I.L.R. 39 Cal. 232 : 13 I.C. 331:39 I.A.1. (P.C.).

The earlier observation in the same case that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property may be considered along with their Lordships' observation in *Waghela Rajsanji* v. *Sheikh Masluddin*[1] that "the guardian exceeded her powers so far as she purported to bind her ward". These observations must be understood as indicating the limitations on the power of a guardian, so as to give the minor the option of saying that he is not bound by such covenants and not that the covenants are void in the sense that the minor cannot stand by the contract and seek to hold the other party bound by it even for purposes of remedies other than specific performance. The observations of Sir John Wallis on *Waghela Rajsanji* v. *Sheikh Masluddin*[2] in *Ramajogayya* v. *Jaganadham*[3] lay undue stress upon the fact that their Lordships "dismissed the suit altogether". It would be sufficient for the present purpose to distinguish in *Waghela Rajsanji* v. *Sheikh Masluddin*,[4] on the ground that the objection to the guardians' covenant was there taken by the minor and their Lordships' upholding the objection is quite consistent with the view that it is voidable at the instance of the minor. But the view of Sir John Wallis, that decision precludes not merely the "personal" liability of the ward in the narrow sense but also the liability of his estate, ignores the fact that their Lordships state an argument of Mr. Mayne which however they leave open on the express ground that the question before them related only to the liability of the *talukdari* estate and that the liability was precluded by the terms of Act 6 of 1862. In nearly all the cases where the decision in *Waghela Rajsanji* v. *Sheikh Masluddin*[5] has been discussed, the objection to the binding character of the covenant was raised by the minor himself.

This was certainly the case in *Ririchand* v. *Manakkal Rahman Somayasajipad*,[6] referred to by Mockett, J., as pointed out by the Full Bench in *Raghavachariar* v. *Srinivasa Raghavachariar*,[7] principles recognized or enacted for the benefit or protection of minors need not necessarily be held to apply to their prejudice. In respect of the covenant to repair, no question of specific performance can arise.[8] The remedy of the tenant in the event of a breach of the covenant can only be either by way of a deduction from the rent or by way of a claim for damages, or reimbursement of moneys spent. The tenant cannot ordinarily treat a breach of this covenant as avoiding the lease or justifying him in throwing up the tenancy. It is unnecessary at this stage and for the purpose of this appeal to examine the argument that the covenant to repair imposes no special burden on the estate, because it may be said to be part of a guardian's duty, even apart from the lease to do all things necessary to preserve the property of the minor, and in the case of a house preservation may include repair. On behalf of the respondents it has been suggested that the covenant here implies much more, but the main argument is based on the fact of this being a "covenant" and not merely an obligation under the personal law.[9]

32. Mutuality, not of universal application.—Where the defendant tenant agreed to give up possession to the plaintiff upon the latter getting a liquor licence

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1. I.L.R. 11 Bom. 551 at p. 561 (P.C.).
2. I.L.R. 11 Bom. 551.
3. I.L.R. 42 Mad. 185 : 36 M.L.J. 29 : A.I.R. 1919 Mad 641.
4. I.L.R. 11 Bom. 551.
5. *Ibid.*
6. A.I.R. 1923 Mad. 553 : 74 I. C. 309 : 44 M.L. J 515.
7. A.I.R. 1917 Mad. 630 : 36 I.C. 1921 : 31 M.L. J. 575 (F. B.) : I.L.R. 40 Mad 308.
8. *See* Woodfall on *Landlord and Tenant*, p. 769.
9. Zebunnissa Begum *v.* Mrs. H. B. Danagher, A. I. R. 1936 Mad. 564 at pp. 567, 569 : 1936 M.W.N. 379.

and paying the former a stated sum, it was held that upon the plaintiff doing so he was entitled to specific performance even in the absence of mutuality of equitable relief[1] because the doctrine of mutuality of remedy was not a rule of universal application.[2]

Exception.

The doctrine of mutuality is, however, subject to certain exceptions.

33. Unilateral contracts.—(1) The doctrine of mutuality cannot apply to unilateral contracts.[3] Before the offer has been accepted there is no contract and after it has been accepted and a unilateral contract brought into existence the promisor has already obtained his advantage and he alone is bound to perform his part.[4] Thus where a lease is renewable at the option of the lessee, the option is only a binding offer on the part of the lessor. As soon as the lessee exercises his option, a binding contract for the renewal comes into existence and he may demand specific performance of the contract.[5]

(2) There can be specific performance of a contract the performance of which is optional with both parties.[6] If performance of a contract by one party is not compulsory, but is only to be rendered in case of his election to do so, specific performance cannot be enforced against him as long as he has not made his election to perform, since this would be denying to him a right which by the terms of the contract he has reserved.[7]

(3) Specific performance of negative clauses of a contract by injunction, where neither the plaintiff nor defendant could have specific performance of the affirmative side of the agreement.[8]

(4) Where the mutuality has been waived by the subsequent conduct of the person against whom the contract could not originally have been enforced.[9]

A suit for specific performance of a contract entered into by his guardian brought against the minor would have been defeated as the minor, who has the option of repudiating the contract, could in his defence to the suit plead that he was not bound by the contract and so avoid its effect.

That reason would not apply where there is a decree of Court which had incorporated the contract. No doubt a minor is not bound by a consent decree on the ground that his guardian *ad litem* had not obtained leave of the Court to compromise. It is not, however, a void decree and he has to avoid it by proceeding attacking it in a direct manner, and until it is set aside it is binding on him.[10]

This follows from the general principles. No doubt a decree passed on compromise can be avoided on the same grounds on which a contract can be avoided, because a consent decree derives its force from the compromise. But there is this material difference, namely, that a consent decree cannot be attached collaterally. In *Wilding* v. *Sanderson*,[11] Byrne, J., stated the principle thus:

"A consent judgment or order is meant to be the formal result and

1. Cummings *v*. Riterer, 73 N. Y. S. 2d 347 Misc.
2. Ward *v*. Bickerstaf, 73 N.E. 2d 877.
3. Palmer *v*. Scott, 1 Russ. & M. 391.
4. Pomeroy, Sec. 773, p. 1296.
5. Hersey *v*. Giblett, (1854) 18 Beav. 174; Moss *v*. Karton, (1866) 1 Eq. 474. Moss *v*. Karton, (1866) 1 Eq.474.
6. Tryee *v*. Ditterst, 199 Ill. 189.
7. Dr. Banerji's *Tagore Law lectures*, 353 : 3 Page Con. S. 1619, p. 245
8. Pomeroy, Eq. 4924.
9. Salisbury *v*. Hatcher, (1842) 2 Y. & C. 54; *Ex parte* Lucey, (1802) 6 Ves. 625.
10. Arunachellam v. Murugappa, I.L.R. 12 Mad. 503; Golnur Bibi V. Abdus Samad, I.L.R. 58 Cal. 628 : A.I.R. 1931 Cal. 211 : 130 I.C. 209.
11. (1897) 2 Ch. 534 : 66 L.J Ch. 684 : 77 L.T. 57 : 45 W.R. 675.

expression of an agreement already arrived at between the parties to the proceeding embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course enforceable while it stands, and a party affected by it cannot, if he conceives he is entitled to relief from its operations, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect of which he desires to be relieved. He must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose."[1]

(5 to 7) *See* Secs. 14 to 16 (old) of the Specific Relief Act which deal with specific performance of part of a contract.

34. Unilateral contract; applicability of doctrine of mutuality.—A contract is specifically enforceable only if, as a general rule there is mutuality between the parties thereto ; or in other words, if it might have been enforced by either of the parties against the other at the time it came into existence. But this rule is subject to well-recognized exceptions as set out in Sec. 368 of Halsbury's *Laws of England* at page 270. The position, therefore, is that mutuality is essential for a suit for specific performance and the doctrine of mutuality cannot apply to an unilateral contract.[2]

35. Agreement which is legal; proof of abandonment.—The words "if permitted it would defeat the provisions of any law" occurring in the third paragraph of Sec. 23 of the Contract Act refer to performance of an agreement which necessarily entails the transgression of the provisions of any law. What makes an agreement which is otherwise legal, void is that its performance is impossible except by disobedience to law.

36. When compensation in money is an adequate relief.—The question whether compensation in money is an adequate relief naturally depends on the facts and circumstances of each case. But Sec. 21 of the Specific Relief Act in explicit terms provides for the asking of such relief either in addition to or in substitution for specific relief. It cannot, therefore, be said that the two reliefs are mutually destructive.[3]

37. Breach of contract; compensation in money may not be adequate.—A presumption thus arises under the law that, unless and until the contrary is proved, the Court shall presume that compensation in money cannot adequately relieve a breach of a contract to transfer immoveable property.

It is true that the provisions of Sec. 10 are not independent of the provisions of Sec. 20, under which the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such a relief merely because it is lawful to do so. It has, however, to be seen whether there was any justification for refusing to exercise the discretion in favour of the plaintiff. Section 20 enumerated cases in which the Court may properly exercise its discretion not to decree specific prformance, but it is not in dispute that the defendant is not entitled to the benefit of any of them. It is now well settled that the cases mentioned in Sec. 20 in which the Court may exercise a discretion not to decree specific performance, are not exhaustive, and that the discretion under Sec. 20 will not

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1. Hashem Howladar v. Sreenath Mistri, A.I.R. 1946 Cal. 438 at pp. 439-40: I.L.R. (1946) 2 Cal. 58.
2. A. Venkatasami Naidu v. Annamalai Goundar, A.I.R. 1964 Mad. 474 at pp. 475-76 : 77 M. L.W. 115.
3. Pasumarti Ramulu V. Nuthi Anantha Ramulu, A.I.R. 1966 A. P. 70 at pp. 70-72 : (1964) 2 Andh. W.R. 161,

be exercised in the plaintiff's favour if he is guilty of laches so as to justify the inference that the delay on his part was wilful and amounted to waiver, abandonment or acquiescence to forego the claim for specific performance, or caused hardship or prejudice to the other party.

Ordinarily, in the absence of an agreement to the contrary, time is not of the essence of a contract for the sale of immoveable property and there is nothing wrong if the plaintiff exercises his right to claim specific performance within the period of limitation prescribed by the law.

In a case of a breach of contract for the transfer of immoveable property, a presumption properly arises under Sec. 10 that it could not be adequately relieved by compensation in money and there is no valid reason why the discretion to decree specific performance should not be exercised in the plaintiff's favour.[1]

On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract.[2]

A defendant who avoids the specific performance of the contract on the ground that the property does not belong to him is liable to pay compensation.[3]

38. Interference by an Appellate Court in cases where discretion in granting a decree of specific performance was exercised arbitrarily or capriciously.—A relief for specific performance is, doubtless, a discretionary one, but it is also settled law that an Appellate Court will not interfere with discretion of the courts below unless it were to be shown that the discretion was exercised by them arbitrarily or capriciously.[4]

If the respondent was guilty of laches, it was the duty of the appellants to fix a reasonable time for the completion of the sale. Mere delay, short of waiver or abandonment of the contract is no ground for refusing relief, nor is it evidence of lack or readiness and willingness.[5]

39. Minors and doctrine of mutuality.—It is now well settled law in India that a contract by a minor himself is not merely voidable but absolutely void.[6] That being the case there is absolute lack of mutuality and there can be no claim for specific performance either by or against the minor. There was at one time difference of opinion as to whether a minor could sue for specific performance of a contract entered on his behalf by an ordinary guardian.[7] But their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin*

Contract by minor being void cannot be specifically enforced by either party—Whether a contract entered into on behalf of minor by his guardian or manager of his estate can be enforced.

1. Faujmal v. Nathulal, A.I.R. 1965 Raj. 115 at pp. 118, 119, 120: 1965 Raj. L.W. 37 : I.L.R. (1965) 15 Raj. 233.
2. Mrs. Chandnee Widya Vati Maddan v. Dr. C.L. Katial, A.I.R. 1964 S.C. 978 at pp. 979 : 80 : (1963) 2 S. C.W.R. 215 : 66 Punj. L.R. 138 : (1964) 2 S.C.R. 496 : (1964) 2 S.C.T. 824.
3. A.L. Parthasarathi Mudaliar v. Venkata Kondia Chettiar, A.I.R. 1965 Mad. 188-89 : 77 M.L.W. 672: I.L.R. (1965) 1 Mad. 464.
4. Abdul Kayum Ahmad V. Damodhar Paikaji Kinhekar, A.I.R. 1964 Bom. 46 at pp. 47-49 : 65 Bom. L.R. 505 : 1963 M.L.J. 738.
5. Gomathinayagam Pillai v. Palaniswami Nadar, A.I.R. 1967 S.C. 868 at p. 876.
6. Mohori Bibi v. Dharmodas Ghose, I.L.R. 30 Cal. 539 (P.C.) : 30 I.A. 114 : 7 C.W.N. 441 : 5 Bom. L.R. 421.
7. Fatima Bibi v. Debnath, I.L.R. 20 Cal. 503 : Krishnaswami v. Sunderappayar, I.L.R. 18 Mad. 415.

Mahomed,[1] have held that it was not within the competence of a manager or a manor to bind the minor or his estate by a contract for the purchase or sale of his immoveable property and, therefore, the minor could not sue for specific performance of such contract for want of mutuality.[2] There is no general rule that no decree for specific performance can be passed against minors. For instance, in the simplest and obvious case where a contract is entered into by a Hindu in respect of property which is not joint-family property and the property devolved by inheritance on heirs, some or all of whom are minors, it cannot be contended that no decree for specific performance can be made, and this is conceded by the appellant. The next case is where a Hindu, who is a member of a joint family enters into contract to sell his own share, and dies and the property descends by survivorship to other members of the family some or all of whom may be minors. In *Bhagwan* v. *Krishnaji*,[3] it was held that it can be enforced against the undivided sons of the deceased. This decision is not in conflict with the opinions of Wallis, C. J., and Sadasiva Aiyar, J.,in *Rangayya Reddi* v. *Subramania Aiyar*,[4] nor with the actual decision in *Bappuq*. v *Annamalai Chettiar*,[5] which is not a case of a member contracting to sell his own share. The case in *Bhagwan* v, *Krishnaji*[6] is correctly decided on grounds which need not be stated. The case when the contract is made on behalf of a minor or minors, is settled by the decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*.[7] Thier Lordships say :

> "They are, however, of opinion that it is not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property."

There is no reference here to "necessity", nor is any distinction drawn between a contract being merely "advantageous" to a minor as opposed to its being for necessary purposes binding on the minor though, earlier in the judgment, their Lordships accept the assumption that the purchase was an advantageous "purchase for the minor". This decision also covers the case, where a joint family consists of minors only and therefore has no manager and a guardian of all the minors who is *ex hypothesi* not manager not being member of the family but is merely their guardian, enters into a contract on behalf of some or all of the minors, whatever the nature of the contract may be.

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1. I.L.R. 39 Cal. 232 (P.C.) : 13 I.C. 331:16 C.W.N. 74:1912 M.W.N. 22:9 A.L.J. 38:15 C.L.J. 69:14 Bom. L.R.5.: 21 M.L.J. 1156:11 M.L.T. 8:39 I.A. 1; *see* also Rosi Reddi *v.* Krishna Reddi, A.I.R. 1944 Mad. 540:1944 M.W.N. 622: (1944) 2 M.L.J. 187, where vendors severally agreed to sell their property jointly to vendees is enforceable at the instance of one of the vendees even though one vendor successfully impugned the contract and one of the vendees was a minor. The contract could not be held to be unenforceable for want of mutuality on the ground of plaintiff's minority at the time of the contract.
2. Swarath Ram *v.* Ram Ballabh, I.L.R. 47 All. 84: 23 A.L.J. 625. Molla *v.* Mohd. Sharif, I.L.R. 8 Lah. 212:28 P.L.R. 492; Zamindin *v.* Prabhu Dial, 215 P.L.R. 1913 : 128 P. W.R. 1913:19 I.C. 755; Srinath *v.* Jatindra, 30 C.W.N. 363; Tarini *v.* Sarishi, 85 I.C. 667:A.I.R. 1925 Cal. 1160; Imamband *v.* Mutsaddi, I.L.R. 45 Cal. 878 (P.C.) : 45 I.A. 73: 35 M.L.J. 422: 16 A.L.J. 800 : 24 M.L.T. 330:28 C.L.J. 400:23 C.W.N. 50 : 20 Bom. L.R. 1022 : 3 Pat. L.W. 276 : 1919 M.W.N. 91:47 I.C. 513; Abdul Haq *v.* Yehiya Khan, 2 Pat. L.R. 181; 4 P.L.T. 533; Ramkrishna v. K. Chidambra, 1928 M.W.N. 155: 27 L.W. 232:54 M.L.J. 412; Mova Nageswara v. Mandava, 1928 M.W.N. 214; Waghela Rajsanji v. Sheikh Masluddin, I.L.R. 11 Bom. 55.
3. (1920) 24 Bom. L.R. 997 : 58 I. C. 335.
4. I.L.R. 40 Mad. 365 : 32 M.L.J. 575 : 5 L.W. 797:40 I.C. 429 : 21 M.L.T. 385 (F.B.).
5. A.I.R. 1923 Mad. 313:44 M.L.J. 226: 17 M.L.W. 364:(1923) M.W.N. 218: 32 M.L.T. 256.
6. (1920) 22 Bom. L.R. 997 : 58 I.C. 335.
7. I.L.R. 39 Cal. 232:39 I.A. 1 : 21 M.L. J. 1156:16 C.W.N. 74 : (1912) M.W.N. 22 : 9 A.L.J. 33:13 I.C. 331:15 C.L. J. 69; 14 Bom. L.R.5:11 M,L.T. 8,

The present is a case where the contract is entered into by the manager of a family on behalf of the whole family for purposes binding on the family. The decision in *Bappu* v. *Annamalai Chettiar*[1] does not help the appellant for the contract in that case was not for purposes binding on the family, and the remarks are against him. The remarks in *Krishna Aiyar* v. *Shamanna*[2] are against the appellant and in favour of the respondent. The observations in both these cases are *obiter*, not being necessary for the decisions. In *Narayana Rao* v. *Venkatasubba Rao*,[3] Spencer, J., conceded that a contract made by a manager on behalf of the family may be enforced against the manager, and where it is for the benefit of the family, the completed contract will certainly bind the minor members. Should the accident of the death of the manager before completion in such a case make any difference ? Where a contract is by a manager on behalf of a family and for the benefit of the family and the manager dies, it can be enforced against the survivors when they are all majors.[4] Should it make any difference that some of the survivors are minors, and does the case in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*[5] support such a distinction? The matter is *res integra*, and his Lordship is inclined to answer the above queries in the negative. His Lordship is in agreement with Phillips, J.'s remarks in *Bappu* v. *Annamalai Chettiar*,[6] where he refers with approval to *Ramachandra Aiyar* v. *Sundaramurthi Mudali*,[7] and the *obiter dicta* in *Krishna Aiyar* v. *Shamanna*.[8] The result is that a decree for specific performance may be passed against the minor defendants.

The suit is not barred by limitation, as it does not appear that the specific performance of the contract was refused more than three years prior to suit.[9]

The operation of Sec. 27 (*b*) of the Specific Relief Act is confined to cases where the contracts are in the first instance enforceable as against the parties to the contract. The liability of a person claiming under a party to the contract rests upon the antecedent liability of a party to the contract and arises by reason of the fact that as such transferee he takes subject to the transferor's pre-existing contractual obligation; and where there is no pre-existing contractual obligation, it seems that the case entirely fails as against the transferee. It is quite clear that you cannot enforce a contract as against a transferee unless the transferee has notice of the original contract. Now notice of the original contract must mean notice of an existing obligation under the contract; and where the contract is itself unenforceable, it seems that it is impossible to maintain the view that the contract can be enforced as against a subsequent transferee. The plaintiff's suit must fail so far as defendants are concerned.

Whether the plaintiff is entitled to a decree for specific performance against defendants in regard to their shares in the properties agreed to be sold. Now as to this the rule is that the Court will not, as a general rule, compel specific performance of a contract unless it can execute the whole contract. It may, of course, be that the contract, though in form one and entire, is in substance divisible and where the contract is in substance divisible, there is nothing to prevent

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1. A.I.R. 1923 Mad. 313:44 M.L.J. 226: 17 M.L.W. 364:1923 M.W.N. 218:32 M.L.T. 253.
2. (1912) 23 M.L.J. 610:17 I.C. 497 : 1912 M.W.N. 1188.
3. (1919) 38 M.L.J. 77:27 M.L.T. 264: 55 I.C. 377:1920 M.W.N. 129.
4. Venkateswara Aiyar *v.* Raman Nambudripad, (1916) 3 L.W. 435:33 I.C. 696: 19 M.L.T. 329.
5. I.L.R. 39 Cal. 232:39 I.A. 1:21 M.L.J. 1156:16 C.W.N. 74: 1912 M.W.N. 22 :9 A.L.J. 33:13 I.C. 331: 15 C.L.J. 69:14 Bom. L.R. 5:11 M.L.T. 8 (P.C.).
6. A.I.R. 1923 Mad. 313:44 M.L.J. 226: 17 M.L.W. 364:1923 M.W.N. 218 : 32 M.L.T. 253.
7. (1893) 4 M.L.J. 9.
8. (1912) 23 M.L.J. 610 : 17 I.C. 497: 1912 M.W.N. 1188.
9. Venkanna *v.* Venkatakrishnayya, I.L.R. 41 Mad. 18; Narayan Chetty *v.* Muthiah Chetty, A.I.R. 1924 Mad. 680 at pp. 681-82 : 46 M.L.J. 575.

the Court from carrying into effect that portion of it, in substance a separate contract, which is capable of being carried into effect.

Where the contract is in substance divisible, there is nothing to prevent the Court from carrying into effect that portion of it which in substance is a separate contract and which is capable of being carried into effect. But here again the rule is firmly established that a contract for sale of property in one lot will generally be considered indivisible, for the reason that there is obvious injustice in compelling the purchaser of the entirety to take undivided parts or shares of the estate. Now in the present case the plaintiff having purchased certain specific properties belonging to four persons could not be compelled to take the shares of two of them in those properties.

When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party that party is, generally, incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.

The contract was incapable of being enforced against the plaintiff. That being so the plaintiff is incapable of enforcing it against defendants.

The exact point was decided by the English Court in *Lumley* v. *Ravenscraft*.[1] That was a case where the defendant, an infant and his sister agreed by their agent to grant the plaintiff a lease of premises in which they were jointly interested. The plaintiff brought an action for specific performance of the agreement, and applied for injunction to restrain the defendants till after the trial of the action leasing the premises to another person. It was held that an injunction ought to be granted only where a case was made out for specific performance and that one of the defendants being an infant the plaintiff was not entitled to specific performance against both of them, nor against the sister as to her interest in the absence of any proof of misrepresentation or misconduct on her part. Lindley, L.J., in delivering the judgment said as follows:

> "If Moor's principals were both of age, there would be a complete contract and no difficulty in the case. But unfortunately one of the principals is an infant, nineteen years of age, and the agreement is unquestionably an agreement for a lease by the two. It is an agreement by the two with the plaintiff for a lease to him of certain property of which, as it appears, a lease was being granted to the two. What is the the law? Specific performance is out of the question. You cannot get specific performance against an infant, and upon the evidence before us no case is made out for specific performance against the other defendant either. This case is not within the exception as to misconduct stated in *Price* v. *Griffith*[2] and *Thomas* v. *Dering*,[3] but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his shares."[4]

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1. (1895) 1 Q.B. 683:64 L.J.Q.B. 441: 14 R. 347:72 L.T. 382:43 W.R. 584 : 59 J.P.277.
2. (1851) 1 Deg. M.&G. 80: 21 L.J. Ch 78 : 15 Jur. 1093.
3. (1837) 1 Keen 729:6 L.J. Ch. 267:1 Juf. 427.
4. Abdul Haq *v.* Mohammad Yehia Khan, A.I.R. 1924 Pat. 81 at, pp. 82-83, 84-85,

It made no difference that the contract centered into by the guardian was for purposes of necessity or for the benefit of the minor.[1]

The operation of Sec. 27 (*b*) (old) of Specific Relief Act, is confined to cases where the contracts are in the [first instance enforceable as against the parties to the contract.

It is by statute that you can bring in the subsequent puachaser, and that his liability depends in the first instance upon the validity of the contract of which it is alleged he had notice, and which notice it is necessary to prove in order to establish his liability. But there still remains the question of whether a contract for sale of land is enforceable against a minor. To state the proposition broadly, that is to say, that a contract on behalf of a minor can in no way be enforced would be stating a proposition which obviously cannot be supported in its entirety. The leading case of *Hunooman Persaud Panday* v. *Mst. Babooee*,[2] prevents the assertion of such a proposition. It is quite clear in one form or another that contract on behalf of an infant for the benefit of his estate or for legal necessity is enforceable.

Now the leading case with regard to the matter is that of *Mir Sarwarjan* v. *Fakhruddin Mahomed*.[3] This was a case of purchase of a certain immoveable property by a guardian on behalf of the minor, and Lord Macnaghten delivering the opinion of their Lordships of the Judicial Committee dealt with the matter in one broad statement. He said referring to their Lordships of the Privy Council :

> "They are however of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property."

It is said on the one hand that their Lordships' opinion thus expressed must be confined to those cases to which it particularly refers, that is to say, to a contract for the purchase of property. The proposition as laid down by Lord Macnaghten can be readily udderstood, if for no other reason, for the reason that it would be difficult to show that a contract for the purchase of property would be for the benefit of the estate or for legal necessity. But in *Saikh Haq* v. *Mohammad Yehia Khan*,[4] Das, J., held that there was no distinction between a contract for sale and a contract for purchase.

What is the distinction that is to be drawn and where is the line of difference ? It cannot be said that all contracts by infants through guardians on their behalf were unenforceable for reasons which have been just stated. The Calcutta High Court in the case of *Srinath Bhattacharyya* v.

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1. Mir Sarwarjan *v.* Fakhruddin Mahomed, I. L. R. 89 Cal. 232 ; Narayan Chetty *v.* Muthia Chetty, I. L. R. 47 Mad. 692 ; 80 J. C. 558 : A. I. R. 1924 Mad. 680 : 46 M. L. J. 575.
2. 6 M. I. A. 393.
3. I. L. R. 39 Cal. 232 : 13 I. C. 331 : 39 I. A. 1 (P. C.).
4. A. I. R. 1924 Pat. 81 ; 71 I. C. 483.

Jogindra Mohan Chatterji,[1] Greaves, J., appears to hold the view that although a contract may in some instances be a valid contract, yet specific performance cannot be obtained where the defendant is a minor. Does the decision of their Lordships of the Privy Council in the leading case decide that no contract is enforceable against a minor, that is to say, a contract entered into by his guardian or by his manager; is there a distinction between contract for sale or purchase of land and that of a conveyance? Answering the question it seems quite clear that there can be no distinction between a contract for sale or purchase of land and a conveyance. That cannot be a point of difference. A contract was not enforceable on the grounds stated by their Lordships of the Judicial Committee in the leading case, that is to say, on the ground of mutuality or the lack of mutuality. The mere fact that a conveyance had been given and the transaction completed would make no difference. If mutuality did not exist at the time of the negotiation it must be said that it never existed.[2] Though it was held by the Calcutta High Court[3] that the decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[4] is to be confined to a contract of purchase, but this contention has not found favour in subsequent rulings.[5] In a recent Patna case, however, it has been held that a contract for sale of immoveable property entered into on behalf of a minor by his natural guardian in the circumstances which would establish legal necessity can be specifically enforced.[6]

In *Mir Sarwarjan* v. *Fakhruddin Mahomed*,[7] their Lordships refused specific performance because there was no affirmation of the contract on or before the institution of the suit so as to make the remedy mutual.[8] A recent decision of the Madras High Court in *Adinarayan* v. *Venkatsubbayya*,[9] would also seem to proceed on the view that want of mutuality can be waived. The facts were, however, dissimilar and no reference is made in the judgment to *Mir Sarwarjan* v. *Fakhruddin Mahomed*[10] or to the decision of Madras High Court based thereon. Be that as it may, their Lordships were of the view that the defence of want of mutuality cannot avail defendant 2 for other reasons. The contract sought to be enforced, although severable as regards the vendors and the properties agreed to be sold, is joint and indivisible so far as the vendees are concerned. Defendant who was one of the persons to whom the property was to be conveyed was an adult at the time of the contract, and the consideration for the sale was to be the discharge of the debt due by defendant 2 to the plaintiff and defendant 1. It has been held by a Full Bench of the Madras High Court in *Annapurnamma* v. *Akkayya*,[11] that one of several payees under a promissory note can give a valid discharge of the entire debt without the

1. A. I. R. 1926 Cal. 445 : 89 I. C. 892.
2. Brahamdeo Sao *v.* Hari Singh, A. I. R. 1935 Pat. 237 at pp. 238-39.
3. Innatunnissa *v.* Jankinath, 40 I. C. 890 : 22 C. W N. 477.
4. I. L. R. 39 Cal. 232.
5. Srinath *v.* Jotindra, 89 I. C. 892 : A. I. R. 1926 Cal. 445 : 30 C. W. N. 263; Tarini *v.* Sarish, 85 I. C. 667 : A. I. R. 1925 Cal. 1160; *see* also Ramakrishna *v* K. Chidambara, 108 I. C. 202 : A. I. R. 1928 Mad. 407; Swarath Ram *v.* Ram Ballabh, I. L. R. 47 All. 84 : 89 I. C. 27 : A. I. R. 1925 All. 335.
6. Brahamdeo Sao *v.* Hari Singh, A. I. R. 1935 Pat. 237 at p. 238.
7. I.L.R. 39 Cal. 232 : 39 I. A. 1 (P. C.).
8. *See* Flight *v.* Bolland, (828) 4 Russ. 298 where Clayton *v.* Ashdown, (1714) 9 Vin. Abr. 393 was apparently regarded as distinguishable on the ground that the plaintiff in the latter case affirmed the contract by filing the bill after attaining majority, a distinction approved by Fry at p. 279.
9. I. L. R. (1910) Mad. 852 : A. I. R. 1946 Mad. 625.
10. I. L. R. 39 Cal. 232 : 39 I. A. 1 (P. C.).
11. I. L. R. 36 Mad. 544 (F.B.).

concurrence of the other payees. If, therefore, defendant 2 had offered payment of the debt in money, defendant 1 would have been bound to accept it and such payment would be a complete discharge. Can it make any difference if defendant 2 offered immoveable property in pursuance of a valid contract to accept such property in satisfaction of the debt? Their Lordships think not. If defendant 2 was thus in a position to compel the acceptance of the property by defendant 1 alone in complete discharge of the debt, there would be no lack of mutuality of remedy and there is no reason why defendant 1 should not be entitled to claim specific performance of the contract by the vendor, offering to give him a complete discharge of the debt.[1] It was further held that the doctrine of mutuality is not affected by the doctrine of part-performance. The doctrine of part-performance being a doctrine of equitable relief could be held to apply only to the person concerned and if the contract was not a contract of the plaintiff who was suing, the equitable principle could not be invoked as against him.[2] Consequently, it was laid down that the guardian of minor could not enter into a contract on the minor's behalf so as to bind the minor in such a manner as to be capable of being specifically enforced against the minor and it made no difference that pursuant to the contract the guardian, by way of part-performance of the contract had placed the other party in actual possession.[3] This was the state of the law until recently.

In order to find out whether a departure has been made from the principle enunciated by Lord Macnaghten in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[4] in the subsequent cases or to what extent the doctrine of mutuality adumbrated there can be applied. In his Lordship's view that doctrine will apply only to instances where the contract is with regard to separate property of the minor alone and not where he is a coparcener in a joint Hindu family or co-tenant with other adults and the contract is with respect to such coparcenary or co-tenancy properties.

Before that it may he advantageous to consider the effect of an earlier decision in *Waghela Rajsanji* v. *Shekh Masluddin*,[5] which related to a contract of indemnity entered into by the mother of a minor as his guardian on favour of the purchaser agreeing to idemnify him in case the Government claimed to enforce their right to revenue upon certain villages which she as a guardian transferred to the purchaser as rent-free. The deed of sale purported to name both the guardian and the ward personally liable in that respect and also charged the liability upon other parts of the minor's estate. On the minor becoming a major and the transferee attempting to enforce the liability under the sale-deed the Privy Council held that no personal liability can be fastened on the erstwhile minor as a result of the contract of indemnity. Their Lordships held that the guardian of an infant, had no power to make the minor personally liable with respect to any contract and observed as follows :

> "It would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose to a personal

1. Gade Rosi Reddi *v.* Gade Krishna Reddi, A. I. R. 1944 Mad. 540 at pp. 541, 543.
2. Movva Nageswara Rao *v.* Mandava, A. I. R. 1928 Mad. 830 at pp. 830-31 : 110 I. C. 492 : 1928 M. W. N. 214.
3. *Ibid.*
4. I. L. R. 39 Cal. 232 (P. C.).
5. I. L. R. 11 Bom. 551 (P. C.).

> liability upon the ward they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that, so far as this suit is founded on the personal liability of the *talukdar*, it must fail."

The principle enunciated in this decision has so far not been questioned anywhere even if the contract is for the benefit of the minor. The doctrine of mutuality was not expressed in so many words till the judgment of Lord Macnaghten in *Mir Sarwarjan* v. *Fakhruddin Mahomed*.[1] The facts of the case show that it was a contract entered into on behalf of the minor by his manager or guardian found to be for his benefit.

Still the Privy Council held that specific performance of the same cannot be had by the minor on attaining majority because of want of mutuality. In fact the manager of the minor's estate was one Mr. Garth and the agreement was entered by the agent of Mr. Garth which was not to be specifically enforced by the minor on attaining majority. Lord Macnaghten states the law thus :

> "They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property and they are further of opinion that the minor in the present case was not bound by the contracts, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract."

The decision in *Narayan Row* v. *Venkatasubba Row*[2] laid down that it is not within the competence of a guardian of a minor to bind the minor or his estate to a contract for the purchase of immoveable property and the minor in such a case is not bound by the contract as there is no mutuality.

Consequently it is not open to a minor on attaining majority to enforce specific performance of the contract following *Mir Sarwarjan* v. *Fakhruddin Mahomed*.[3] It is in this case that Spencer, J., assumed that if the contract was to sell or to purchase joint family property then the action of the guardian will be binding on the minor. Here again it related to the separate property of the minor.

The Full Bench decision in *Venkatachalan Pillai* v. *Sethuram Rao*[4] was a case in which the guardian of a minor sold the minor's property to another and in the sale-deed there was a covenant that in case the vendee or his heirs have to sell the property to others, then such a sale must first of all be to the minor or his heirs at the same price. On the erstwhile minor filing a suit for specific enforcement of the agreement to re-sell, the Full Bench held that as the contract cannot be enforced against the minor for want of mutuality the minor is also prevented from enforcing it on the same principle,

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1. I. L. R. 39 Cal. 232 (P. C.).
2. A. I. R. 1920 Mad. 423.
3. I. L. R. 39 Cal. 232 (P. C.).
4. A. I. R. 1933 Mad. 322.

having come to the conclusion that the contract in question was an executory one. Sundaram Chetti, J., who delivered the judgment of the Full Bench followed the Privy Council decesion in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[1] and held that the contract is unenforceable for want of mutuality.

This case also related to the separate property of the minor. The case reported in *Singara Mudali* v. *Ibrahim Baig*[2] was one in which the contract was with respect to the joint-family property of the three minors and it was held that such a contract is not enforceable.

As stated in *Raghunathan* v. *Rarutha Kanni*,[3] and *Ramakrishna Reddiar* v. *Kasi Vasi Chidambara Swamigal*,[4] inasmuch as the contract was by the guardian for the sale of property belonging to the minor such contracts were held to be not enforceable. Specific performance cannot be granted of a contract which can be enforced at the option of only one of the parties and it is immaterial whether the purchase was advantageous for the minor. Various authorities are cited the chief of which is *Mir Sarwarjan* v. *Fakhruddin Mahomed*.[5] In the case of contracts entered into by an individual on his or her own behalf and as guardian of a minor with respect to a property belonging to both of them the doctrine of mutuality cannot apply has been laid down by Varadachariar, J., in *Chisnakkal* v. *Chinnathambi Goundan*.[6] In that case a mother for herself and on behalf of her minor son sold certain property by a registered document and on the same date there was an unregistered deed for reconveyance of the same property to the original vendors themselves and when a suit for specified performance of the contract was brought by the mother an objection as to want of mutuality for such a contract so far as the minor son was concerned was raised. Varadachariar, J., held that no objection with regard to the question of mutuality can apply so far as the mother was concerned. He left open the question, whether the doctrine of mutuality can be applied to such an indivisible contract but held that it was open to the mother to have specific performance of the entire contract. The learned Judge was inclined to think that the doctrine of mutuality was a doubtful proposition so far as optional contracts were concerned. One thing is clear from this judgment and that is that such contracts are capable of specific performance though the transaction does not relate to the joint-family property but is concerned with the joint property as in the present case.

The decision in *China Munuswami Naidu* v. *Sagalaguna Naidu*,[7] and its confirmation by the Privy Council in *Sagalaguna Naidu* v. *Chinna Munuswami Naidu*,[8] related to a contract for repurchase entered into by a father on behalf of himself and his minor son with a counterpart document by which the vendee agreed to reconvey the property for the same consideration mentioned in the sale-deed itself if the vendors made an application for that purpose in the month of *Ani* thirty years later and in that case their Lordships held that the option created by the counterpart could be exercised not only by the father and his son personally but also by the assignees thereof.

It was further held that taking contract and the surrounding circumstances into consideration the option could be exercised by the two persons

1. I. L. R. 39 Cal. 232 (P. C.).
2. A. I. R. 1947 Mad. 94.
3. A. I. R. 1938 Mad. 765.
4. A. I. R. 1928 Mad. 407.
5. I. L. R. 39 Cal. 232 (P. C.).
6. A. I. R. 1934 Mad. 703.
7. A. I. R. 1926 Mad. 699.
8. A. I. R. 1928 P. C. 174.

or their heirs or assigns. It is clear from this judgment that the doctrine of want of mutuality was never sought to be applied in a case where the property did not belong to the minor separately. In *Adinarayana* v. *Venkatasubbayya*,[1] it was decided that a contract for sale of land belonging to a joint Hindu family signed by the major members and by the managing member as guardian of the minor could be specifically enforced against the whole family as such after the minor had attained majority.

It was further held that if at the time of the hearing of the suit there was good title in the joint family though there was none such at the time of the contract still the same could be enforced. Here also the absence of mutuality was not considered as a bar to specifically enforcing the contract. It has been held that in the case of a *de facto* guardian dealing with a minor's estate where he is not *de jure* or a natural guardian the transactions entered into by him will not be binding on the minor by an authoritative decision of the Supreme Court in *Sriramulu* v. *Pundarikakshayya*,[2] while affirming the decision of the Madras High Court in *Pundarikakshayya* v. *Sriramula*.[3]

The principle deducible from that case is that where it is the minor's property that is being dealt with the *de facto* guardian as such has no authority and if the *de facto* guardian is also the natural guardian or *de jure* guardian then the touchstone is one of necessity for binding the minor. In view of the authorities discussed above it is clear that the doctrine of mutuality does not apply to a case where the property belongs to the minor and another as tenants-in-common.

A similar case in point is the judgment of the Chief Justice and Rajagopala Ayyangar, J., in *Srinivasalu Naidu* v. *Raju Naicker*,[4] confirming the decision of Viswanatha Sastri, J., in App. No. 487 of 1947, where it was held that a sale followed by an agreement of reconveyance should be treated as one transaction and that consideration for the reconveyance should be the sale itself.

In those circumstances it was held that such contracts can be specifically enforced. If the agreement to reconvey was part of the bargaining which permitted the same, then the agreement could be supported on the ground of benefit. There are also observations in the decision in *Sohanlal* v. *Atalnath*,[5] in which the Chief Justice refers to a case where the property was purchased for the joint family with the moneys borrowed and when the question of repaying the debt came up for consideration the minors disputed the debt. The learned Judge observed as follows :

> "We do not think that a minor member of the family can take a share in the property so acquired and at the same time repudiate the authority of the other members to enter into such a contract. If he wishes to repudiate such a contract he must repudiate the whole of it and not take benefit under it."

Therefore in the instant case if the second defendant does not want to have the advantage of the purchase he can disclaim to purchase and claim the consideration paid for it but he will not be allowed to approbate and reprobate at the same time. *Held* that the contract cannot be bifurcated, it has specifically to be enforced and the 2nd defendant cannot repudiate the liability to reconvey at the same time retaining to himself the advantage gained by the purchase.[6]

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1. A. I. R. 1940 Mad. 625.
2. A. I. R. 1949 F. C. 218.
3. A. I. R. 1946 Mad. 1.
4. A. I. R. 1955 Mad. 635.
5. A. I. R. 1933 All. 846.
6. N. B. Sitarama Rao *v.* Venkatarama Reddiar, A. I. R. 1956 Mad. 261 at pp. 264, 267-68.

In *Vadakattu Suryaprakasam* v. *Gangaraju*,[1] the question arose on a reference to the Full Bench by the Division Bench of the Court, which was, "whether a contract entered into by a guardian of a Hindu minor for sale or for purchase of immoveable property is specifically enforceable against the minor". K. Guha Rao, the then Chief Justice, delivered the judgment of the Full Bench while answering the question in the affirmative, at page 45 : "I have held that if the contract of a sale was for necessity or for the benefit of the minor, it would be valid and enforceable. The competency of the guardian to enter into a valid contract is conditioned by the existence of facts attracting the aforesaid doctrine. Once the condition is fulfilled the competency to execute it is complete. If that is conceded it becomes enforceable and the supervening circumstances cannot invalidate it. But the existence of a valid enforceable contract cannot in itself deprive the Court of its discretionary power to refuse to enforce the contract, if the supervening circumstances obviously affect the interest of the minor." The Judge strikes a note of caution here and says: "In all transactions affecting a minor a paramount duty rests upon a court not to put its seal on transactions affecting his interest. Therefore, though the contract might be valid and otherwise enforceable if at the time the Cout was asked to enforce it, it transpires that the circumstances have so changed that it would obviously be unjust and detrimental to the interest of the minor to enforce it, the Court may well in exercise of its discretion refuse to give a decree for specific performance."

40. Origin of doctrine.—The doctrine of mutuality as developed by the English decision with its deceptive appearance of symmetry and simplicity, but having no foundation in reason or logic was imported in India by Lord Macnaghten of the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin Mahomed*.[2] This case related to a suit at the instance of a minor, after attaining majority, for specific performance of a contract of purchase by the guardian of the minor. It was found, as a fact, that the transaction was beneficial to the minor. On these facts Lord Macnaghten introduced in India the high technical doctrine of mutuality in these words :

> "It is not within the competence of a guardian of a minor to bind the minor of his estate by a contract for the purchase of immoveable property. The minor in such a case is not bound by such a contract and there is no mutuality : it is not open to the minor, on attaining majority, to enforce specific performance of the contract."

It is now well established that, as a matter of custom, the right of pre-emption in accordance with Hanafi law exists between Hindus in Bihar, and it is hardly necessary to enumerate reported decisions in which the existence of such a custom has been recognized. So well recognized, apparently, is custom that the plaintiff in this case did not think it necessary expressly to plead its existence. The claim to pre-empt, however, by necessary implication, pleaded the existence of such a custom, and the absence of a pleading of its non-existence in the written statement amounts to an admission of its existence. It is clear from the record that the parties proceeded on the basis that such a custom exists and no issue on the point was raised. It is too late to raise the point in appeal. A sufficient reply is contained in the observation

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1. A. I. R. 1956 Andh. 33 at pp. 34, 55.
2. 16 C. W. N. 74 at p. 81 : (1912) 39 I. A. 1 : I. L. R. 39 Cal. 232 : 21 M. L. J. 1156 ; 13 I. C. 331 : 15 C. L. J. 69.

with which the Judicial Committee dismissed a similar objection in *Jadu Lal* v. *Janki Koer*[1] :

> "In the case of *Fakir Rawat* v. *Emambaksh*,[2] the High Court of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Bihar.....
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> "In their Lordships' judgment the decision in *Fakir Rawat's* case[3] is conclusive on the point raised on behalf of the defendants. Their abstention from taking the objection in a definite and distinct form at the earliest stage of the case was, it may fairly be presumed, due to the explicit enunciation of the law in the ruling referred to."[4]

Although the doctrine was new to India and highly [technical there was no alternative but to follow the said decision in all cases of contract of purchase by a guardian on behalf of his ward;[5] but some cases are to the contrary[6] and, on the same principle, to contracts of repurchase in agreements relating thereto in the sale-deeds on behalf of the minors.[7]

It should be noted also that, as held in America, in a suit for specific performance by or against a minor on a contract of a guardian of a minor, the minor's interest is safeguarded, for the Court can always refuse specific performance if the contract is not fair to him. Whatever the state of law might appear to be from a study of original Arabic books of Fikh, still there is the very clear pronouncement of their Lordships of the Privy Council in *Mir Sarwarjan's* case[8] that it is not within the competence of a guardian of a Muslim minor to bind him by a personal covenant of the purchase of immoveable property.[9]

The doctrine of mutuality which was one of the defences in English law to an action for specific performance has been deliberately left out from the Specific Relief Act by the Legislature and that it is not applicable to India.[10]

This distinction between "void" and "voidable" as regards minors' contracts, is not of much importance when courts are dealing with a suit for specific performance of an executory contract entered into on behalf of a minor by his guardian. The distinction between the non-availability of the

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1. 39 I. A. 101 : I.L.R. 39 Cal. 915 (P.C.).
2. Beng L. R. Sup. Vol. 35 : 1863 W. R. 143 (F. B.).
3. *Ibid.*
4. Sonabashi Kuer *v.* Chaudhury Ramdeo Singh, A. I. R. 1951 Pat. 521 at pp. 521-22.
5. Malla *v.* Mohd. Sharif, A. I. R. 1927 Lah. 355 at p. 355 : I. L. R. 5 Lah. 212 ; Venkatachalam *v.* Setharamarao, A. I. R. 1935 Mad. 322 at p. 324 (F. B) : I. L. R. 56 Mad 433 ; Suchit Chandra Rama Krishna *v.* Kasivasi Chidambara, A I. R. 1923 Mad. 407 at pp. 408-9 : 54 M L. J. 412 ; Krishna *v.* Laksmi Chand, A I R. 1937 All. 456 at p. 462 ; Narayana *v.* Venkata Subbarao, 38 M. L. J. 77 at p. 79 : 1920 M. W. N. 129 : 51 I. C. 377 ; Madhavarao *v.* Venkatarao, 1 Mys. H. C. R. 221 : 25 Mys. L.J. 30 ; Suresh Chandra Pradhan *v.* Ganesh Chandra. I.L.R. (1919) Cut. 744 ; Sonabshi Kuar *v.* Choudhu Ramdeo Singh, A. I. R. 1951 Pat. 521 at p. 525.
6. Kewalram *v.* Conald, 5 S. L. R. 61 and Krishnaswami *v.* Sundarappayar, I. L. R. 18 Mad. 415.
7. Venkatachalam Pillai *v.* Sethuramarao, I. L. R. 56 Mad. 433 : 64 M. L. J. 354 (F. B.).
8. 39 I. A. 1 (P. C.).
9. Amir Ahmad *v.* Mir Nizam Ali, A. I. R. 1952 Hyd. 120 at p. 133.
10. Chetoomal Bul Chand *v.* Shankerdas Girdharilal, A. I. R. 1929 Sind 83 at pp. 84-85.

remedy by way of specific performance and the voidability only of the contract so far as the minor is concerned is pointed out in the same decision. Specific performance could not be enforced because they are contracts entered into on behalf of a minor on whom personal covenant cannot be imposed by the guardian. The question whether specific performance should be decreed or not depends not so much on the void or voidable nature of the contract but of its being executory or executed so far as the minor is concerned, and this is apparent from the Full Bench decision in *Venkatachalam Pillai* v. *Sethuramarao*,[1] where it was held that a contract of re-sale in favour of a minor could not be enforced by him after he attained majority inasmuch as it was an executory contract and for want of mutuality cannot be enforced by either party even though on the date of the suit, the plaintiff had become a major and had elected to ratify or affirm the transaction that was entered into on his behalf or for his benefit.

41. The possession of karta of a joint Hindu family consisting of some minor members is different from that of the guardian of a minor.—In exercising its discretion, the Court can take into consideration the plaintiff's abandonment of his claim to specific performance, position he is entitled to take up under O. XXIII, R. 1 of the Civil Procedure Code. A somewhat similar point arose in *Bombay Cycle and Motor Agency Ltd.* v. *Rustomji Dossabhai N. Wadia*.[2] In that case also there was a change of position by the parties. The plaintiff sued for specific performance. Abandoning that he wanted to fall back upon the alternative relief of damages, if on an inspection of defendant's accounts he found it worthwhile to do so. In the Appeal Court judgment the learned Chief Juttice says :

> "It is the Court alone which has to decide whether specific performance ought or ought not to be granted, and unless the parties come to the Court agreed as to what the terms of the decree should be, the Court has to come to a decision on that question ; and it is open to the plaintiffs to say that considering all the facts of the case, the Court ought not to grant the prayer for specific performance in the plaint, but to grant the alternative prayer for damages.
>
> "The plaintiff's claim has been dismissed, as they were not then prepared to submit to a decree for specific performance by consent. They were in no sense bound to consent to such a decree; and just as the defendants changed their position, they were also in my opinion entitled to consider their position with reference to the state of the market as it developed during pendency of the suit, and to limit their prayer to damages, if so advised."

The Court can no doubt come to the conclusion that in the circumstances the plaintiff's proper and equitable remedy is to get a decree for specific performance, and that if he refuses to take this his suit should be dismissed with costs. But where the controversy between the parties from time to time has changed with marked value of the property and even the form it has taken at the hearing is due largely to the fluctuations in the market value of the property. There can be no doubt, that the defendant's failure to perform the contract prior to the suit and his desire to perform it after the suit is entirely due to such fluctuations. The

1. I. L. R. 56 Mad. 533 : A. I. R. 1933 Mad. 922 : 142 I. C. 315 (F. B.).
2. (1921) O. C. J. No. 7 of 1921.

maxim applies "that he who comes into equity must come with clean hands", and the defendant is really in the same box as the plaintiff in regard to the latter seeking to avoid the performance of the contract.[1]

Where a manager of a joint Hindu family makes a contract for himself and on behalf of a minor coparcener, then such a contract can be specifically enforced against the minor if it is proved that it was made for family necessity or for the benefit of the minor.[2]

It is not that specific performance of a contract cannot be obtained against a minor and therefore cannot be obtained by him because there are cases in which it can be obtained against him. The Allahabad case of *Babu Ram* v. *Saidunnisa*[3] in which *Mir Sarwarjan*'s case[4] was distinguished, is one. The prineiple is that no person can sue for specific performance if he could not be sued for it, whether because he is a minor or for any other reason.[5]

It must, however, be remembered that the case of a contract made in behalf of a minor by his guardian does not stand on the same footing as a contract made by a *karta* of a joint Hindu family on behalf of the family some of the members of which happen to be minors. Contracts made by the managing member of a joint family bind the minor members of the family and on the other hand such contracts can also be enforced on behalf of the family. There is, therefore, ample authority for the proposition that where a contract is by the *karta* of a joint Hindu family on behalf of the family for purposes binding on the family it can be enforced against the family.[6] The reason for this rule of law is clearly stated both by Sulaiman, C.J. and Mr. Justice Rachhpal Singh in *Dhapo* v. *Ram Chandra*[7] : "There is a marked distinction," observed Sulaiman, C. J., "between the position of the manager of a joint Hindu family and a mere guardian of a minor owner. In the former case the manager represents the whole family *as one unit* to the outside world and the property is vested in him jointly with the other members. In the case of a mere guardian the property of the minor is not vested in him at all and he is acting merely as the agent of a minor who would not otherwise be capable of acting. In the case of the managing member the contracting party is the whole family as one unit acting through the manager, whereas in the case of a minor owner the contracting party is the minor who, however, acts through his guardian." "It appears to me," remarked Rachhpal Singh, J., "that a contract made by the manager of a joint family stands on a different footing from a contract made by a mere guardian of a minor or a manager of the minor's estate. A Hindu woman may be a guardian of a minor or a manager of an estate of a Hindu minor. Now a mere guardian or manager cannot make a contract which can be enforced against a minor for want of mutuality. A minor cannot enforce a contract specifically which has been made by his guardian or by the manager of his estate. So on the same principle such a contract cannot be enforced against him. But where a contract is made by a

1. Karsandas Kalidas Ghia *v.* Chhotalal Motichand, A. I. R. 1924 Bom. 119 at pp. 125 26.
2. Mst. Dhapo *v.* Ram Chandra, A. I. R. 1934 All. 1019 at p. 1022.
3. I. L. R. 35 All. 499.
4. I. L. R. 39 Cal. 232.
5. Thakur Har Govind *v.* Mehtab Singh, A. I. R. 1922 Nag. 192 at p. 194 ; *see* pp. 219 and 499 of the 6th Ed. of Fry on *Specific Performance.*
6. Hari Charan *v.* Kaulo Rai. 40 I. C. 142 : 2 Pat. L. J. 513 (F. B.) ; Krishna *v.* Samana, 17 I. C. 497 : 1912 M. W. N. 1188 ; 23 M. L. J. 610 ; Ram Chandra *v.* Sunder Murti, 4 M. L. J. 9 ; Bhagwan *v.* Kisanai, 22 Bom. L. R. 997; Narayan *v.* Venkata, 55 I. C. 377: 1920 M. W. N. 129 : 38 M. L. J. 77 : 27 M. L. T. 264 ; Narayan Muthia, I. L. R. 47 Mad. 692 : 80 I. C. 658 : 46 M. L. J. 575 : 29 L. W. 103 : 34 M. L. T. 350 : 1924 M. W. N. 482 ; Venkataramanier *v.* Amamalai, 72 I. C. 42 : 44 M. L. J. 226 : 17 L. W. 364 : 1923 M. W. N. 218 : 32 M. L. T. 253.
7. I. L. R. 57 All. 374 : 154 I. C. 235 : A.I R. 1934 All. 1019 at pp. 1020-21, 1022,

karta of a joint family, then the position is different. Unlike the case of a guurdian or manager of the estate of a minor, he has his own interest in the joint family estate. To the outside world he represents the entire joint family consisting of himself and other major and minor co-parceners. Unlike the guardian or a manager of a minor's estate he can enter into binding contracts on behalf of the whole family.....The distinction between contracts made by a guardian of a minor or a manager of the estate of a minor on the one hand and the contracts made by a managing member of a joint Hindu family consisting of minors is clear. In the first case such a contract cannot be specifically enforced for lack of mutuality, while in the second case there is no want of mutuality, because the manager of a joint Hindu family has power to make binding contract on behalf of the joint family." There is, however, a limitation on the powers of a *karta* of joint family which should not be lost sight of. His authority to alienate family property is not absolute, but is conditional on the existence of legal necessity or the benefit of the family or in a case when he is the father of the other members, the need for the payment of his antecedent debts. But when such conditions exsist, then his authority to alienate property is complete and in no way limited. The authority to alienate property necessarily implies authority to contract to alienate it first and then to fulfil the promise by alienating it.[1] The point strongly pressed for the appellants is that the defendants 2 and 3 being minors, there can be no decree for specific performance against them. There is no general rule that no decree for specific performance can be passed against minors. For instance, in the simplest and obvious case where a contract is entered into by a Hindu in respect of property which is not joint-family property and the property devolved by inheritance on heirs, some or all of whom are minors, if cannot be contended that no decree for specific performance cannot be made. The next case is where Hindu, who is a member of a joint family enters into contract to sell his own share, and dies and the property descends by survivorship to other members of the family some or all of whom may be minors. In *Bhagwan* v. *Krishnaji*,[2] it was held that it can be enforced against the undivided sons of the deceased. This decision is not in conflict with the opinions of Wallis, C. J., and Sadasiva Aiyar, J., in *Rangayya Reddi* v. *Subramania Aiyar*,[3] nor with the actual decision in *Bappu* v. *Annamalai Chettiar*,[4] which is not a case of a member contracting to sell his own share. If the point arises for decision, the case in *Bhagwan* v. *Krishnaji*[5] is correctly decided on grounds which need not be stated. The case when the contract is made on behalf of a minor or minors is settled by the decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[6] Mr. Srinivasa Aiyangar contends that, all that the Judicial Committee decided was that such a contract cannot be specifically enforced only when it was not for purpose of necessity binding on the minors, and the contract in that case which was one for the purpose of immoveable

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1. Mst. Dhapo *v.* Ram Chandra, A. I. R. 1934 All. 1019 at pp. 1022-23 : I. L. R. 57 All. 374 : 154 I. C. 235.
2. (1920) 22 Bom. L.R. 997 : 58 I C. 335.
3. I. L. R. (1917) 40 Mad. 365 : 32 M. L. J. 575 : 5 L. W. 797 : 40 I. C. 429 : 21 M. L. T. 885 (F. B.).
4. A. I. R. 1923 Mad. 313 : 44 M. L. J. 226 : 17 M. L. W. 364 : (1923) M. W. N. 281 : 23 M. L. T. 253.
5. (1920) 22 Bom. L. R. 997 : 58 I. C. 335.
6. I. L. R. 39 Cal. 232 : 39 I. A. 1 : 21 M. L. J. 1156 : 16 C. W. N. 74 : (1912) M. W. N. 22 : 9 A. L. J. 33 : 13 I. C. 331 : 15 C. L. J. 69 : 14 Bom. L. R. 5 : 11 M L. T. 8 (P. C.).

property was not for the benefit of the minors. Court cannot agree with this narrow interpretation of the decision. Their Lordrhips say at page 237 : "They are, however, of opinion that it is not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property." There is no referenee here to necessity, nor is any distinction drawn between a contract being merely "advantageous" to a minor as opposed to its being for necessary purposes binding on the minor though, earlier in the judgment, their Lordships accept the assumption that the purchase was an advantageous "purchase for the minor".

The present is a case where the contract is entered into by the manager of a family on behalf of the whole family for purposes binding on the family. The decision in *Bappu* v. *Annamalai Chettiar*[1] does not help the appellant for the contract in that case was not for purposes binding on the family, and the remarks at page 228 are against him. The remarks in *Krishna Aiyar* v. *Shamanna*[2] are againt the appellant and in favour of the respondent. The observations in both these cases are *obiter*, not being necessary for the decisions. In *Narayana Rao* v. *Venkatasubba Rao*,[3] Spencer, J., conceded that a contract made by a manager, on behalf of the family may be enforced against the manager, and where it is for the benefit of the family, the completed contract will certainly bind the minor members. Should the accident of the death of the manager before completion in such a case make any difference ? Where a contract is by a manager on behalf of a family and for the benefit of the family and manager dies, it can be enforced against the survivors when they are all majors.[4] Should it make any difference that some of the survivors are minors and does the case in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*[5] support such a distinction ? The matter is *res integra*. His Lordship is in agreement with Phillips, J.'s remarks in *Bappu* v. *Annamalai Chettiar*,[6] where he referred with approval to *Ramachandra Aiyar* v. *Sundaramurthi Mudali*,[7] and the *obiter dicta* in *Krishna Aiyar* v. *Shamanna*.[8] The result is a decree for specific performance may be passed against the minor defendants.

The suit is not barred by limitation, as it does not appear that the specific performance of the contract was refused more than three years prior to suit.[9] The words "on demand" show, in a case like this, the cause of action arises only after request.[10] Again where a Hindu who is a member of a joint family enters into a contract to sell his own share, and dies and the property descends by survivorship to other members of the family, some or all of whom may be minors, the contract can be enforced against the undivided sons of the deceased.[11] Another patent

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1. A. I. R. 1923 Mad. 313 : 44 M. L. J. 226 : 17 M. L. W. 364 : (1923) M. W. N. 218 : 32 M. L. T. 253.
2. (1912) 23 M. L. J. 610 : 17 I. C. 497 : (1912) M. W. N. 1188.
3. (1919) 38 M. L. J. 77 : 27 M. L. T. 264 : 55 I. C. 377 : (1920) M. W. N. 129.
4. Venkateswara Aiyar *v.* Raman Nambudripad, (1916) 3 L. W. 435 : 33 I. C. 696 : 19 M. L. T. 329.
5. I. L. R. 39 Cal. 232 : 39 I. A. 1 : 21 M. L. J. 1156 : 16 C. W. N. 74 : (1912) M. W. N. 22 : 9 A. L. J. 33 : 13 I. C. 331 : 15 C. L. J. 69 : 14 Bom. L. R. 5 : 11 M. L. T. 8 (P. C.).
6. A. I. R. 1923 Mad. 313 : 44 M. L. J. 226 : 17 M. L. W. 364 : (1923) M. W. N. 218 : 32 M. L. T. 253.
7. (1893) 4 M. L. J. 9.
8. (1912) 23 M. L J. 610 : 17 I. C. 497 : (1912) M. W. N. 1188.
9. Venkanna *v.* Venkatakrishnayya, I. L. R. 41 Mad. 18.
10. *See* 49 Halsbury, Sec. 65, p. 43 ; Narayan Chetty *v.* Muthiah Chetty, A. I. R. 1924 Mad. 680 at pp. 681-82 : 34 M. L. T. 350 : 40 M. L J. 575.
11. Bhagwan *v.* Krishnaji, 58 I. C. 335 : 22 Bom. L. R. 997.

instance where a specific performance may be allowed is the case where a contract is entered into by a Hindu in respect of property which is not joint family and which devolves on his death on heirs some or all of whom are minors.

A reference to notes under the heading "Transfer in favour of minor", *infra*, may be made.

42. Statutory guardians.—The decision of their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed*[1] has no application to contracts by certificated guardians, i. e. guardians appointed under the Guardians and Wards Act, 1890, or Court of Wards Act. Such a guardian is competent to enter into a contract for sale or purchase of immoveable property on behalf of the minor.[2] A contract between a certificated guardian and a person for the sale of a property of the minor of that guardian is contingent upon the permission of the Court. This is a correct proposition of law ; but, when the contingency happens, then by virtue of the sanction the contract becomes a completed one, and no case has gone to this extent that after the sanction is actually accorded, it is necessary for the certificated guardian to solemnly enter upon another contract with the proposed purchaser. And a consideration of the various sections of the Guardians and Wards Act (Act 8 of 1890) will lead to the same result. The true view is that a certificated guardian can enter into a contract with an intending purchaser, but such a contract is subject to sanction being accorded to the proposed transaction and that, when the sanction has been accorded, the contract becomes a completed contract by virtue of that sanction.[3] Sanction under Sec. 31 of the Guardians and Wards Act is complete authority to the certificated guardian to sell to any person he likes who is willing to comply with the terms upon which permission to sell is accorded by the District Judge.[4] It is also noteworthy that a sale by a certificated guardian in contravention of Secs. 28 and 29 of the Guardians and Wards Act is voidable and not void.[5] There is, however, no authority whether in statute or case-law for the proposition that a court is bound to decree specific performance of a contract entered into by a certificated guardian.

Contract of sale or purchase of immoveable property entered into on behalf of minor or by legal guardian appointed by Court can be enforced.

Agreement must be for the minor's benefit.

No decree for specific performance of an agreement to sell immoveable property entered into on behalf of a minor by his guardian should be passed against the minor unless the Court is quite satisfied that the agreement was for the benefit of the minor and that it would be for his benefit to enforce it.[6] The reason is that courts in India will not allow a bargain

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1. I. L. R. 39 Cal. 232 (P. C.) : 13 I. C. 331 : 16 C. W. N. 74 : 1912 M. W. N. 22 : 9 A. L. J. 38 : 15 C. L. J. 69 : 14 Bom. L. R. 5 : 21 M. L. T. 1156.
2. Babu Ram *v.* Saidunnissa, I. L. R. 35 All. 499 : 20 I. C. 916 : 11 A. L. J. 783; Innatunnissa *v.* Jankinath, 40 I. C. 400 : 22 C. W. N. 477 ; Etwara *v.* Chandar Nath, 10 C. W. N. 763.
3. Gobardhan Lal *v.* Sheo Narayan Sahu, A. I. R. 1929 Pat. 202 at p. 204 : I. L. R. 8 Pat. 226.
4. Gobardhan Lal *v.* Sheo Narain, A. I. R. 1929 Pat. 202 at p. 204 : I. L. R. 8 Pat. 226 : 117 I. C. 161.
5. *Ibid.* at p. 205; see *cf.* Sec. 30, Guardians and Wards Act.
6. Bahadur Chand *v.* Muhammad Ismail, 79 I. C. 201 : A. I. R. 1924 Lah. 181 ; Chhitar Mal *v.* Jaggannath, I. L. R. 29 All. 213 : 4 A. L. J. 24 : 1907 A. W. N. 25 ; Tarini Kumar *v.* Srish Chandra, A. I R. 1925 Cal. 1160 at pp. 1164-65 : 85 I. C. 967 ; Gobardhan Lal *v.* Sheo Narain, *supra*.

made by an improvident guardian to be enforced against the interests of the minor if it be shown to be a bargain made to the detriment of the minor.[1]

The following statement of the law is worth perusal : "An infant is not allowed to enforce a contract because it is said the contract lacks mutuality. This is often thought so mean merely that since the adult could not have enforced the contract against the infant, the infant is similarly deprived of equitable relief, but the difficulty is not simply that the adult could not have enforced the contract against the infant, but that even though the adult performed the contract, the infant might subsequently exercise his privilege to rescind the transaction. The decree of the Court should not be used to deprive him of his privilege and unless he is deprived of it the adult is subjected to injustice if compelled to perform. This difficulty does not arise where the infant has come of age before seeking to enforce the contract. In such a case specific performance should be granted, and also where the infant has irrevocably performed his side of the contract.[2]

43. **Modern view.**—According to the decisions of the Privy Council it must be taken that in a contract for sale of minor's immoveable property by his guardian want of mutuality does not render the contract void and unenforceable specifically. In *Sri Kakulam Subrahmanyam* v. *Kurra Subba Rao*,[3] it would appear, therefore, that the contract was binding upon the respondent from the time when it was excluded. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, and not his mother was the owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother. Having regard to all the circumstances, their Lordships are of opinion that the respondent is the person who most aptly answers the description of "the transferor" in the sense in which these words are used in Sec. 53-A. It follows that he is debarred by the section from obtaining the relief claimed by him in the present action, which was rightly dismissed. On the point in question Lord Morton of Henryton spoke thus :

> "The contract (of sale) in the present case was binding on the respondent (minor) from the time it was executed ; if a sale had been completed by a transfer the transfer would have been a transfer of property of which the respondent (minor) and not his mother (guardian) was the owner. If an action had been brought for specific performance of the contract it would have been brought by or against the respondent (minor) and not by or against his mother (guardian)."

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1. Tarini Kumar *v.* Srish Chandra, A.I.R. 1925 Cal. 1160 at p. 1166 ; Chhittar Mal *v.* Jaggannath, I. L. R. 29 All. 213 ; 4 A. L. J. 24 ; 1907 A. W. N. 26.
2. Williston on *Contracts*, Sec. 1438.
3. A. I. R. 1948 P. C. 95 ; (1948) 2 M. L. J. 22.

44. Doctrine discarded.—The words are clear and unmistakable. *Mir Sarwarjan's* case[1] was quoted and relied on in the High Court's judgment under appeal. In these circumstances this passage clearly shows that the doctrine of mutuality which has so long sterilized contracts of sale entered into by a gaurdian on behalf of his ward for the latter's benefit or interest, has been definitely discarded by the very tribunal which was responsible for its introduction in India. It need not any longer cast its spell on Indian courts. This view is further supported by a still more recent decision in *Ramalinga Reddi* v. *Babanambal Ammal*,[2] in which Viswanatha Sastri, J., ably reviewed the English and Indian decisions. This doctrine of "mutuality" found its place in English decisions rather from a desire for symmetry than from its "inherent utility" and was discarded by the Specific Relief Act which defined and amended the law relating to specific relief in India.[3] Even in England the want of mutuality did not stand in the way of specific performance of a contract by the grant of an injunction.[4] The objection on the score of mutuality may also be waived.[5] In Leake on *Contracts* (8th Ed. at pp. 410 and 411), the rule is thus stated :

> "A contract which is voidable by an infant is binding on the other contracting party until avoided ; the privilege of avoidance being that of the infant only.....An infant may sue upon the contract during his minority. But a court of equity will not, in general, grant specific performance at the suit of the infant because the remedy is not mutual until he has come of age."

That this doctrine of "mutuality" is a conventional rule evolved gradually by the decisions of the English Courts of Equity and does not rest on any logical or fundamental principle appears from the following passage in Pollock on *Contracts*[6] at pages 46 and 47 :

> "An infant is not absolutely incapable of binding himself, but in generally speaking incapable of absolutely binding himself by contract. His acts and contracts are voidable at his option, subject to certain statutory and other exceptions. Where the obligation is incident to an interest (or at all events to a beneficial interest) in property it cannot be avoided while that interest is retained. An infant's express contract may be valid if it appears to the Court to be beneficial to the infant."

In *Salisbury* v. *Hatcher*,[7] Knight Bruce, V.C., observed :

> "In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle

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1. I. L. R. 39 Cal. 232 (P. C.) : 13 I. C. 331 : 16 C. W. N. 74 : 1912 M. W. N. 22 : 9 A. L. J. 38 : 15 C. L. J. 69 : 14 Bom. L. R. 5 : 21 A. L. J. 1156.
2. A.I.R. 1951 Mad. 431 at p. 433 : (1950) 2 M. L. J. 597 : 1950 M. W. N. 669.
3. *See* Whitley Stokes' *Anglo-Indian Code*, Vol. I, p. 931.
4. James Jones and Sons *v.* Earl of Tankerville, (1909) 2 Ch. 440.
5. Fry on *Specific Performance*, 6th Ed., para. 468.
6. 12th Ed. by Professor Winfield.
7. (1842) 2 Y. & C. C. C. 54 : 12 L. J. Ch. 68.

and authority to say that perfect mutuality is required in order to call a court of equity into action. There are cases in which plaintiffs have had a decree for specific performance against dependents, who when the bill was filed were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract the enforcement of it in this Court is a matter of judicial discretion."

Learned Judges of the English courts have found it difficult to define precisely the metes and bounds of this doctrine of mutuality.

The doctrine of mutuality as developed by English decisions with its deceptive appearance of symmetry and simplicity but having no foundation in reason or logic, was imported in India by the decision of the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin Mahomed*,[1] delivered by Lord Macnaghten.

Principles laid down for the protection or benefit of minors had been applied in this country to their prejudice by invoking this artificial doctrine of mutuality. If the guardian has made an advantageous contract for the sale or lease of the property of the ward there is no reason why the ward should be disabled from enforcing it against the other party to the contract. The doctrine of "mutuality", illogical in form and in substance unjust, has now been discarded by the very tribunal which was responsible for its introduction in India and it need no longer cast its spell on Indian courts and sterilize contracts of sale entered into by a guardian on behalf of his ward for the latter's interest or benefit.

Held that the guardian's contract for sale was within her authority, that it was necessary and beneficial to the minor and that the vendee should be given a decree for specific performance.[2]

45. True tests.—As a result of the above discussion it may be stated that the true test for validity and enforceability of a guardian's contract of sale on behalf of a minor is not the existence of mutuality in the contract but whether it was by a competent guardian and for legal necessity or benefit of the minor's estate. This may be put in the form of general propositions, namely—

(*i*) A minor's contract being now decided to be viod it is clear that there is no agreement to be specifically enforced ;

(*ii*) It is however different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India (and now by the Privy Council also) in cases which arose subsequent to the decision of the Judicial Committee in *Mohori*

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1. I. L. R. 39 Cal. 232 : 39 I. A. 1 (P. C.).
2. Ramalingam Reddi (Minor) *v.* Babanambal Ammal, A. I. R. 1951 Mad. 431 at pp. 432-34. 437.

Bibi v. *Dharmodas Ghosh*,[1] that the same can be specifically enforced by or against the minor if the contract is one which it is within the competency of the guardian to enter into on his behalf so as to bind him by it and further it is for the benefit of the minor. But if either of these two conditions is wanting the contract can be specifically enforced at all."[2]

Minority of deities is pure fiction.

46. Contract on behalf of deities.—There is no authority for the proposition that the deities are perpetual minors and so no contract made on their behalf can be specifically enforced. The analogy of the minority of deities is a pure fiction for which no authority is to be found in Hindu law itself and it is not possible to conceive of any principle on which, on such analogy, a contract otherwise good and valid can be taken out of the class of the contract of which specific performance may be granted under the law.[3]

47. Option contracts—Mutuality.—"An option is a contract or other act in the law containing a term by which one party (who may be called the option-holder) is empowered to elect wtthin a specified time whether the contract or other act in the law shall operate further than by conferring the power of so electing it has already done."[4]

"In other words, an option is an act, in the law which is conditional upon the option-holder electing that it shall become fully and (so far as regards the power of election) unconditionally operative between the parties."[5]

A conditional contract which is an option, is generally in the form of a deed. Consideration is also necessary as in the case of the other contracts.

The option-holder has the benefit not of a mere revocable offer but of an irrevocable and binding, though conditional, contract.

Page Wood, V. C., in *Weeding* v. *Weeding*,[6] while speaking of an option to a lessee to purchase demised premiscs observed : "It is as much a conditional contract as if it depended on any other contingency than the exercise of an option by a third porty, such as for exemple, the failure of issue of a particular person."

There can be no mutuality in respect of what are known as "option contracts" until at any rate the party to whom the option is given has exercised the option. Where the plaintiff executed a sale-deed to the defendant (which was registered) for himself and on behalf of the minor

1. (1903) 30 I. A. 114 : I. L. R. 30 Cal. 539.
2. Pollock and Mulla (7th Ed.), pp. 70,71, approved in A. I. R. 1949 P. C. at p. 99 and 1950 M. W. N. at p. 672; *see* Sanjiva Rao's *Contract Act*, 4th Ed., by same editor under Sec. 11 for full discussion.
3. Sri Sri Gopalsridhar Mahadeb *v.* Sashibhusan, A. I. R. 1933 Cal 109 at p. 113 : I. L. R. 60 Cal. 11 : 142 I. C. 465 : 36 C. W. N. 1108.
4. Salmond and Williams, 2nd (1945) Ed., pp. 131-32.
5. *Ibid.*
6. (1861) 1 J. & H. 424 at p. 430: 70 E, R. 812,

son, and took on the same date from the defendant an agreement to recover the properties, and when she sued for specific performance of the agreement the defendant pleaded want of mutuality. It was held that the privilege under the agreement was conferred either on the plaintiff or on her minor son and whatever force there may be in the objection as regards the minor, no such objection could arise as regards the plaintiff.[1]

48. True doctrine of mutuality.—Specific enforcement may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed and its concurrent or future performance is not well secured to the satisfaction of the Court.

The rule is flexible enough to allow wide discretion in granting or refusing specific performance, thus obviating the difficulties inherent in stating a general rule to cover all the situations. For example, when the party seeking specific performance has fully performed, or is now tendering complete performance, clearly specific performance should be granted. Where the contract is executory on both sides, the Court may still give specific performance if it is satisfied that the person seeking relief will continue to perform. This may be shown by past conduct; or the person seeking specific performance may have such a strong economic interest in the carrying out of the contract by reason of extensive investment of his funds and labour that default on his part is highly improvable. The Court may further secure the defendant by means of a conditional decree or by requiring the person seeking performance to give security for his own performance. In answer to the objection to this latter procedure, on the ground that the Court is enforcing a new contract between the parties it has been pointed out that almost every decree of specific performance requires a performance differing in some degree from that required by the contract.

The correct doctrine in regard to mutuality has been more than once enunciated by eminent Judges but other inconsistent and confused statements, though generally made in cases which were properly decided on any view, have somewhat obscured the matter.[2]

49. Specific enforcement of options.—An option is a term of business usage rather than of strictly legal nomenclature, and has frequently been used to include indiscriminately both binding conditional contracts and mere usealed offer without consideration. Both are offers, but the latter kind has, of course, no binding force either at law or in equity. On the other hand, an option for which consideration has been given is both an offer and also an unilateral contract. The only difference in the two kinds of offers is that one is revocable, the other is not. In either case when the offer is seasonally accepted a new contract, usually bilateral arises, and it is, strictly speaking, this contract which is specifically enforced. Failure to recognize this has sometimes caused confusion. It is, indeed, abundantly settled that if the option was given for valid consideration the acceptor may enforce

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1. Chinnakkal *v.* Chinathambi Gobinda, 152 I. C. 634 : A. I. R. 1934 Mad. 703 : 67 M. L. J. 635: 40 L. W. 626 ; 1934 M. W. N. 1122.
2. Williston on *Contracts*, Sec. 1440.

it, and it is not necessary that the consideration shall have been given exclusively for the option. It is enough if it is one term of contract for consideration was given. Thus, an option in a lease or in another instrument given contemporaneously with a lease, and as part of the same transaction, may be specifically enforced. Even though no consideration was given for the option, it is, nevertheless, enforceable if under seal in a jurisdiction where seal still retain their common-law significance. The enforcement of such an option is no exception to the rule that equity will not enforce a contract without consideration, for as has been said, it is the contract created by the acceptance of the option which is enforced, and it might as well be said that no contract which originated in an offer and a subsequent acceptance could be enforced as to deny enforcement to a contract arising from the acceptance of an option.

It is true that if an attempt has been made to revoke the offer contained in an option for which consideration has been given or which is under seal, to deny effect to the revocation and treat the offer as irrevocable is equivalent to a preliminary specific performance, but it is not effected by a decree in equity. A court of law as well as a court of equity assumes the irrevocability of such offers. An option for which no consideration is given and which is not under seal is subject to the same rule if accepted before revocation or expiration by lapse of time ; for every offer is an option, revocable or not, as the case may be, for the time therein stated, or, if no time is stated, for reasonable time ; and cases which hold a contract based on an option is not specifically enforceable, because the option at the outset lacked mutuality, are suggesting a test which is not only intrinsically unreasonable but is distructive of the right to enforce any contract based on acceptance of a continuing offer.[1]

50. Consideration for option contract.—It follows that in order to support an option contract it is not necessary to have distinct and separate consideration. As observed by Lord Green, M. R., the covenants in the contract including the option clause must be read as part of the consideration for the purchase price.[2] Thus in *Hutton* v. *Watling*,[3] the plaintiff took on lease, in 1937, a business concern and an option was given to her to purchase for a stated sum the house in which the business was being carried on. In 1944, the plaintiff exercised the option to purchase. The defendant pleaded want of consideration for the option covenant. The Court repelled the contention and decreed specific performance.

51. Maximum time fixed, but not date.—Specific performance can nevertheless be granted though the contract did not fix a definite time for the exercise of the option while limiting the maximum period. The reason is the Court can determine with reasonable certainty parties' duties and conditions under which performance was due.[4]

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1. Williston on *Contracts*, 1940 Ed., Sec. 1441.
2. Hutton *v.* Watling, (1948)1 All E.R. 803 at p. 806 : C. A. (1948) Ch. 398: 64 T.L.R. 326.
3. *Ibid.*
4. Trotter *v.* Lewis, 185 Md. 528.

52. Damages for breach of option contract.—In an option contract it is open to the optionee to contract that, on his failure to exercise the option within the time limited, the optioner, despite the lapse of the option, would be entitled to the remedies open to him for the breach of the covenant. The Supreme Court of Canada, in a recent case, relating to an option agreement on petroleum and natural gas in certain lands decreed that in such circumstances, the proper measure of damages was not the cost of performance to the optionees but the value of the performance to the optioner, i. e. to place them in the same position as they would have been in if the covenant had been performed.[1]

53. Re-purchase subject to conditions.—In a contract for repurchase subject to certain conditions no claim for specific performance can be granted unless the conditions are strictly satisfied. Thus in a recent Supreme Court case, *Shanmugam Pillai* v. *Annalakshmi Ammal*,[2] their Lordships observed as follows :

> "It is well settled that, when a person stipulates for a right in the nature of a concession or privilege on fulfilment of certain conditions, with a proviso that in case of default the stipulation should be void, the right cannot be enforced if the conditions are not fulfilled according to the terms of the contract. Such conditions though relating only to payment of money, are not regarded as a penalty and courts of equity will not afford relief against a forfeiture for their breach. Thus in *Davis* v. *Thomas*,[3] which was decided on very similar facts, there was a sale of the equity of redemption in a certain estate which was followed by a demise of the estate to the vendor for a term at a certain rent payable half-yearly. That was a collateral agreement whereby the vendor stipulated that he should have the right to repurchase the premises any time within five years at a price slightly in excess of the original price in case he 'regularly paid the rent by 4th June and 26th October', with a proviso that if default were made in the payment of rent within the stated periods the agreement was to be void. The vendor failed to pay the rent at the periods stated and distresses for it had been levied on the premises, but within the five years he applied to repurchase and at the same time tendered the arrears of rent then due. The vendee having refused to reconvey, a bill was filed claiming specific performance or redemption on the footing that the transaction was a mortgage The bill was dismissed by the Master of the Rools (Sir John Leach) and the decision was affirmed on appeal by the Lord Chancellor (Lord Brougham). It was held (to quote the head-note) though in cases of non-payment of money the Court will relieve against penalty or forfeiture, yet when it is not a question of penalty or forfeiture

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1. Coller *v.* General Petrolcums Ltd., Canada, (1951) S.C. R. 154 at p. 160 ; Wetheim *v.* Chicantini Pulp Co., (1911) A.C. 301 at p. 307.
2. A. I. R. 1950 F.C. 38 at pp. 42, 43: 1949 F.C.R. 537: 1950 S.C.J. 1 : (1950) 1 M. L.J. 683 (F.C.) (Mahajan and Mukherjea, JJ., *contra*) .
3. (1830) 1 Russ. & M. 506 : 39 E. R. 195.

but a privilege is conferred upon payment of money at a stated period, the privilege is lost if the money be not paid accordingly.

"The position then, as already pointed out, was that forfeiture for non-payment of rent had been incurred in respect of the lease as well as the agrement both of which had therefore become voidable at the instance of Rangaswami. Having the option to affirm or disaffirm the transactions he had elected by giving notice in writing of his intention to determine the lease and the lease had accordingly determined. By the same notice he had also terminated the agreement as he was entitled to do under the terms thereof. Acceptance of payments as rents for the subsequent period from the appellant who was continuing in possession might result in a renewal of the tenancy. But such renewal, even if one was to be presumed in the circumstances, could not *ipso facto* or of necessity, revive the appellant's right of repurchase under the agreement which was a distinct transaction."

54. Re-sale agreement without conditions.—But where in a contract of re-sale no conditions are imposed, the contract is enforceable as a binding bilateral contract on the exercise of the option.[1]

55. Re-sale, no time fixed.—Where no time is fixed for the execution of the re-sale the law presumes a reasonable time. In view of Secs. 54 and 14, Transfer of Property Act, the contract of re-sale does not offend the rule against perpetuities.[2]

56. Clause of pre-emption.—Where usufructuary mortgage contained a clause relating to pre-emption to the effect that if the mortgagors choose to sell clay, they should first offer it to the mortgagees at a fixed price, it was held that the clause would not come into operation unless the mortgagors made up their mind to sell clay to others. Again, a decree for specific performance after notice of redemption, offering mortgage money, would be inequitable and should be refused.[3]

57. Transfer in favour of minor.—A minor though he is incompetent to enter into a valid contract is capable of being a transferee. Therefore a completed mortgage or sale in his favour is valid and his rights under the same may be enforced.[4]

A reference may be made to notes under the heading "33. Minors and doctrine of mutuality", *supra*.

58. Bankruptcy.—There is no authority for holding that the principle of mutuality applicable to suits for specific performance of contracts before the institution of a suit applies to the parties after the suit has been decreed

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1. Sardar Arjan Singh *v.* Sahu Maharaj Narain, I. L. R. (1950) All. 32.
2. Rajammal *v.* Gopalaswami Naidu, A. I. R. 1951 Mad. 767 at pp. 768-9.
3. Pinto *v.* Sheenappa Malli, (1950) 2 M. L. J. 169 at p. 170: 63 L. W. 1002.
4. Ulfat Rai *v.* Gouri Shankar, I. L. R. 33 All. 657 : 11 I. C. 20 : 8 A. L. J. 670 ; I. L. R. 40 Mad. 308 : 36 I. C. 921: 31 M. L. J. 570 : 20 M. L. T. 407 : 1916 M. W. N. 363 (F. B.) ; Narain Das *v.* Mst. Dhania, I. L. R. 38 All. 154 : 35 I. C. 23 : 14 A. L. J. 65 ; *see* also 22 C. W. N. 130 ; I. L. R. 33 Mad. 312 ; I. L. R. 38 All. 62 ; I. L. R. 30 All. 63.

and the money has been deposited by the purchasers before he becomes a bankrupt.[1]

In *Kamal Krishna Kunda Chowdhury* v. *Chatoorbhuj Dassa*,[2] it was urged that the plaintiff having become an insolvent, the decree for specific performance cannot be enforced. There is no doubt that if the plaintiff had become a bankrupt before the institution of the suit, he could not have enforced the contract. In the above case, however, the bankruptcy took place after the suit had been decreed.

Accordingly specific performance cannot be enforced against a purchaser's trustee in bankruptcy without his consent.[3] Section 62 of the Presidency Towns Insolvency Act upon which also reliance is placed on behalf of the appellant runs as follows :

> "Where any part of the property of an insolvent consists of land of any tenure burdened with onerous covenants, of shares or stocks in companies of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act to the payment of any sum of money, the official assignees may, notwithstanding that he may have endeavoured to sell or have taken possession of the property, or exercised any act of ownership in relation thereto, but subject always to the provisions hereinafter contained in that behalf, by writing signed by him at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property."

It was contended that the principle of mutuality should also be extended after the decree for specific performance had been passed. But, in the first place, specific performance may be enforced against the trustee in bankruptcy of a vendor. In the present case, as already stated, the bankruptcy of the purchaser took place after the suit had been decreed, and the money had been deposited by the purchaser. There is no authority for holding that the principle of mutuality applicable to suits for specific performance of contracts before the institution of a suit, applies to the parties after the suit has been decreed and the money has been deposited by the purchaser before he becomes a bankrupt.[4]

There is no invariable rule that in cases relating to moveable property, damages only should be given.

Where the judgment-debtor has become an insolvent but that does not mean that the decree has become entirely infructuous. No doubt, it may be that the amount of the money realizable in execution of the decree had become reduced, but that is no ground for saying that the agreement to assign has become invalid.[5]

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1. Kamal Krishna Kunda Chowdhury *v.* Chatoorbhuj Dassa, A. I. R. 1925 Cal. 324 at p. 327 : 78 I. C. 962.
2. A. I. R. 1925 Cal. 324.
3. Fry on *Specific Performance*, para. 951.
4. Kamal Krishna Kunda Chowdhury *v.* Chatoorbhuj Dassa, A. I. R. 1925 Cal. 324 at p. 327.
5. K. S. Krishna Aiyar *v.* Nynadikkam Pillai, A. I. R. 1924 Mad. 801 at p. 801 : 1924 M. W. N. 693.

59. Plaintiff committing act of bankruptcy cannot enforce contract of sale.—The commission of the act of bankruptcy by the plaintiff prevents him from enforcing a contract of sale, either as a purchaser or vendor. In the former case, because he may not be able to pay the money ; in the latter case, because he may not be capable of conveying the estate. Similarly, a trustee in bankruptcy is unable to enforce a contract of the debtor involving onerous covenants unless on the terms of the trustee assuming personal liability for such covenants. Performance is enforced against a vendor's trustee in bankruptcy, but not against the purchaser's trustee.[1] The bankruptcy or insolvency of a party does not alone necessarily result in such an incapacity to perform the contract as to entitle the other party at once to treat it as broken and to claim damages ; the trustees of the bankrupt may disclaim an onerous contract or may perform all that the bankrupt was neglecting to perform at the time when he was bound to perform them and the bankruptcy having no other effect on the contract than to put the trustee in the place of the bankrupt neither rescinding the obligation on either side nor imposing new ones, nor anticipating the period of performance on either side, if the trustee does all that the bankrupt ought to have done, he may recover against the contracting party the damages which the bankrupt himself could have recovered if he had performed the contract or if he omits to do so and neglects to perform the contract, he loses the benefit of the contract and the other party has his remedy against the bankrupt's estates.[2] Thus in *Jennings Trustee* v. *King*,[3] the defendant agreed to sell certain property to *A* and received some money as deposit in April, 1951. The agreement was to complete the contract by executing the sale-deed by the end of November. But a few days before the due date the purchaser became a bankrupt and gave notice to that effect. After the due date (on 3rd December) the defendant's solicitor wrote to the purchaser rescinding the contract and forfeiting the deposit. The trustee of the purchaser contested. Harman, J., gave judgment for the trustee for damages for breach of the agreement because the defendant had no right to rescind the contract. The law does not require that the trustee in bankruptcy should give express notice within a reasonable time after the date of the bankruptcy of his adoption of the contract. The law only requires the trustee in bankruptcy to perform the bankrupt's part of it as and when he should have done it himself.[4] The effect of a company going into liquidation while a contract entered into by the company before the

Position of trustee in bankruptcy.

Bankruptcy of purchaser, could seller rescind contract ?

No express notice is necessary by trustee in bankruptcy.

1. Halsbury's *Laws of England*, Vol. 27, p. 59: *see* also Currimbhoy & Co. Ltd. *v.* L.A. Creet, 123 I.C. 250: A. I. R. 1930 Cal. 113 : 50 C. L. J. 208 : I. L. R. 57 Cal. 170.
2. Currimbhoy & Co. Ltd. *v.* L. A. Creet, A. I. R. 1930 Cal. 113 at pp. 121-22 : 123 I.C. 250 : 50 C. L. J. 208: I. L. R. 57 Cal. 170 ; Gibson *v.* Carruthers, (1841) 8 M. & W. 321 : 51 R. R. 713 : 11 L. J. Ex. 138 : 151 E. R. 1061.
3. (1952) W. N. 431 at p. 432.
4. *Ibid.*

Effect of company going into liquidation.

liquidation is subsisting is the same as when a party to a contract becomes bankrupt or insolvent.[1] When a party to a contract has failed to perform it within a reasonable time, the contract comes to an end and his receiver in bankruptcy cannot take advantage of it.[2]

60. Insolvency as a ground for specific performance.—In the law of bankruptcy an insolvent debtor's obligations by way of mere contract must be sharply distinguished from his obligations to surrender specific property because the legal or equitable ownership is in another. If under the facts of the case apart from the defendant's insolvency equity regards the plaintiff as having an interest in the property in question, specific enforcement of the obligation to transfer to him that interest should be granted, and if the defendant becomes bankrupt, the Court of Bankruptcy should recognize the plaintiff's interest in the property. Whatever the character of specific personal property however readily purchasable for a money equivalent to the distinction is always vital in bankruptcy between a right to the return of specific property from the bankrupt estate and a claim for its money value. Therefore, bankruptcy courts since they have equity powers, always give the property itself to the claimant of personal property of any kind, if he has an equitable property right, and do not relegate him to a claim for damages.

But if a bankrupt has contracted to sell ordinary goods and still retains title and possession, they are assets of the estate and if he has been paid in advance before the bankruptcy and has subsequently delivered the goods within four months prior to the presentation of the bankruptcy petition in England and in India, it would be a performance if he had delivered the goods "with a view" to prefer, and in America, it is a preference, it being immaterial in that law with what motive or view he delivered. For a court to decree specific performance of such a contract because of insolvency, would in America, be absolutely in violation of the bankruptcy statute.[3]

61. Partition.—There is nothing in Hindu law which prevents parties from making private partition orally in respect of the immoveable property provided possession changes. If two brothers owning immoveable properties decide to partition the same, it is open to them without executing any deed to agree between themselves what share each of them would get and then to make over possession in accordance with those terms but there can be no partition of any immoveable property without change of possession. The only other method for partitioning the immoveable properties is to execute a registered deed.[4]

A minor son is entitled to show that the agreement to partition made between his father and his father's brother should not be enforced against him because it is not fair to him.[5]

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1. Currimbhoy & Co. Ltd. *v.* L. A. Creet, A. I. R. 1930 Cal. 113 at pp. 121-22 : 123 I. C. 250 : 50 C.L.J. 208 : I. L. R. 57 Cal. 127.
2. *Ibid.*
3. Williston on *Contracts*, 1940 Ed., Sec. 1420.
4. Kishan Lal *v.* Lachmi Chand, A. I. R. 1937 All. 456 at p. 460 : 1937 A. L. J. 729.
5. *Ibid.*

62. Partition deed partly acted upon —*A fortiori* where there is no question of unfairness in a partition deed executed between the parties and it is not given effect to after acting upon it partly the proper remedy of the aggrieved party is to sue for specific performance of the partition deed but not asking to be put back in the original position.[1]

63. Sale, contract of —If parties enter into an agreement for sale and the vendor makes certain representation as to his title, the conveyance which follows must be in conformity with the terms of the agreement. If that is so, a court decreeing specific performance of an agreement to sell is bound to put the parties in the same situation in which they were on the date of the agreement. The recitals of representation in the sale deed must affect the spirit of the agreement.[2] If a proper title by adverse possession is made out it would fulfil the vendor's obligation to make out a marketable title.

The ordinary rule governing vendors and purchasers is that the payment of the consideration is to be simultaneous with and at the time when the conveyance is executed by the vendor.[3] In any particular case, however, the parties may agree to deviate from the ordinary rule. Unless, therefore, there be any special contract the parties are to follow the normal rule governing vendors and purchasers. Now, whether the failure on the part of the plaintiff to actually tender the amount of the consideration bars a suit for specific performance. There is no question that there had been an express repudiation of the contract by the defendant as conveyed in the solicitor's letter dated 18th December, 1942. Was it necessary for the plaintiff after such clear repudiation to tender the amount of the consideration ? Such a tender would be a useless formality when the defendant repudiates the contract itself.

Non-performance of some of the terms of the contract on part of the plaintiff in a suit for specific performance is excused when that has resulted from the default of the vendor-defendant.[4] "Reference may, however, be made to the principle enunciated by Wigram, V. C, in *Hunter* v. *Daniel*,[5] with approval by the Judicial Committee in *Cholikanti Venkata Rajanim Garu* v. *Venkata Subadrayamma*."[6] "The practice of the courts is not to require a party to make a formal tender where from the facts stated in the bill or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

64. The meaning of term "marketable title" explained —"Marketable title" is one which could be enforced on an unwilling purchaser under a contract for sale made without any special conditions at all times and under

1. Bhawani Koonwar *v.* Thakoor Das, 2 Agra 277 ; Nukchand Chand *v.* Hunooman, (1868) 10 W. R. 69 ; Virasami *v.* Ramswami, I. L. R. 3 Mad. 87 at p. 91 (agreement to enforce right of pre-emption after partition).
2. Shankar *v.* Ram Chandra, A. I. R. 1938 Nag. 411 at p. 412 ; 175 I. C. 761.
3. *See* Nicholson *v.* Smith, (1882) 22 Ch. D. 640 ; *see* also Pratap Chandra *v.* Kali Charan, A. I. R. 1952 Cal. 32 at pp. 33-34.
4. Hotham *v.* East India Co., (1787) 1 T. R. 638 : Manik Chandra *v.* Abhoy Charan, A I. R. 1917 Cal. 283 ; Parsanta Kumar Sur *v.* International Contractors Ltd., A. I. R. 1955 Cal. 101 at pp. 103-4 : 59 C. W. N. 675.
5. (1845) 4 Hare 420 at p. 433 referred to.
6. A. I. R. 1923 P. C. 26 at p. 28.

all circumstances. Where the rectitude of the title depends upon facts which are certainly capable of being disputed, a court of equity will not enforce the contract of sale. This is all the more so when questions of fact depend entirely on matters within the knowledge of third party and the only proof is their oral statements which bind no one except themselves.[1] The effect of a stipulation by a vendor to make out a marketable title "to the satisfaction of the purchaser's attorney" is that it is incumbent on him to establish either that the solicitors approved of the title or that there was such a title tendered as made it unreasonable not to approve of it. The term does not give the solicitor arbitrary and absolute power to reject a title, however good it may be. He is the sole judge provided he acts "reasonably and *bona fide*". For determining if he acted reasonably, the Court has to examine the title tendered to the solicitor, to consider whether it was such as would induce the Court to hold that its rejection was reasonable or unreasonable. On the one hand, the Court cannot lightly disregard the judgment of a solicitor on the question, but on the other hand the purchaser is not entitled to maintain that his solicitor's judgment is the last word on the subject.[2] The vendor can enforce specific performance of a contract to sell even though he is not in possession of sale-deed, provided he is able to prove the terms of his agreement.[3]

65. **English law.**—"The vendor is not at liberty to require the purchaser to assume as the root of his title that which documents within his possession show not to be the fact, even though those documents may show a perfectly good title on another ground." Specific performance will not be decreed even when such representation may be due to an innocent oversight.[4]

66. **American law.**—As regards granting of specific performance of contracts to buy and sell, Williston on *Contracts* (Art. 1419) says :

> "A contract to convey land is always specifically enforceable by the purchaser whatever may be the form of contract, whether an ordinary contract to purchase, or an agreement to exchange lands, to reconvey on the mortgagor finding a purchaser, to partition land held in common, or to make conveyance by way of compromise. . . . Contracts to sell ships, to transfer documents of any kind, as well as the intangible right of the owner of a stock exchange or annuity [*see* Sec. 13, Illus. (*ii*), S. P. Act] are also specifically enforced."

67. **Agreement by two or more, one incompetent.**—Where three persons agree to sell certain property belonging to them as tenants-in-common and one of them is incompetent to enter into the agreement, there is no impediment in the purchaser having specific performance as against the two who are competent.[5] But it is different where the

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1. J. N. Duggan *v.* Talyar Khan, A. I. R. 1938 Bom. 77 at pp. 78, 81 : 173 I. C. 714 : 39 Bom. L. R. 1166.
2. Krishanji Gopinatha *v.* Ram Chandra, A. I. R. 1932 Bom. 51 at pp. 52, 53 : 135 I. C. 417 : 33 Bom. L. R. 1377.
3. Diwan Singh *v.* Gurbachan Singh, A. I. R. 1932 Lah. 276 at p. 277 : 137 I. C. 41 : 33 P. L. R. 227.
4. Pollock on *Contracts*, 1951 Ed., p. 414 ; Broad *v.* Munton, (1879) 12 Ch. D. 131 at p. 149 ; Sottingham Brick Co. *v.* Butler, (1886) 16 Q. B. D. 778 : 55 L. J. Q. B. 280.
5. Abdul Karim *v.* Gladys Murial, 54 C. W. N. 770 at pp. 776-77 (P. C.).

executant is the owner of "protected property". In *Raja Bahadur Singh* v. *Ram Sumiran Misra*,[1] the Court had to consider whether a High Court will be justified in granting specific performance of the contract of sale to the plaintiff knowing fully well that the plaintiff is under a statutory disability to execute the sale-deed, where it is not open to a "protected" land without the permission of the Sub-divisional Officer. Admittedly within the period allowed by the Sub-divisional Officer no sale-deed was executed by the proprietor in favour of the appellant. She utilized the opportunity which the permission had given to her to transfer the property to some other persons. It is obvious that she was not acting in a straightforward manner so far as the appellant is concerned.

In *Enayat Ullah* v. *Khalil Ullah Khan*,[2] it was laid down by Iqbal Ahmad, J., that :

> "The sale-deed executed by a court in pursuance of a decree for specific performance is a transfer, by the Court on behalf of the judgment-debtor and it is the title of the judgment-debtor to the property that is transferred by the sale-deed executed by the Court. If the judgment-debtor is precluded from transferring his property by some statutory provision, the Court cannot, in violation of that provision, execute a sale-deed of the property. Clause (3) of Sec. 7, Encumbered Estates Act, provides that until the happening of certain contingencies the landlord shall not be competent, without the sanction of the Collector, to make any exchange or gift of or to sell, mortgage or lease his proprietary rights in land. . . As the Court was asked to execute the sale-deed on behalf of the judgment-debtors, the Court could not ignore the statutory provision just referred to and could not execute the sale-deed without the sanction of the Collector. We consider that it is not for the Court to apply for the sanction of the Collector."

This was a case under the U. P. Encumbered Estates Act but, no doubt, the principle which it has laid down is applicable to cases under the U. P. Regulation of Agricultural Credit Act also. Reference may be made to another case of the Allahabad High Court on this point, viz. *Sri Narain Dube* v. *Jang Bahadur*.[3] In this case it was remarked by Verma, C. J, in delivering the judgment of the Bench that the execution of a deed of sale by the Court in the enforcement of a decree for specific performance is a transfer on behalf of the party and not by the Court and that such a transfer is a voluntary transfer within the meaning of Sec. 12 of the Act. It was further laid down by the learned Judges composing that Bench that the intention of the Legislature being to prevent a transfer of certain classes of land it was the duty of the courts to give effect to that intention.[4]

68. Agreement to sell, what right it confers.—It may be noted that an agreement to sell gives a personal right to the obligee against the obligor or his assignee with notice, to compel the latter by a suit, to specifically perform his contract ; but the obligee has no direct right over the land.[5]

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1. A. I. R. 1950 All. 692.
2. 1938 A. L. J. 569 : A. I. R. 1938 All. 432.
3. 1947 A. L. J. 196 : A. I. R. 1947 All. 431.
4. Raj Bahadur Singh *v.* Ram Sumiran Misra, A. I. R. 1950 All. 692 at pp. 692-93 ; *see* also Unayat Ullah *v.* Khalil Ullah Khan, A. I. R. 1938 All. 432 at p. 434 : 1938 A. L. J. 569 (decree does not transfer title); Sri Narain Dube *v.* Jang Bahadur, A. I. R. 1947 All. 431 at p. 433 : 1947 A. L. J. 196.
5. Peer *v.* Mahomed, I. L. R. 29 Bom. 234 at p. 238 ; Fateh *v.* Narsing, (1912) 16 I. C. 988 at pp. 989-90 [Sec. 27 (*b*) considered].

69. Suit to enforce an agreement.—In *Dhapai* v *Dalla*,[1] there was a contract between the parties inasmuch as the plaintiff gave to the defendants one-half of the fishery rights in the tank on the condition that they would pay him half the *theka* money. The allegations made in the plaint show that the defendants had already worked out the *theka* in respect of their share of it. All that remained to be done was to pay the proportionate *theka* money to the plaintiff. In such circumstances no suit for specific performance of contract could be filed : only a suit to enforce the agreement so far as it related to the payment of the proportionate *theka* money could be, and has been filed. A suit for the recovery of a specified sum under a contract cannot be said to be a suit of the nature where pecuniary compensation would not afford adequate relief.

70. False plea of payment.—In *Kommisetti Venkatasubbayya* v. *Karamsetti Venkateswarlu*,[2] the plaintiff filed a suit for specific performance of an agreement of himself and the 2nd defendant on 24th April, 1960, agreeing to sell a house site in Kavali. He paid Rs. 50 on the date of the execution of the agreement and he averred that he paid a further sum of Rs. 1,500 on 14th October, 1960, receiving which the defendants put him in possession of the suit site He said that he was ready and willing to perform his part of the contract and called upon the defendants by a notice, dated 10th October, 1961, to execute a sale deed after receiving Rs. 272 the balance of the purchase-money. The statement that he had already paid Rs. 1,500 was found to be not true by both the courts.

The Lower Appellate Court refused to exercise the discretion in favour of the plaintiff who had set up false plea of payment of a major portion of purchase-money. It was held that the plaintiff was not only disentitled to the discretionary relief on the ground that he had set up a false plea but also on the ground that that discloses that he was not ready and willing to perform his part of the contract.

71. Instances where specific performance is allowed.—In the following cases it has been held that specific performance could be decreed[3] :

(1) Specific performance may be decreed notwithstanding difficulty in fixing the value of coal and minerals on the land.[4]

(2) Ordinarily, non-payment of the full purchase-money is not a ground for denying the plaintiff's claim for specific performance of a contract of sale. In *Jamshed Khodaram* v. *Burjorji Dhunjibhai*,[5] Viscount Haldane observed at page 33 :

> "*Prima facie* equity treats the importance of such time-limits as being subordinate to the main purpose of the parties and it will enjoy specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the plaintiff as regards the time limit specified.'

To the same effect are the observations of Lord Cairns in *Tillley* v. *Thomas*[6] :

> "A court of equity will indeed relieve against and enforce specific performance notwithstanding a failure to keep the dates

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1. A. I. R. 1970 All. 206 at p. 208
2. (1971) 1 Andh. W. R, 125 at pp. 125, 127 : A. I. R. 1971 A. P. 279.
3. *See* Banerji, App. pp. 43, 44.
4. Birmingham Coal Co. *v.* Bularam, I. L. R. 5 Cal. 932 at p. 937 (P. C.).
5. 43 I. A. 26.
6. (1868) S. Ch. A. 61.

assigned by the contract either for completion or for the steps towards completion, if it can do justice between the parties and if as Turner, L. J., said in *Roberts* v. *Berry*[1] there is nothing in the express stipulation between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right."

Applying the above principles to the agreement as found by the Lower Appellate Court, it must be held that time was not of the essence of the contract. But there is another insuperable difficulty in the plaintiff's way. As was pointed out by Lord Blanesburgh in *Ardeshir H. Mama* v. *Flora Sassoon*,[2] the plaintiff in a suit for specific performance had—

"to allege and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part."

It was also observed in that case that—

'although so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England [Sec. 24 (6) is the nearest], it seems invariably to have been recognized and, on principles their Lordships think rightly, that the Indian and the English requirements in this matter are the same."

In the present case, the plaint did not allege any willingness to abide by the contract, in fact the terms set out are to some extent different from the contract as proved.[3]

(3) Specific performance will be decreed notwithstanding execution of a formal document if the vendor gets at it and fraudulently suppresses it and prevents registration. The decree must direct the execution of a fresh document and to get it registered.[4]

(4) An agreement to make a dedication, i. e. to make a gift of property (shop) to *dharmshala* can be specifically enforced.[5]

(5) An agreement to exchange lands can be enforced specifically. Where a piece of land was sold in consideration of receiving in exchange another piece of land, which was not given, it was held that the seller's remedy was not by a suit to get back the land sold, but by a suit for damages for the breach of the contract, by a suit for specific performance of the contract or so much of it as was left unperformed.[6]

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1. (1853) 3 D. M. & G. 284 at p. 299.
2. 55 I. A. 360.
3. Smt. Parul Bala Ghosh *v.* Saroj Kumar Goaswmi, A. I. R. 1948 Cal. 147 at p. 148.
4. Ruhumutoollah *v.* Shuriutoollah, (1868) 10 W. R. 51 (F. B.); Toolsee *v.* Mahadeo, (1868) 10 W. R. 483; Irabhooram *v.* Robinson, 11 W. R. 398; Tripura *v.* Russick, (1871) 15 W. R. 189; Footeh *v.* Leclambar (1871) 16 W. R. 26 (P. C.); Banerji, p. 43; Chinna Krishna Reddi *v.* Doraswami Reddi, I. L. R. 20 Mad. 19 at p. 20 (Nynakka. Routhen *v.* Naina Md Naina, 5 M. H. C. R. 123 foll; Venkatyswami *v.* Krishnnayya, I. L. R. 16 Mad. 341 dist.) in which the document was with the plaintiff.
5. Shiv Dial *v.* Hira Nand, 100 P. R. 1890.
6. Nasir Ali *v.* Government, 3 Agra 394; Basheshar Nath *v* K. S. Mian Feroze Shah A. I. R. 1935 Pesh. 12 at p. 14.

In *Tatayya* v. *Pitchayya*,[1] the purchaser of the property under an agreement of sale agreed to discharge a mortgage existing on the property. He deposited the amount into Court under Sec. 83, Transfer of Property Act. In these proceedings there was a compromise whereby the vendee was to pay the mortgagor Rs. 400 and to convey part of the property to the mortgagee in discharge of the mortgage debt. It was held that the mortgagee was entitled to specific performance of the contract to convey.

72. Subject-matter acquired.—*Nobinchandra Sah Pramanik* v. *Smt. Krishna Baroni*[2] was a suit for damages for breach of an agreement of sale. Since the plaintiff claimed damages to start with and his cause of action had arisen prior to the acquisition proceedings, he was permitted to sue. The case here is entirely different. The plaintiff in the present suit has elected to sue for specific performance and even when he knew that the claim for specific performance had become impossible, he has persisted in that course. The case in *Nobinchandra Sah Pramanik* v. *Smt. Krishna Baroni*[3] does not, therefore, help the appellants.

After Lord Cairns' Act, the courts of equity could award damages additional to or alternative to specific performance. But this exercise of power was limited by certain well-settled considerations. In *Ardeshir H. Mama* v. *Flora Sassoon*,[4] their Lordships have given the history of the development of this branch of law in England and stated the considerations in these words :

> "In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit which the Court had granted specific performance, so the power to give damages as an alternative to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible."

The case of *Ardeshir H. Mama* v. *Flora Sassoon*[5] fell within the first category of cases described above under the alternative relief of damages. This case falls within the second part where the relief of specific performance has become impossible.

To a case of this type the observations of their Lordships in *Ardeshir H. Mama* v. *Flora Sassoon*[6] apply with even greater force. The plaintiff elected to pursue the remedy of specific performance even though he knew that if not impossible at the time (the acquisition proceedings might have been abandoned), it could at any moment become impossible. Twelve years have now elapsed and having lost the claim for specific performance the plaintiff seeks the alternative relief. On a dismissal of such a suit, the plaintiff's right in respect of the contract must be deemed to be at an end and there was no reservation of any right as if, to proceed again for damages. And this is what it would amount to were the plaintiffs (appellants) allowed to amend the pleadings at this late stage. The Court of Equity refused specific performance not only for fraud but also for trickiness for he who comes into equity must come with clean hands.

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1. I. L. R. 13 Mad. 316 at p. 318.
2. 15 C. W. N. 420 : I. L. R. 38 Cal. 458 : 9 I. C. 525.
3. *Ibid.*
4. A. I. R. 1928 P. C. 208 : 55 I. A. 360 : 111 I. C. 413 (P. C.).
5. *Ibid.*
6. *Ibid.*

Damages also should not be granted in cases where the Court of Equity would not have granted specific performance.[1]

73. Sale of reversion.—As regards the granting of relief by way of specific performance in case of sales of reversions, the law in India was different from what it used to be prior to the Act 31 Vic 4 (the Sale of Reversions Act).[2] The law in England then was that inadequacy of consideration was a sufficient ground to refuse specific performance although there was no question of fraud or oppression involved. After the said Act inadequacy of consideration is not ground for refusing specific performance of reversionary interests.[3]

74. Not to revoke will.—Where a contract is not simply to make a specified devise or bequest, but not to revoke a specific will already drawn, as where the parties agree upon mutual wills, the contract will in effect be enforced specifically by denying validity to any attempt made to revoke the will by later testamentary acts.[4]

75. Mortgage, contract to.—A promise to advance money in loan cannot sustain a suit for specific performance. The converse proposition that a promise to borrow money is not susceptible of specific performance is equally not open to any doubt. Nor will equity specifically enforce contracts to lend or borrow money, except under extraordinary circumstances. In *Columbus Club* v. *Simons*,[5] the plaintiff, in reliance upon he defendant's agreement to loan money, brought up property, made contracts for the construction of a building, and executed a note and mortgage to defendant. Specific performance was granted in those circumstances. In the absence of such circumstances, the real question is as to mutuality of performance. If the lender is required to advance the money, can the Court assure him that he will get back his money years hence when it is due.[6]

Promise to borrow or advance money cannot be enforced.

As a broad proposition it may be accepted at once that it is settled in the law of England that a promise to advance money in loan cannot sustain a suit for specific performance. The converse proposition that a promise to borrow money is not susceptible of specific performance is equally not open to any doubt.[7] But in the events which have happened that proposition has no bearing on the determination of this case. In the first place a promise to execute a mortgage of immoveable property in lieu of consideration advanced is a promise to transfer title in such property. Section 58 (*a*) of the Transfer of Property Act, 1882, defines a mortgage as follows :

> "A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan an existing or future debt or the performance of an agreement which may give rise to a pecuniary liability."

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1. *See* Lavery *v.* Pursell, (1888) 39 Ch. D. 508 at pp. 518-19 ; 57 L. J. Ch. 570 ; 58 L. T. 846 : 37 W. R. 163 ; Mohammad Abdul Jabbar *v.* Lalmia, A. I. R. 1947 Nag. 254 at pp. 255-56 : I. L. R. (1947) Nag. 328.
2. Gitabai *v.* Balaji Keshav, I. L. R. 17 Bom. 232 at p. 234.
3. Fry on *Specific Performance*, pp. 217-18; Pollock on *Contracts*, 1951 Ed., pp. 498-99.
4. Williston on *Contracts*, Art. 1421 ; Frazier *v.* Patterson, 243 Ill. 80 : 90 N. E. 216.
5. 110 Okl. 48.
6. Pound, *Progress of the Law—Equity*, (1920) 33 Harv L. Rev. 432 ; Kunhitti *v.* Joseph, 4 D. L. R. (Coch.) 217.
7. *See* South African Territories *v.* Wallington, (1898) A.C. 309 ; 67 L. J. Q. B. 470 : 78 L. T. 426 : 14 T. L. R. 298 : 46 W. R. 545.

The reason of the rule of law ennunciated in the case of the *South African Territories Ltd. v. Wallington*,[1] is that damages furnish adequate relief in relation to a contract of loan. This was recognized by the Indian Legislature in the third illustration of Sec. 21 of the Specific Relief Act, 1877. In the explanation to Sec. 12 (old) of the same Act, however, we find the following provision :

> "Unless and until the contrary is proved the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved."

The nature of a mortgage transaction being what it is given in the definition quoted above it follows from what has been stated that specific performance of a contract to transfer immoveable property by way of a mortgage may be granted under Cl. (*c*) of Sec. 12 of the Specific Relief Act, 1877. In the circumstance of this case it is abundantly clear and indeed it was not disputed that a relief by way of damages will not be an adequate relief. A simple money decree in favour of the plaintiffs will bring no fruits to them for the reason that almost the whole of the sale-proceeds will be distributed amongst the secured creditors and nothing will be left to fall to the share of the plaintiffs as such decree-holders.[2]

A claim for specific performance can only be granted or refused. If it is granted, that must be performed, which is promised, not something less or something more but the thing itself. You cannot have a partial grant of specific performance. Consequently if, since the time when the agreement was made, the party claiming specific performance of that agreement has received in part the benefits provided for by that agreement, it would make it impossible in fairness to the other side to decree fully specific performance of the agreement. In such a case specific performance will be refused.[3]

When the defendant, on pressure put by the plaintiff to repay the amount due to him under promissory notes or to furnish security by way of mortgage, handed over the title-deeds of certain properties and also wrote that if the amount was not paid without much delay, he would execute a mortgage-deed on stamp paper and the defendant failed to pay the amount, it was held that the plaintiff was entitled to a decree for specific performance of the contract to grant the mortgage of the properties.[4] The Bombay High Court, however, is of opinion that in India a mere agreement to mortgage cannot create any interest in the mortgaged property in favour of the party to whom the property is agreed to be mortgaged, nor does it create any charge. An agreement to mortgage gives rise only to a personal obligation which does not constitute either a charge or a mortgage, nor is an agreement to mortgage capable generally of specific performance.[5]

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1. ('893) A. C. 309 : 67 L. J. Q. B. 470 : 78 L. T. 426 : 14 T. L. R. 298 : 46 W. R. 545.
2. Hakmi Chand *v.* Pioneer Mills Ltd., A. I. R. 1927 Oudh 55 at pp. 57-58 : I L. R. 2 Luck. 299 ; Satyanarayanamurti *v.* Venkata Pitchaih, A. I. R. 1916 Mad. 56 at p. 57 (I. L. R. 36 Mad. 426 considered).
3. Appu *v.* N. V. Sivaramakrishna Ayyar. A. I. R. 1935 Mad. 560 at p. 562 : 1935 M. W. N. 834.
4. *Ibid.*
5. Waman Mahadeo *v.* Janardhan Balwant, A.I.R. 1938 Bom. 357 at p. 358 : 177 I. C. 467 : 40 Bom. L. R. 545 ; *see* Rani Bai *v.* Khimji Hirji, A. I. R. 1950 Kut. 86 at p. 86.

76. Suit for recovery of money left with mortgagee.—The principle that no suit to specifically enforce a contract to lend money is maintainable does not apply to the case of a usufructuary mortgage in which a portion of the consideration is left with the mortgagee to pay off the creditors of the mortgagor and on failure of the mortgagee so to do, the mortgagor sues to recover the amount held in trust for him. Nor is the failure of the mortgagee to obtain possession through no fault of the mortgagor any defence to the action.[1]

The earliest case in which the question was raised was that of *Ganesha* v. *Dyala*,[2] and in that case the learned Judges were clearly of opinion that a suit for money due under an award was not, as such, excluded from the cognizance of a Court of Small Causes. In the next case, *Simson* v. *McMaster*,[3] the provision of both Arts. 15 and 24 of Sch. 2 of the Provincial Small Causes Courts Act were considered and it was held that neither of those articles excluded a suit for money payable under an award from the cognizance of Small Causes Court and that the suit was cognizable by such a court. In the case of *Sukar Hajam* v. *Oli Mohammad Mea*,[4] a Bench of the High Court of Calcutta took the same view and referred to the case of *Simson* v. *McMaster*,[5] and also to an earlier case in the Calcutta Court, namely *Bhajahari Saha Banikya* v. *Behari Lall Basak*.[6]

The next case in order of date is the Calcutta case of *Kunj Behari Burdhan* v. *Gosta Behari Burdhan*.[7] In that case the award disposed of certain immoveable properties and also gave directions for payment of sums of money by one of the parties to the other. One of the parties sued for money due to him under the award and objection was taken that the award could not be enforced piecemeal. Objection was also taken that the Small Causes Court had no jurisdiction. The cases of *Simson* v. *McMaster*,[8] *Sukar Hajam* v. *Oli Mohammad Mea*[9] and *Bhajahari Saha Banikya* v. *Behari Lall Basak*,[10] were considered but the Bench came to the conclusion that a suit to enforce an award is in essence a suit for specific performance of a contract and is, therefore, barred by Art. 15 from the cognizance of a Court of Small Causes. The answer to this view has been suggested in the order of reference. The payment of money is not regarded as specific relief under the Specific Relief Act, *vide* the provisions of Secs. 21 (*a*) and 12 (old) of that Act, the relief provided in that Act being relief *in specie*, that is the performance of a specific act or the delivery of particular articles, and not the payment of money, unless of course the contract is for the delivery of particular coins.[11]

77. Kanom.—The contract was really and substantially not for lending money but for a tenure in land the fact that one of the incidents of the tenure is that the *kanom* tenant advances money to the *jenmi* and that there are stipulations for the return of the sum or such portion of it as is left after settling of arrears of rent at the termination of the tenure, is not sufficient to make the contract one of borrowing or lending. By Sec. 12 (*c*) [new Sec 10 (*b*)], Specific Relief Act, the Court may enforce specific relief if the act agreed to be done is such that pecuniary relief would not afford adequate

1. Thakar Singh *v.* Jagat Singh, A. I. R. 1933 Lah. 1 at pp. 2, 3 : 140 I. C. 495 : 33 P. L. R. 1085.
2. (1877) 57 P. R. 1877.
3. I.L.R. 13 Mad. 344.
4. (1914) 25 I. C. 826.
5. I.L.R. 13 Mad. 344.
6. I.L.R. 33 Cal. 881 : 4 C. L. J. 162.
7. (1918) 27 C. L. J. 486 : 42 I. C. 590.
8. I.L.R. 13 Mad. 344.
9. (1914) 25 I. C. 826.
10. I.L.R. 33 Cal. 881 : 4 C.L.J. 162.
11. Maung Ni *v.* Maung Aung Ba, A. I. R. 1926 Rang. 198 at p. 199 : I. L. R. 4 Rang. 227.

relief and the explanation says that a breach of contract to transfer immoveable property shall be presumed to be one not capable of adequate relief by compensation in money. To those conversant with the system of property holding in Malabar, including in the expression the whole of the Malayalam speaking country, it would certainly come as a startling surprise to learn that a bargain for a *kanom* was one for money and not for land.[1]

In proper cases a decree for specific performance of an agreement to grant *kanom* can be passed. The principle that no decree can be made for the specific performance of a contract to advance or take a loan will not apply to such a case. While the tenant's (defendant's) possession by itself, though coupled with an agreement to renew, would not be complete defence to a suit for possession by a person in the position of the plaintiff in the circumstances, yet as was pointed out by one of the learned Judges in the Full Bench case in *K. Veerareddi* v. *K. Papireddi*,[2] where the right of the defendant to enforce specific performance of the agreement in his favour had not become barred by limitation it would be open to him to apply to the Court to have the suit for ejectment stayed and in the meantime he could file in his turn a suit for specific performance of the agreement and after having got a duly registered document he could file the same in the first suit and thus completely sustain the plea that the plaintiff is not entitled to the relief asked. This view has been approved by their Lordships of the Privy Council in *Arif* v. *Jadunath Majumdar*.[3]

73. Lease. - An agreement to lease which does not create a present demise is not required to be in writing or registered, and can be oral. Such an oral agreement can be specifically enforced under this section. Section 35-A (new) which applies to a contract in writing does not operate as a bar to a claim for specific performance of the oral agreement.[4] An agreement to grant a permanent lease "hereafter" cannot be said to be vague and uncertain; the word "hereafter" only means after the date of the contract. In such a case the plaintiff would be entitled to specific performance of the agreement to lease; even the granting of time to the defendant to exclude the deed would not amount to giving up of his rights.[5] Specific performance of a contract of lease may be decreed though the lease was intended to enable the lessor to obtain money for commencing legal proceedings against the then tenant of the subject-matter of the lease.[6]

"Hereafter" in lease.

79. Lease and specific performance.—In order that a lease in respect of the property demised be effective and operative, it is not necessary that delivery of possession be given *in praesenti*. Under Sec. 105 of the Transfer of Property Act, delivery of possesion is not a condition precedent. Where, therefore, a lessee obtains an interest in the land by means of a lease, he is entitled to sue for possession, if the possession is not delivered to him under the lease. In such a case a suit for possession is the proper relief. This

1. Thiruthiyil Unniri Kutti *v.* Narayana Chettiar, A. I. R. 1929 Mad. 777 at pp. 777-78.
2. I. L. R. 29 Mad. 336 : 16 M. L. J. 395 (F. B.).
3. A. I. R. 1931 P. C. 79 : 131 I. C. 762 : 58 I. A. 91 : I.L.R. 58 Cal. 1235; Valiya Kalyani *v.* Krishnan Nambiar, A. I. R. 1932 Mad. 305 at p. 307 : 1932 M.W.N. 193 ((1929) M.W.N. 686 foll.).
4. Gokul Chandra *v.* Haji Mohammad, A. I. R. 1938 Cal. 136 at pp. 138-39 : I. L. R. (1938) 1 Cal. 563 : 176 I. C. 832 : 42 C.W.N. 97.
5. Kalidas Bhanja *v.* Giribala Dasi, (1914) 23 I. C. 360 at p. 362.
6. Pitchukutti Chetti *v.* Kamala Nayakhan, 1 M. H. C. 153.

he can claim as a matter of right under the lease. A suit for specific performance of contract will be misconceived.[1]

80. Restitution of conjugal rights.—In *Gokuldas* v. *Lutchmi*,[2] it is held that a suit for restitution of conjugal rights is in the nature of a suit for specific performance, because the granting of such a relief is in the discretion of the Court.

81. Lost deed.—Where a deed that has been executed is lost the proper course is not to file a suit for requiring the defendant to execute a fresh deed but a suit on the basis of the lost deed.[3]

82. Plaintiff's duty.—A plaintiff seeking to enforce specific performance of a contract must show that he has performed his part of the contract or that he has ever been willing and ready to perform the terms of the contract on his part. The law on the point is the same in India as in England.[4] He must also show that he is ready and willing to do all matters and things on his part thereafter to be done.[5] A default on his part in either of these things furnishes a good defence to the defendant.[6] The basic principle for this rule of law is that "if you desire to enforce a contract, you must first put yourself right by performing your part of or being willing to perform it".[7] The plaintiff has to allege and, if his allegation is not admiited by other side, to prove a *continuous* readiness and willingness from the date of the contract up to the time of the hearing to perform his part of the contract. Failure to do so will result in the dismissal of his suit.[8] In *Bindeshri Prasad* v. *Jairam Gir*,[9] there was a contract for the sale of the proprietary right in certain lands and the intending purchaser had unjustifiably insisted on a right to compel the vendor to give an absolute warranty of the title and when suing for specific performance of the contract he required a guarantee of this character from the vendor, until it appeared that the judgment of the Appellate Court was about to be given against him on the ground that he was not entitled to the guarantee which he claimed. In the course of the judgment their Lordships of the Privy Council remarked as follows :

Plaintiff must prove that he has performed his part of the contract or he has ever been willing and ready to perform the contract as it actually was.

> "He distinctly claimed to have the contract performed by having this warranty of title, and when he says that he was ready to have the contract completely performed, as far as he himself was concerned, it must be taken that he was ready to have it performed in that way".

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1. *See* Narayan Chetti *v.* Muttiah Servai, I. L. R. 35 Mad. 63 : 8 I. C. 520 (F. B.); Ramjoo Mohammed *v.* Haridas Mullick, A. I. R. 1925 Cal. 1087 : I. L. R. 52 Cal. 695 ; H. V. Rajan *v.* G. N. Gopal, A.I.R. 1961 Mys. 29 at pp. 31, 32.
2. A. I. R. 1937 Rang. 308 at p. 310: I.L.R. 4 Rang. 227 (it is submitted that the decision goes too far).
3. *See* Maya Ram *v.* Prag Dat, I. L. R. 5 All. 44.
4. A. Mama *v.* F. Sassoon, A.I.R. 1928 P.C. 208 at pp. 216, 218 : I. L. R. 52 Bom. 597 (P. C.) : 55 I. C. 360 : 30 Bom. L.R. 1242 ; 1928 M. W. N. 893 : 28 L. W. 257 : 26 A. L. J. 1220 : 55 M. L. J. 523; 48 C. L. J. 451 : 32 C. W. N. 1953 : 111 I. C. 413 ; Bansidhar *v.* Calcutta Auction Co., (1862) 1 Hyde 45 ; Abbot *v.* Blair, 8 W. R. 672 ; Ram *v.* Mullick, 14 W. R. 338 ; Kansandas *v.* Chhotabhai, 25 Bom. L. R. 1037 ; *Re* Nicholas, (1910) 1 Ch. 43 C.A.
5. Walker *v.* Jefferys, (1812) 1 Hare 341 ; Vishva Nath *v.* Bapu, 1 Bom. H. C. R. 262 ; Saukhi Sah *v.* Mahamaya Prasad Singh, A. I. R. 1934 Pat. 518 at p. 519 : 15 P. L. T. 469 (must also prove a concluded contract).
6. General Bilporting *v.* Atkinson, (1909) App. Cas. 122.
7. Lumley *v.* Wagner, (1892) 19 L. T. O. S. 264.
8. A Mama *v.* F. Sassoon, *supra*.
9. I. L. R. 9 All. 705 : 14 I. A. 173 ; 5 Sar. 61.

The plaintiff was ready and willing to have the contract performed only in the way upon which he himself was insisting, namely that the *khancha* should be included in the property of which he required the conveyance.

In *Ardeshir Mama* v. *Flora Sassoon*,[1] their Lordships of the Privy Council were dealing with a case that was somewhat different in its facts from the present case, but while remarking that—

> "although there is no express statement so far as the Specific Relief Act is concerned that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England, it seems invariably to have been recognized and on principle their Lordships think rightly that the Indian and English requirements in this matter are the same."

> "in a suit for specific performance the injured party had to allege, and if the fact was traversed, he was required to prove, a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part."

That rule prescribes a course of conduct which the plaintiff has certainly not followed in the present case, regard being had to the finding of the Trial Judge (from which the District Judge did not dissent, as pointed out above), namely, that the plaintiff had never from the date of the contract up to the date of hearing shown willingness to have the house alone for Rs. 3,500 and regard being also had to the nature of the prayer which the plaintiff made in his plaint that—

> "in case the *khancha* could not be included in the sale he should be awarded Rs. 500 damages in addition to the sale-deed of the defendant's house."

On the above view of the case it was held that the plaintiff was not willing and ready to perform his part of the contract as it really was and that he is thereby debarred from obtaining the relief of specific performance of the contract as it really was.[2]

In *Ardeshir H. Mama* v. *Flora Sassoon*,[3] their Lordships of the Judicial Committee held that the plaintiff—

> "in a suit for specific performance had to allege and, if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good the averment brought with it the inevitable dismissal of his suit."

In *Waring* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*,[4] Vice-Chancellor Wigram laid down :

> "In the common case of a bill for specific performance by a purchaser the Court will not direct a conveyance unless the plaintiff will pay what is due. The Court can decree that, and the Court will, therefore, in that case, give relief; but if that which the plaintiff is to

1. A. I. R. 1928 P. C. 208 : 111 I. C. 413 : 55 I. A. 360 : I.L.R. 52 Bom. 597.
2. Narinjan v. Mohd. Yunus, A. I. R. 1932 Lah. 265 at pp. 266,67.
3. A.I.R. 1928 P. C. 208 : I. L. R. 52 Bom. 597 : 55 I. A. 360.
4. (1848) 7 Hare 492.

give on a bill for specific performance be something to be done at a further time, and which the Court cannot enforce, the understood rule has always been that the Court in that case will not give relief."

And in *Blacket* v. *Bates*,[1] Lord Cranworth said :

"Had it been an agreement, would there have been a case for specific performance ? I think not, and for this short and simple reason that the Court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks, the lease; but the defendant cannot gets what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by the plaintiff of daily duties during the whole term of the case."[2]

It is incumbent on the plaintiff to prove that he was ready and willing to perform the contract *as it actually was* and not as he alleges it was. Where, therefore, the plaintiff's case is that he agreed to purchase the property for Rs. 85 and that he was ready and willing to pay this price but the Court found that the purchase price fixed by the contract was not Rs. 85 but Rs. 130, the claim for specific performance must fail.[3] Similarly, where the plaintiff alleges that he was willing and ready to perform his part of the contract but it appears that he was without any justification insisting on an absolute warranty of title or on the inclusion of a property in the conveyance to which he was not entitled, his suit could not be decreed.[4] But there is no need for the plaintiff to be ready up to the date of the suit where the defendent has repudiated the contract prior to the plaintiff's suit for specific performance [5]

Readiness till end, when no need.

In a suit for specific performance of contract of sale by vendee, the plaintiff should prove that he was "ready" and willing to perform the contract of sale. It is not necessary in such a contract to establish that he had arranged for the requisite money or ready arrangement for the same. The question whether the plaintiff was ready and willing to carry out the contract of sale on his part depended upon the facts and circumstances disclosed by him in evidence.[6]

83. The meaning of the words "readiness and willingness" explained and illustrated.—In a suit for specific performance the plaintiff is bound to aver that he was willing and is still willing at the time of suit to perform the part of contract to plead and prove that he was willing and is still willing to perform his part of the contract.[7]

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1. (1866) 1 Ch. 125.
2. Madan Choudhry *v.* Kamalaldhari Thakur, A. I. R. 1930 Pat. 121 at pp. 126-27.
3. Rustomali *v.* Sheikh, 45 .C. W. N. 837 ; *see* also Teju Kava & Co. *v.* Ganji, 142 I. C. 381 : A.I.R. 1933 Bom. 71 : 34 Bom. L. R. 1629 : I.L.R. 57 Bom. 29 ; Bindeshri *v.* Jairam, I. L. R. 9 All. 705 (P. C.): 14 I. A. 173; Narinjan *v.* Mohd. Yunus, 136 I. C. 557 : A.I.R. 1932 Lah. 265 : 33 P. L. R. 151.
4. Bindeshri *v.* Jairam, I. L. R. 9 All. 705 (P. C.) : 14 I. A. 173. In Ramakrishnayya *v.* Sreeramulu, 188 I. C. 691 : 49 L. W. 362 : 1939 M. W. N. 451 : A. I. R. 1939 Mad. 547 : (1939) 1 M. L. J. 436, it has been held that the execution by the plaintiff of *mun gutta* lease for the purpose of raising money to enable him to sue for enforcement of the contract could not by itself be held sufficient to show that he wos not ready and willing to perform his contract as there was no evidence to show that by that transaction he intended to abandon the contract or treat it as at an end.
5. Sree Lal *v.* Hari Ram, A.I.R. 1926 Cal. 181 at pp. 182-4 : 88 I. C. 737.
6. Subrayya Choudhary *v.* Veerayya, A.I.R. 1955 Andh. W. R. 502.
7. Surendra Chandra Roy *v.* Baikunth Chandra Roy, A. I. R. 1973 Gau. 21 at pp. 22, 23.

The Privy Council in *Ardeshir H. Mama* v. *Flora Sassoon*[1] has held that in this regard the law in India is the same a the law in England and that, "although so far as the Act is concerned, there is no express statement in a suit for specific performance the averment of readiness and willingness on the plaintiff's part up to the date of decree is necessary as it was always in England". Approving this decision of the Privy Council the Supreme Court in *Gomathinayagam Pillai* v. *Palaniswami Nadar*,[2] has held :

> ". . . . the respondent has claimed a decree for specific performance and it is for him to establish that he was since the date of the contract continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail."

In *Prem Raj* v. *D.L.F. Housing and Construction (Pvt.) Ltd.*,[3] the Supreme Court has held :

> "In a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract."

It must, however, be remembered that "readiness and willingness" in this context connote not only the disposition to perform his part of the contract by the plaintiff but also his capacity to perform it.[4] In order to entitle themselves to an order for specific performance, it was necessary for the vendors to aver and prove that at the date when they raised their claim for specific performance they were in a position, that is to say, were ready and willing to carry out their part of the contract.[5]

The vendors having failed to prove that they are entitled to specific performance have no answer to plaintiff's claim for the return of the money.[6] The Court will not decree a suit for specific performance of a contract if it finds that at the date of the suit the plaintiff cannot complete the contract by doing what remained to be done by him under it. Where a decree-holder agrees to sell his decree, the transfer to the purchaser could be effected only by an assignment in writing and until execution of such an assignment it is the duty of the decree-holder (vendor) to keep the decree alive, and if owing to bar of limitation the decree becomes incapable of execution, the vendor cannot maintain a suit for specific performance of the agreement against the purchaser inasmuch as the decree which the purchaser has agreed to purchase and which the vendor has agreed to assign to him is a decree capable of execution.[7] The fact that the tender of the full sale-price if made would not have been accepted by the vendor is not a sufficient ground for not making such offer on the part of the vendee.[8]

In *Sreelal Chamaria* v. *Hariram Goenka*,[9] it was urged that the plaintiff was absolved from showing that he was ready and willing to perform his part of the contract, namely, the payment of the decree held by the Maharajah

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1. A.I.R. 1928 P. C. 208.
2. A.I.R. 1967 S. C. 868.
3. (1968) 3 S.C.R. 658 : A. I. R. 1968 S. C. 1355.
4. British & Benington Ltd. *v.* Cachar Tea Co., (1923) A. C. 48.
5. Teju Kaya & Co. *v.* Gangji Nensey & Co., A. I. R. 1933 Bom. 71 at p. 74 : 34 Bom. L. R. 1629.
6. *Ibid.* at p. 76.
7. Jatindra *v.* Payer Deye, I. L. R. 43 Cal. 930 (P. C.) : 43 I. A. 108 : 34 I. C. 69 : 24 C. L. J. 67 : 29 C. W. N. 866 : 14 A. L. J. 527 : 18 Bom. L. R. 509 : 31 M. L. J. 248 : 1 M. W. N. 403 : 20 M. L. T. 25.
8. Manak *v.* Abboy, 37 I. C. 257 : 24 C.L. J. 90.
9. A.I.R. 1926 Cal. 181.

of Darbhanga, and thus to save the property from sale, because the defendant had repudiated the contract before the suit was brought. In support of this contention he relied upon the case of *British & Benington Ltd.* v. *N. W. Cachar Tea Co.*[1] The proposition of law, as broadly stated, is undisputable, but then the proposition which remains to be established is "was there such a repudiation in fact as would attract the operation of this rule". Lord Abinger, in *Demedina* v. *Norman*[2] laid down that the words "readiness and willingness" used in such a connexion imply not only the disposition but the capacity to perform the contract, when repudiation is accepted and acted upon by the seller, as it evidently was in this case, the seller is relieved from the performance of all conditions precedent, including the condition of being ready and willing at the date of repudiation. In commonsense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendant.

In *Jones* v. *Barkley*,[3] it is observed :

> "The party must show he was ready ; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther and do a nugatory act".[4]

The claim for a decree for specific performance of contract is not a matter of right. The Court has to consider the whole of the surrounding circumstances and the position of the parties and then to consider whether, in the exercise of its discretion, no doubt to be exercised on well-known principles, the Court should grant such relief or grant damages in lieu thereof.[5] The Bombay High Court is of the view that in a suit which is really a suit for specific performance, the strict law as to tenders is applicable, and considering the negotiations which went on for several months, and the fact that the suit was filed before the three years had expired, and also the fact that the defendants had been in possession of a portion of the village when they undertook to re-convey to the plaintiff, there is no reason why justice should not be done by directing the defendants to re-convey on payment of the consideration money.[6]

The plaintiff, it may be remembered, is not responsible for the non-performance where the same is due to the defendant.[7] Again, non-performance of a condition precedent by the plaintiff may be excused where the performance has been waived by the party entitled to insist on it.[8] But the vague rumour that the other party was trying to secure a higher price does not amount to such waiver or repudiation.[9] When the agreement for transfer of property is such that its specific performance cannot be granted, the plaintiff will not be entitled to such relief merely because his other relief has become time-barred. But at the same time if the contract admits of being specifically performed, then the mere fact that the other remedy has become time-barred is no ground for refusing specific performance.[10]

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1. (1923) A. C. 48 : 92 L. J. K. B. 62 : 128 L. T. 422 : 23 C. C. 265.
2. (1842) 9 M. & W. 820 : 2 D. (N. S.) 239 : 11 L. J. Ex. 320.
3. (1731) 2 Dougl. 684.
4. Sree Lal Chamaria *v.* Hariram Goenka, A.I.R. 1926 Cal. 181 at p. 182.
5. *Ibid.* at p. 184
6. Tribhovandas Varjivandas *v.* Balmukundas Kishoridas, A. I. R, 1923 Bom. 15 at pp. 15-16.
7. Hothern E. I. Co., (1878) 1 T. R. 638.
8. Bealson *v.* Nicholson, (1842) 6 Jut. 620; Jones *v.* Barkley, (1781) 2 Dougl. 684.
9. Sree Lal Chamaria *v.* Hari Ram Goenka, A. I. R. 1926 Cal. 181 at p. 183.
10. Sohan Lal *v.* Atalnath, A. I. R. 1933 All. 846 at pp. 850-51: 34 A.L.J. 1584.

84. Burden of proof.—In a suit for specific performance of a contract the *onus* is on the plaintiff to prove the contract unless its existence is admitted by the opposite-party.[1] Therefore, where the plaintiff fails to prove the contract and payment of earnest-money, the mere fact that the defendant admits receipt of money but on an altogether different account, does not suffice to shift the burden to the defendant.[2] But where the written statement admits the contract but does not disclose any valid defence, the plaintiff may move for a decree for specific performance and may get decree at once as a matter of course.[3]

Onus on plaintiff to prove contract.

85. Lis pendens.—There is ample authority for the proposition that the doctrine of *lis pendens* applies to suits for specific performance of contracts to sell immoveable property.[4]

86. Delay.—In England, to entitle a party to specific performance of contract, he must show that he has been in no default in not having performed the agreement and that he has taken all proper steps towards the performance of his own part.[5] The law in India is not at par with the law in England in this respect, for in India a suit for specific performance of a contract is governed by three years' limitation under Art. 113, Limitation Act, 1908. "The right to enforce a contract specifically may in England be lost by delay in resorting to Court and a large mass of cases exist relating to this doctrine. The Bill eontains no rules on the subject, for in India the provisions of the Limitation Act (IX of 1877) (now IX of 1908), Sch. II, Art. 133, that suits for specific performance must be brought within three years from the day on which the plaintiff has notice that the performance is refused renders the doctrine of laches inapplicable to this kind of litigation."[6] But it would be too wide a proposition to state that in no case can delay defeat a suit provided it is brought within limitation.

English law is different from the Indian law.

87. Delay as evidence of abandonment or waiver may prove fatal.—There is abundant authority for the proposition that delay may in certain cases be the evidence of abandonment, acquiescence or waiver.[7] In *Kissen Gopal Sadaney* v. *Kally Prosonno Seth*,[8] the learned Judge, who decided the above noted case made the following observation in his judgment:

> "When a right is not in fact actually abandoned, delay to enforce it may induce a reasonable belief that the right is foregone and the party, who acts upon the belief so induced and whose position is altered by this belief to his prejudice, may plead delay as an answer to a claim made against him. But, in my opinion, mere delay is not

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1. East Indian Railway Co. *v.* Nuthumhadoo, 5 M.I.A. 217; Bengal Coal Co. Ltd. *v.* Prosannakumar, A. I. R. 1932 Cal. 39 at p. 40 : 54 C.L.J. 110.
2. Bengal Coal Co. Ltd. *v.* Prosannakumar, A. I. R. 1932 Cal. 39 at p. 40 : 54 C. L. J. 110.
3. Ikramul *v.* Wilkie, 11 C. W. N. 946.
4. Vedachari *v.* Narasimha, A. I. R. 1924 Mad. 307 at p. 307 : 76 I. C. 793 : 45 M. L. J. 825 : 19 L. W. 28 : 1924 M. W. N. 14; Johar Mal *v.* Bhupendra, I.L.R. 49 Cal. 495 : 67 I. C. 108 : A. I. R. 1922 Cal. 412 : 34 C. L. J. 79; Bhaskar *v.* Shankar, 80 I. C. 453 : A. I. R. 1924 Bom. 467 : 26 Bom. L. R. 418.
5. Story's *Equity*, para. 771.
6. Statement of Objects and Reasons of Specific Relief Act.
7. Lachman Das *v.* Kharak Singh, 57 P.R. 1919 : 51 I. C. 701; Malpuri *v.* Sanagavarapu, 26 I. C. 121 : 27 M. L. J. 482; Kissen Gopal Sadaney *v.* Kally Prosonno Seth, I. L. R. 33 Cal. 633; Peer *v.* Mohomed, I. L. R. 29 Bom. 245; *see* also 27 C. W. N. 199; 50 I. C. 171; I. L. R. 71 Cal. 568; 37 I. C. 776; I. L. R. 40 Bom. 289 (P. C.); 32 I. C. 246 : 43 I. A, 26 : 22 C. L J. 328; 14 A. L. J. 225; 1916 M. W. N. 229 : 3 L. W. 239.
8. I.L.R. 33 Cal. 633.

a sufficient reason for debarring the plaintiff from relief by way of specific performance. . . . In my opinion delay is not material so long as matters remain in *status quo*, and it does not mislead the defendant or amount to acquiescence. It must be shown that delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted."[1]

In no case does mere lapse of time deprive the plaintiff of his right to specific performance, unless it be held that there has been abandonment, acquiescence or waiver or at the least, an alteration in the position of the defendant, in that the other party has been put in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted.[2] Delay which does not amount to waiver, abandonment or acquiescence and which in no way alters the position of the defendants does not disentitle the plaintiff to sue for specific performance. Where the suit is within time and the delay is not so great as to induce the Court to hold that the plaintiff has forfeited his right under the agreement, the Court will not refuse specific performance.[3] Lapse of time may prove fatal to an action for specific performance unless the defendant is the cause of it.[4] What amount of delay is fatal is a question of fact depending upon the circumstances of each particular case.[5] A delay of one month has been held not to be fatal[6] while delay of 20 months and two years have been held to be so.[7] According to the Bombay High Court an unexplained delay of one year or even less is sufficient to negative the rights of a party to obtain specific performance. This applies also to the case of a consent decree where execution is in the nature of specific performance.[8] In the case of contract for sale of land time is not of the essence unless expressly so stipulated at the time of the contract. Failure to keep to the dates assigned will not disentitle a party to a relief unless the delay has been gross.[9]

Specific performance may be denied if the hardship to the defendant or to a third person will be out of all proportion to the value of the performance to the plaintiff. Appreciation or depreciation in value or other events subsequent to the formation of the contract will not ordinarily afford ground for refusing enforcement by equity even though they make the performance of the two parties unequal. But if the plaintiff was in default or guilty of gross laches, and the value of the property has materially changed, specific

1. Jugal Singh *v.* Ghulam Mahomed, A. I. R 1922 Lah. 461 at pp. 465 66 : I.L.R. 3 Lah. 376.
2. Allah Ditta *v.* Jamna Das, A I. R. 1929 Lah. 679 at p. 680 : 117 I. C. 225 : 30 P. L. R. 285.
3. Jugal Singh *v.* Ghulam Mahomed, A. I. R. 1922 Lah. 461 at pp. 465-66 ; I.L.R. 3 Lah. 376 : 67 I C 700 ; *see* also 77 I. C. 897 : A.I.R. 1923 Sind 50 : 16 S. L. R. 278 ; 75 I. C 743 : A. I. R. 1923 Lah. 694.
4. Ma Shwe Mya *v.* Manng Mo Hnaung, A. I. R. 1922 P. C. 249 at p. 251 : I.L.R. 48 Cal. 832 (P. C) : 63 I. C. 914: 48 I. A. 214 : 24 Bom. L. R. 682 : 30 M. L. T. 28 : 1921 M.W.N. 396.
5. Haridhan *v.* Bhagabatt, I. L. R. 41 Cal. 852.
6. *Ibid.*
7. Malpuri *v.* Sanagawarapu, 26 I.C. 124 : 27 M L. J. 482 ; Lachman Das *v.* Kharak Singh, 57 P. R. 19 9.
8. Shankar Sakharam *v.* Ratanji Premji Seth, A. I. R. 1923 Bom, 441 at pp. 445-46 : I.L R. 47 Bom. 607 : 79 I. C. 226 : 25 Bom. L. R. 328.
9. Jamshed Khodaram Irani *v.* Burjorji Dhanjibhoy, I L.R. 40 Bom. 289 (P.C.): 43 I. A. 26 : 32 I. C. 246 : 30 M. L. J. 186 : 3 L. W. 239 : 19 M. L. T. 184 : 14 A. L. J. 225 : 18 Bom. L. R. 163 : 23 C. L. J. 358 : 20 C. W. N. 744 : 1 M.W.N. 229.

performance may be denied, since otherwise a plaintiff might endeavour to take a speculative advantage of the changes in value. Even apart from such default if the subsequent events though not amounting to such impossibility as would excuse at law are, nevertheless, of a kind which not only greatly change the value of one performance or the other, but also could not reasonably have been anticipated when the contract was made, specific performance has been denied.[1]

88. Decree.—A decree for specific performance only declares the right of the decree-holder to have a transfer of the property covered by the decree executed in his favour. The decree by itself does not transfer the title. It is the execution of the sale-deed that transfers the property.[2] Where a vendor sues a purchaser for specific performance, the form of the decree is that the plaintiff be at liberty to prepare and execute a conveyance to the defendant as an escrow to be delivered to the defendant on payment of the purchase-money *within* the time limited and the defendant should pay the purchase-money after a conveyance is ready. If the contract is that the purchase-money is to be paid before execution of the conveyance, then, the decree must be made accordingly.[3] It is open to the Court to extend time for the payment fixed in a decree for specific performance. The delay in payment, when time is not of the essence of the contract, eannot entail the penalty of rescission unless there has been such persistent delay as to justify the rescission.[4] Where there is a condition in the contract for the payment of damages in default of performance, whether by the vendor or by the vendee, it must be held that the parties considered that the enforcement of these damages would be adequate in case the contract is not performed. So far as the default on the purchaser's side is concerned, it is not suggested that the provision for default can be treated otherwise than as furnishing security for performance.[5]

Extension of time fixed in decree for payment.

89. Decree enures for benefit of both parties.—On a general principle, leaving aside altogether the dealings between the defendants and other parties that the decree for specific performance was capable of being executed by the defendants as well as by the plaintiff. If this were not so, it would follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration-money, the defendant is left with no remedy whatever, while, owing to the decree passed against him, he would still be debarred from dealing in any way with the suit property. It is clear in such a case that a defendant would be entitled to come to Court and ask for the payment to him of the consideration-money for the purchase on his tendering a sale-deed. The order made by the Judge in the Court below was a perfectly correct order and that the defendants came within the definition of decree-holder in Sec. 2(3), C. P. C. If the plaintiff in suit for specific performance, after having obtained a decree, discovers or is apprehensive that the defendant cannot give him a good title, then it seems that the proper course is to apply to the Court that passed the decree for a review, or in the alternative it may be open to him to file another suit against the defendant to set aside the previous proceedings.[6]

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1. *See* Williston on *Contracts*, Sec. 1425.
2. Enayat Ullah *v.* Khalil Ullah Khan, A. I. R. 1938 All. 432 at p. 433 : I.L.R. (1933) All. 677 : 176 I. C. 436 : 1938 A. L. J. 569 : 1938 A. W. R. (H. C.) 381 : 1938 A. L. R. 658.
3. Bashiya *v.* Andalamina, 49 I. C. 385 : 1918 M. W. N. 896.
4. Gokul Prashad *v* Fatte Lal, 1945 N. L. J. 500.
5. Metta Rama Bhatlu *v.* Metta Annayya Bhatlu, A I.R. 1926 Mad. 144 at p. 145.
6. Bai Karima Bibi *v.* Abde Raheman Sayad Banu. A. I. R. 1923 Bom. 26 at p. 27 : I L. R. 46 Bom. 990.

In *Karim Mahomed Jamal* v. *Rajooma Noorbai*,[1] the form of the decree had not followed the ordinary form. The decree was to this effect that the agreement should be carried out by the defendant ; and afterwards an application was made to the Court to compel the plaintiff to carry out his part of the agreement. Sargent, C. J., said as follows :

> "The declaration which the decree contains that the plaintiffs are entitled to have the agreement of 27th September, 1871, specifically performed implies that he is himself specifically to perform it as well as the defendant. As however the absence of mandatory words as against the plaintiffs has given rise to difficulties, we have now to consider whether the decree can now be rectified so as to allow the necessary orders to be made. Can we now insert the mandatory words ? ****We are merely asked to put the decree into the ordinary and usual form of decrees in cases of this nature. I can see no difficulty in doing this. The plaintiffs asked for a decree for specific performance of an agreement and they got it. How can they object to the decree being in the form in which such decrees are ordinarily framed ? The decree, as it stands at present, declares that the plaintiffs are entitled to specific performancc of the agreement. The usual form is to declare that the agreement ought to be specifically performed and the Court doth order and decree that the same be specifically performed accordingly. I think the dccree may be amended so as to put it into the usual form."

In *Bai Karima Bibi* v. *Abde Raheman Sayad Banu*,[2] the Bombay High Court held that :

> "The decree for specific performance was capable of being executed by the defendant as well as by the plaintiff. If this were not so, it would follow that, if a plaintiff who has obtained a decree for specific performance refuses to take the sale-deed and pay the consideration-money, the defendant is left with no remedy whatever while, owing to the decree passed against him, he would still be debarred from dealing in any way with the suit property."

That it has always been regarded as a maxim in equity, that a decree for specific performance operates in favour of both parties, may be seen not only from the text books but from a referenee to the judgmeut of a most learned Judge. In *Halkett* v. *Earl of Dudley*,[3] the learned Judge observed in passing, as though it was a matter of common knowledge, that :

> "a decree for specific performance enures for the benefit of both parties".

The theory of the matter has been very fully expounded by the judgment delivered by Lord Blanesburgh in the case of *Ardeshir H. Mama* v. *Flora Sassoon*.[4] It is pointed out in that case that in a suit for specific performance the plaintiff has to treat the contract as subsisting, he has to allege and it is necessary for him to prove his continuous readness and willingness from the date of the contract to the time of the hearing to perform the contract on his part and that failure to make good that averment brings with it the inevitable dismissal of his suit. And in dealing with the question whether in a suit for

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1. I.L.R. 12 Bom. 174.
2. A. I. R. 1923 Bom. 26 : 67 I. C. 667 : I.L.R. 46 Bom. 990.
3. (1907) 1 Ch. 590 : 76 L. J. Ch. 330 : 96 L. T. 539.
4. A.I.R. 1928 P. C. 208 : 111 I. C. 413 : 55 I.A. 360 : I.L.R. 52 Bom. 597 (P.C.).

specific performance the Court ought to allow an amendment asking for damages, an amendment inconsistent with the willingness of the plaintiff to have the contract performed, their Lordships of the Privy Council pointing out how serious the effect of such amendment is, had occasion to observe as follows : They point out first that, in that particular case, the plaintiff held the defendant to the contract for four years and thus :

> "without any undertaking in damages on his part held an effective injunction against the defendant's dealing with that property in derogation of his claim thereto as purchaser."

> "An amendment which deprived to Court of the power to compel him to accept a decree on pain of having his action dismissed if he did not was not one lightly to be granted."

The position therefore of the plaintiff in a specific performance suit is that at the time of the decree he submits to having an order made against him that he should perform the contract and that unless he is willing to make that submission, *prima facie* his suit will be dismissed with costs. It seems impossible to assent to the argument that the defendant is bound by that decree and is not able to enforce it. In the case of a suit for specific performance where untimately the purchaser being the plaintiff it is found that the vendor had no good title there is on the authorities great difficulty in giving the remedy of damages as well as the remedy of cancellation. There is no reason in this case why the plaintiff who came before the Court holding the defendants to the contract and asking the Court to require both parties to perform it should be allowed to resile from that position. Their Lordships were not at all satisfied that the plaintiffs have any excuse for the attitude they have now adopted. The coincidence that the plaintiffs are unwilling to complete the purchase and the defendants are anxious to have it completed leaves little room for doubt that the learned Judge is right in thinking that the dismissed value of the property is the secret of the inconsistent conduct of the plaintiffs.[1]

A question of general importance has been argued whether, when a decree for specific performance is made, it operates in favour of both parties, so that the defendant also can have it carried into effect. It is argued on the one hand that the defendant to the action does not enjoy the same privilege as the plaintiff, that as regards the relief he can obtain in the suit itself, Sec. 35 (*c*) (old), Specific Relief Act, prescribes a remedy and that he cannot obtain any other or further relief in the action than what is provided by that section. It is contended on the other hand that the decree in the suit enures for the benefit of both and each of the parties can after judgment claim specific performance. The question is, which of these two views is correct ? The Specific Relief Act, it has been pointed out, is based on the rules and practice of the English law in relation to the doctrine of specific performance.[2] Their Lordships of the Judicial Committee have interpreted the sections of this Act, both as to substantive law and practice, in the light of the principle recognized by the English courts. If there is an express divergence, then the Act will be strictly adhered to, whatever be the English law. It seems to be well settled under the English practice that a decree for specific performance operates in favour of both parties. The usual form of a decree is to declare that the agreement ought to be specifically enforced without stating

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1. Heramba Chandra Mitra *v.* Jyotish Chandra Sinha, A. I. R. 1932 Cal. 579 at pp. 582-83 : 36 C.W.N. 71.

2. Ardeshir H. Mama *v.* Flora Sassoon, A. I. R. 1928 P. C. 208 : 111 I. C. 413 : 55 I. A. 360 : I.L.R. 52 Bom. 59 .

that it shall be so enforced at the instance of the plaintiff only. The form given in Seton on *Decrees* runs thus ;

> "Declare that the agreement in the pleadings mentioned, ought to be specifically performed and carried into execution and order and adjudge the same accordingly."[1]

In India also this view was taken in some cases.[2] In a recent case the point was discussed at great length by Rankin, C. J., who after an elaborate examination of the authorities, came to the same conclusion.[3] In England a suit for specific performance is not deemed to come to an end by the passing of the decree. In Chapter 4 of Fry's *Standard Work on Specific Performance* he discusses the various reliefs that may be obtained after judgment. The right to these reliefs is not possessed by the plaintiff alone. The learned author says :

> "It may and not unfrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part, as, for instance, where a vendor refuses or is unable to execute a proper conveyance of the property or a purchaser to pay the purchase money. The character of the consequential relief appropriate to any particular case will of course vary according to the nature of the subject-matter of the contract and the position which the applicant occupies in the transaction ; but in every case the application must, under the present practice, be made only to the Court by which the judgment was pronounced.
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> "There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself."

Then he goes on to describe at some length the various kinds of relief that are open to a vendor and those open to a purchaser. The nature of the relief depends upon whether the applicant is the vendor or the purchaser, not upon whether he is the plaintiff or the defendant. The chapter deals with varieties of reliefs, and some of them may probably not apply to India, the law and practice here being in some respects different ; but there is no reason why the principle, which has been accepted by the English courts, should be departed from in this country. The Specific Relief Act is defective in this respect, and courts should turn for guidance to the English practice on the subject. In this case the defendant happens to be the purchaser. The plaintiff, who has obtained judgment, makes default. What then is the defendant's position ? He is prepared to pay the purchase price and otherwise observe the decree, but on the hypothesis that it does not enure for his benefit, he cannot compel the plaintiff to execute the conveyance. There is no provision in the Specific Relief Act, which such a defendant can invoke. The decisions say that the plaintiff may obtain in certain circumstances an

1. 7th Ed., Vol. 3, pp. 2136 and 2137.
2. Karim Mahomed Ismail *v.* Rajooma Noorbai; I. L. R. 12 Bom. 174 ; Bai Karima Bibi *v.* Abdc Rahcman ; Sayad Banu, A. I. R. 1923 Bom. 26 : 67 I. C. 667 : I. L. R. 46 Bom. 990.
3. Heramba Chandra *v.* Jyotish Chandra Sinha, A. I. R. 1932 Cal. 570 : 139 I.C. 230 : I.L.R. 59 Cal. 501.

extension of the time originally granted. When then can the defendant feel that he is absolved from the contract ? How long is he to keep ready in his hands the purchase-money ? It cannot be that the intention of the law is that a defendant-purchaser should be subject to this unmerited hardship Therefore in the case of a defendant-purchaser at any rate, there being no provision in the Specific Relief Act, one must necessarily turn to the recognized English practice in that respect. Next, is there anything to show that, where the defendant is the vendor, the remedy provided by the Act is exhaustive? Section 35 applies to both the plaintiff-vendor as well as the defendant-vendor and is not confined to the latter case only. Supposing a vendor as plaintiff obtains a decree for specific performance but finds that the defendant is impecunious and cannot pay the purchase-money, why should it not be open to him to have the contract rescinded under that section ; and secondly the words "in the same case" in the final paragraph refer to the case mentioned in Cl. (*c*).[1]

The opening paragraph of the section refers to the "following cases", then three cases follow, case (*c*) being one of them. The words "in the same case in the" in the final clause of case (*c*) must therefore refer to that particular case. And further, why should it be assumed that a departure from the English law is intended and the relief is restricted to the contingency mentioned in the penultimate clause, namely, where the purchaser is in possession ?

Section 35 thus applies to both the plaintiff-vendor and the defendant-vendor, and it enables them to have the contract rescinded in the very action in which the decree for specific performance was made. But is that any reason for holding that the other remedies open to them under the English law are denied to them under the Act? It is difficult to overlook that the word used in the final clause of Sec. 35 is "may" and not "shall". It therefore seems that a defendant, whether he be purchaser or vendor, must after judgment be in a position to require specific performance from the opposite party in the same action. If the principle on which the rule of mutuality is founded be accepted, the remedies open to the plaintiff after judgment must be equally available to the defendant and the varied nature of the remedies is set forth, as already noticed, by Fry in his work. Thus, the right of rescission recognized in Sec. 35 (*c*) (old), Specific Relief Act, is not confined to a vendor, whether plaintiff or defendant, but must be equally open to a purchaser it being immaterial whether he appears in the action as plaintiff or defendant. That the principle of reciprocity is not limited to the enforcing of the decree by requiring specific performance, is the effect of the observations of Sir Walter Schwabe, C. J., in *Abdul Shakur* v. *Abdul Rahiman*[2] already cited. The learned Chief Justice gives a rough summary of the remedies enumerated by Fry as they obtain in the English system and assumes that they are equally available to either party in this country.

This is the necessary result of the acceptance of the dual principle recognized in the English law : first that the passing of the decree does not terminate the suit but that various reliefs may be obtained after judgment in the action itself (according to Sir Walter Schwabe, C. J., the decree is in the nature of a "preliminary decree"), and secondly, that the decree enures not only for the benefit of the plaintiff but also the defendant. Mr. Seshagiri Sastri

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1. Kurpal *v.* Sham Rao, A.I.R. 1923 Bom. 211 ; I.L.R. 47 Bom. 589 ; Mahomedali Shah *v.* Abdul Khader Saheb, (1927) 128 I. C 875.
2. A. I. R. 19 3 Mad. 284 : 72 I. C. 868 : I.L.R. 46 Mad. 148.

suggested (though on the facts of this case it was not necessary for him to take up this position) that in regard to limit of time, applications by a defendant to enforce the decree would be governed by the provisions of the Limitation Act.[1] The reason for this rule of law is not far to seek. If this were not so, it would follow that if a plaintiff who has obtained a decree for specific performance refuses to take the sale-deed and pay the consideration money, the defendant could be left with no remedy whatever, while owing to the decree passed against him he would still be debarred from dealing in any way with the suit property.[2] The definition of the term "decree-holder" is quite applicable to the defendant in a suit for specific performance because the decree is just as much in favour of the defendant as in favour of the plaintiff.

90. Nature of decree.—On principle, the decree that the agreement ought to be specifically enforced, is a decree against the plaintiff as well as against the defendant and in favour of the plaintiff.[3] The decree is in the nature of a preliminary decree and the Court can pass all necessary orders to enforce the decree.[4] In case the plaintiff succeeds the proper decree to pass is to direct both the original contracting party and the subsequent purchaser to convey the property to the plaintiff.[5] Since in case of a decree for specific performance the implication is that both the plaintiff and the defendant are to perform the agreement the decree can be rectified to compel the plaintiff to carry out his part of the agreement.[6]

Where after obtaining a decree the plaintiff feels that the defendant cannot give him a good title, his proper course is to apply to the Court that passed the decree for a review or in the alternative to file another suit against the defendant to set aside the previous proceedings.[7]

91. Foundation for rule of specific performance.—The original and sole foundation of the jurisdiction to decree specific performance of contracts is that an award of damages does not give adequate compensation to which the party is entitled, that is, it does not put him in a situation as beneficial to him as if the agreement were specifically enforced.[8] According to the common law of England the legal right which arises upon the non-performance of a contract in favour of the party injured by its breach is a claim for damages. The inadequacy in many cases of that remedy for the purpose of justice supplied the incentive to a court of conscience, as the Chancellor's Court has been called, to decree when applied to in particular cases, the more complete remedy of specific performance. As a result of long course of decisions by Chancellors and other equity Judges there was gradually evolved in England a body of settled principles and rules governing the exercise of that jurisdiction so that in the course of time its limits were settled almost as definitely as if they had been embodied in a statute, by 1877, when the Specific Relief Act, I of 1877, was passed and in most respects long before this stage had been reached.

Review of decree.

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1. Akshayalingam Pillai *v.* Avayambala Ammal, A. I. R. 1933 Mad. 386 at pp. 387-89 : 64 M L.J. 536.
2. Bai Karimahibi *v.* Abderehman Sayad Banu, I. L. R. 46 Bom. 990 : 67 I. C. 667 : A. I. R. 1923 Bom. 26.
3. Heramba Chandra *v.* Jyotish Chandra Sinha, I. L. R. 59 Cal. 501 : 139 I. C. 230 : A. I. R. 1932 Cal. 579: 36 C.W.N. 171.
4. Abdul Shakur *v.* Abdul Rahiman, A.I.R. 1923 Mad. 284 at p. 285 : I. L. R. 46 Mad. 148 : 72 I. C. 868 : 44 M. L. J. 107 : 1922 M.W.N. 1 : 17 L.W. 216.
5. Khalil-ud-din *v.* Samir-ud-din, 34 C.W. N. 698.
6. Karim Mahomed Jamal *v.* Rajooma Noorbai, I.L.R. 12 Bom. 174.
7. Bai Karimabibi *v.* Abderehman, *supra*.
8. Hamett *v.* Yielding, 2 Sch. & Lef. 553.

92. Specific Relief Act a Code.—The Specific Relief Act, like the Contract Act, is a Code. Part II, Chapter 2, which deals with specific performance of a contract, is a codification, with modifications called for by the Indian conditions and procedure, of the then existing rules and practice of the law in relation to the doctrine of specific performance.[1] In every case of specific performance the question for decisions is whether damages will afford an adequate remedy for the breach of the contract. The Legislature has by way of explanation to Sec. 12 (now explanation to Sec. 10) enacted a presumption to be kept in view by courts in deciding whether in a particular case an award of damages would or would not put the party aggrieved in a situation as beneficial as if the agreement was specifically performed.[2] The explanation to Sec. 12 (now Explanation to Sec. 10) makes it clear that unless and until the contrary is proved the Court shall presume that the breach of a contract to transfer immoveable property cannot be relieved by compensation in money.[3] Where the Court below exercises its discretion to grant specific relief, before a court of appeal thinks of interfering with that discretion it should come to the conclusion that the discretion was exercised by the Court below arbitrarily.[4]

93. Effect of presumption arising under the explanation.—The effect of this presumption is that in a suit to enforce a contract to transfer immoveable property the Court will grant specific performance as a matter of course, provided of course, the plaintiff has been himself up to date of the decree ready and willing to perform his part of the contract.[5] The presumption arising under explanation, however, is not absolute but is a rebuttable one and may be rebutted when it is fouud that the breach of the contract can be adequately relieved by compensation in money.[6]

It would be noticed that in the explanation to Sec. 10 it is clearly mentioned that unless and until the contrary is established the Court will presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money and that being so, the decree for specific performance of the agreement can be rightly passed, where the defendant has not brought anything on the record to show that the plaintiff could be suitably compensated by the award of liquidated damages.[7]

In the above-noted case the defendant did not bring anything on the record to show that the plaintiff could be suitably compensated by award of liquidated damages. It was held that the decree for specific performance could be rightly passed.

In *Ardeshir H. Mama* v. *Flora Sassoon*,[8] it was decided that in a case of breach of contract by one party the other party may elect to put an end to the contract and to sue for damages, or he may keep the contract open and sue for specific performance. In the latter case he must, if required, prove a continuous readiness and willingness from the date of the eontract to the time of the hearing to perform the contract on his part. If during the progress of

1. A. Mama *v.* F. Sassoon, I. L. R. 52 Bom. 597.
2. *Ibid.*
3. Mst. Gaindo Devi *v.* Shanti Swarup, 167 I. C. 657 : A.I.R. 1937 All. 161 : 1937 A. L. R. 227 : 1936 A. W. R. 1290 ; A. Mama *v.* F. Sassoon, *supra.*
4. Mst. Gaindo Devi *v.* Shanti Swarup, *supra.*
5. A. Mama *v.* F. Sassoon, *supra.*
6. Rumji Patel *v.* Rao Kishore, A. I. R. 1929 P. C. 190 at p. 194 : 43 C. W. N. 899.
7. Dina Nath Bhandari *v.* Parkash Chand Jain, 74 Punj. L. R 614 at p. 620.
8. A. I. R. 1928 P. C. 208 : 111 I. C. 413 : I.L.R. 52 Bom. 597 : 55 I. A. 360 : 26 A. L. J. 1220.

the suit and before the hearing he abandons his claim to specific performance or disentitles himself to that relief by some act on his part, he cannot claim to be awarded by the Court damages in lieu of specific performance of the contract. Jurisdiction to award damage in substitution of the relief for specific performance remains so long as the plaintiff does no act on his part to disentitle himself to a decree for specific performance. A court may allow a plaint for specific performance to be amended into a plaint for claim of damages, pure and simple, but discretion to allow such an amendment should be exercised with great care and caution. It is to be observed that this decision is no authority to the proposition that the Court is precluded from awarding damages in a suit for specific performance where the plaintiff during the pendency of suit withdraws his claim for specific performance. After an exhaustive review of the law upon the question the Board observed:

"In other words, that the Court should have the power of granting such amendment in a proper case is salutary and indeed necessary. The possibility that the power will be exercised may, in certain cases, be the only effective check upon a defendant to a specific performance suit, who by delay, expensive appeals and other devices, sets himself to starve a relatively impecunious plaintiff into submission by making continued performance of the contract on his part beyond his power. And such a power is possessed by the Court in England, and in a proper case and under suitable conditions it may be used But it is one to be most carefully and exercised jealously in all the circumstances of each individual case and with due regard to its effect upon the position both of the plaintiff and the defendant. If the defendant is to be prevented by the possible exercise of the power from starving a plaintiff out of his rights, the plaintiff must not by its ill considered exercise be permitted to turn his suit into a gamble for himself at the defendant's expense. Indeed so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a Judge before allowing any amendment in a contested case to require the plaint to be actually remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent, and the amendment will be allowed or refused with a due appreciation of the position."[2]

In *Jaggo Bai* v. *Harihar Prasad Singh*,[3] the plaintiff does not, in fact, sue for damages for breach of contract. He claims the equitable relief that the contract between him and the defendants having fallen through, he is entitled to what he has paid to the defendants in respect of the purchase price of the mortgagee rights, which under the contract were to be transferred to him. That the plaintiff is in equity entitled to claim the refund of the portion of the purchase price paid by him is not in doubt.[4]

94. Discretion of Court.—It is undoubted rule that giving a specific performance is a matter of discretion. But this does not mean that it is open to a court to do just what it pleases in an individual case without regard to authority or principle. Chambre, J., said in an old case "Granting a specific performance is not to be claimed as matter of right. It is in the

Nature of discretion of Court.

1. *See* Nicholson *v.* Brown, (1897) 41 S. J. 490.
2. Jaggo Bai *v.* Harihar Prasad Singh, A. I. R. 1940 All. 41 at pp. 42, 43.
3. A. I. R. 1940 All. 41 : 1939 A. W. R. (H. C) 824.
4. *Ibid.* at p. 43.

discretion of the Court; and will not be done unless complete justice can be done by the party seeking it." Lord Eldon explained next year that the discretion was not arbitrary or capricious but it must be regulated upon grounds that would make it judicial. No hard and fast rules can, it has been said, be laid down. In exercising its discretionary power, a court will act with more freedom than when exercising its ordinary powers, and will grant or withhold relief according to the case presented. An American Judge has observed: "In every case the question must be whether the exercise of the power of the Court is demanded to subserve the ends of justice and unless the Court is satisfied that it is right in every respect it refuses to interfere." In an old English case it was said, "discretion is a science not to act arbitrarily according to men's wills and private affections". The rules contemplate an exercise of the *orbitrium*, not the arbitrariness of Judges. All that is meant by saying that the right to an equitable remedy is discretionary is that the mere existence of a legal right is not sufficient to attract the equitable remedy. In addition to the facts, events and relations which give rise to certain and absolute *legal* right, there must be *other* facts, circumstances and incidents which determine the existence of the equitable right, which modify its application, or perhaps entirely prevent its exercise.[1] Wherever a contract is unenforceable at law, ordinarily it is unenforceable in equity. Such defences as fraud, duress, mistake, illegality, which would be ground for a defence, either legal or equitable to an action at law are *a fortiori* ground for refusing the equitable relief of specific performance. But conversely, there are some contracts which though they may be enforceable at law, and may relate to a subject matter of which equity ordinarily takes jurisdiction are denied equitable relief. For this reason the jurisdiction of equity is generally called discretionary. It is in this sense that the term "discretionary" is to be understood. In *Dangherg* v. *Langman*,[2] the Court observed, "It is also contended specific performance is not a matter of right, but rests in the sound discretion of the Court. It will not be enforced as a matter of course, when it will impose unreasonable or unjust hardship; when the necessary elements and condition are present it will be enforced as a matter of right and not as a matter of favour." More exactly, therefore, it may be said that wherever a contract though legally valid is grossly unfair, or its enforcement opposed to good policy for any reason, equity will refuse to enforce it, and though certain kinds of unfairness may be classified, equity declines to make an exact inventory of what amounts to such unfairness or impropriety as will preclude relief, but leaves a border land where the Court can consider the particular facts of each case and deal with it on its merits.[3] In India this principle has been crystallised in Sec. 22 of the Specific Relief Act, 1877 (which corresponds to Sec. 20 of the present Act) which enacts that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary but sound and reasonable guided by judicial principles capable of correction by a court of appeal. But when the Court below exercises its discretion to grant specific relief, before a court of appeal thinks of interfering with that discretion, it should come to the conclusion that the discretion was exercised by the Court below arbitrarily.[4] The explanation to Sec. 12 (old), Specific Relief Act, makes it clear that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable

Interference in appeal.

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1. Dr. Banerji's *Tagore Law Lectures*, pp. 31-32.
2. 318 Ill. 266.
3. *See* Williston on *Contracts*, Sec. 1425.
4. Pinto *v.* Sheenappa Malli, (1950) 2 M. L. J. 169 at p. 170 : 63 L. W. 1002 ; *see* Sec. 22.

property cannot be adequately relieved by compensation in money. The discretion to grant this specific relief was granted by the Court below, and before a court of appeal thinks of interfering with that discretion, it should come to the conclusion that the discretion was exercised by the Court below arbitrarily.[1]

95. Inadequacy of consideration.—But inadequacy of consideration is not a ground by itself to refuse specific performance unless the contract is unconscionable.[2] *See* notes to Sec 22.

96 Clause (b) – No standard for ascertaining actual damage.—The ground of the rule is the utter uncertainty of any calculation of damages as they must in such cases be in a great measure conjectural. The clause covers cases where the subject-matter is so unique that it would be impossible to say what it would fetch in the market.[3] A value of affection is seldom appreciated by third persons. "It needs a very enlightened benevolence, and philosophy very uncommon to sympathise with tastes different from our own. The Dutch Florist, who sells tulip bulbs for their weight in gold, laughs at the antiquary who pays a great price for rusty lamp. Legislators and Judges have too often thought like the vulgar. They have applied gross rule to cases which required a nice discernment. There are cases in which the offer of money is not a satisfaction but an insult. Shall a lover take money as the price of his mistress's portrait of which a rival has robbed him?"[4] All contracts concerning unique and precious articles, heirlooms or paintings, old furniture and the like, in which there is no market price to furnish a criterion nor any other means of estimating the *pretium affectionis* which constitutes the real value to the owner . . . also contracts for the delivery of deeds or other muniments of title and instruments in writing whose value to the owner might be priceless, and be beyond the competency of a jury to decide by application of certain legal rules may be specifically enforced.[5] Specific performance may also be granted in case of chattels which though not unique possess a special and pecul ar value and importance to plaintiff.[6] Thus where the article is esteemed not much for its intrinsic value but as being an object of attachment or curiosity, specific performance will be decreed, as in such a case the loss due to breach cannot be measured by the Court who cannot possibly enter into the feeling of the party. In such a case the impossibility or at least great difficulty of supplying the loss puts damages out of question as a medium of redress.[7] If in a contract for chattels damages will be a sufficient compensation, the party is left to that remedy. Thus if a contract for the purchase of a certain quantity of coal's stock, etc., the Court will not decree specific performance because a person can go into the market and buy similar articles. But if damage would not be sufficient compensation the principle on which a court of equity will decree specific

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1. Mst. Gaindo Devi *v.* Shanti Swarup, A. I. R. 1937 All. 161 at p. 165 : 1936 A. W. R. 1290.
2. Jetharam *v.* Hazarimal, A I. R 1952 Raj 28 : 1951 R. L. W at p 377.
3. Story, *Equity*, Sec. 722 (a).
4. Bentham's *Legis.*, 290.
5. Pomeroy, *Sp. C S.*, 34, p. 101; Montgomery Enterprises *v.* Empire Theatre Co., 204 Ala. 565 (motion picture film); Elliot *v.* Jones, 11 Del. Ch. 283 (a race horse) ; Burr *v.* Bloomsburg, 101 N. J Eq. 615 (diamond ring given to the plaintiff by her mother) ; Slone *v.* Cl. 64 Oh. St. 125 (family heirlooms) ; Beasely *v.* Allyn, 15 Phila. 97 (a bowl belonging to a college society); Skine *v.* Walker, 3 Rich Eq. (S C.) 262 (slave) ; Pusey *v.* Pusey, 1 Verno. Ch. 273 (an ancient horn which was an heirloom) ; Somerset *v.* Cookson, 2 Ep. Cas Abr 164 (a silver altar piece) ; Fells *v.* Read, 3 Ves. 70 (silver tobacco box) ; Lowther *v.* Lowther, 13 Ves. 95 (a painting by Titian) ; Falcke *v.* Gray, 4 Drew. 65 (two china jars).
6. Fry, *Sp. C. S.*, 85 ; *cf.* Legg *v* Mathieson, (1860) 2 Giff. 71 : 66 E. R. 31.
7. McGowin *v* Remington, 12 Pa. St. (2 Jones) 56.

performance is just as applicable to a contract for purchase of chattels, as to a contract for the sale and purchase of land.[1] In the following cases, specific performance was decreed :

Instances where specific performance has been decreed.—(1) Agreement to retire from business.[2]

(2) Contracts for purchase, sale and assignment of choses-in-action or things-in-action are specifically enforceable where damages are uncertain and conjectural.[3]

(3) Contracts for the sale and purchase of life annuities.[4]

(4) A contract for the delivery of paid-up life insurance policy for a certain sum.[5]

(5) Where an agreement was that partnership book was on dissolution of partnership to be the property of one partner and others were to have a copy of it, the agreement as to copy was held to be enforceable specifically.[6]

(6) An agreement by a partner to carry on the same trade with another person in a certain place.[7]

(7) Agreement as to the artist's picture painted by himself, the picture having its peculiar value to the plaintiff.[8]

(8) Sale of patent right is specifically enforceable at the instance of either the purchaser or the seller.[9]

(9) A contract for sale of two china jars at a particular price.[10]

(10) An agreement for the assignment of a copyright.[11]

(11) A contract for the sale of 800 tons of iron to be delivered and paid for by instalments in a certain number of years.[12]

(12) A contract to pay the plaintiff an annual sum for his life and also a certain other sum for every hundredweight of brass wire manufactured by the defendant during the life of the plaintiff.[13]

(13) A contract for sale of the arch stone, the spandril stone and the Bramley Fall stone contained in the Westminster Bridge which had been pulled down.[14]

(14) A contract for the sale of business premises with the goodwill annexed to them was specifically enforced,[15] though not a contract for the sale of goodwill alone unconnected with the business and premises of which it was an incident.[16]

1. Falcke *v.* Gray, 4 Drew 651 (two china jars).
2. Gray *v.* Smith. 43 Ch. D. 208.
3. Adderly *v.* Dixon, 1 Sim & Sti. 607 ; Wright *v.* Bell, 5 Peire 325.
4. Wittry *v.* Cottle, (1822) 23 R. R. 187 : 1 S. & S. 174
5. Hughes *v.* Piedomon Life Insurance Co., 55 Geo. 111.
6. Lingen *v.* Simson, 1 S & S. 300.
7. Krubl *v.* Kean, 6 Sim. 333.
8. Drowing *v.* Bekjamen, 2 J. & H. 544.
9. Cygnet *v.* Gibson, (1864) 23 Beav. 555 ; Gorbin *v.* Tracy, 34 Conn. 325.
10. Falcke *v.* Gray, 113 R. R 493 : 4 Drew. 651 : 29 L. J. Ch. 28. The illustration to Cl. (*h*) of Sec. 12 Specific Relief Act, is traceable to this decision.
11. Thombleson *v.* Batch, 1 Jur. 198.
12. Taylor *v* Nevile, 3 Atk. 384. This case was doubted and criticised in Pollard *v.* Clayton, 1 K & J. 462.
13. Bell *v.* Coggs, (1716) 1 Broc. P. C. 144.
14. Thorn *v.* The Commissioner of Public Works, 32 Beav. 490.
15. Darbey *v.* Whittaker, 4 Drew. 134 ; Cruttwell *v.* Lye. 17 Ves. 335.
16. Baxter *v.* Conolly, 21 R. R. 237 : 1 J. & W. 576.

Goodwill, contract for.—The reason for the distinction is clear. As rightly pointed out by Eldon, L. C.,[1] "what is a goodwill but the probability that the old customers will resort to the old place". So, "partly on the ground of Court's incapacity to execute the contract, and partly in consequence of the uncertainty of the subject matter, specific performance of the agreement for the sale of a goodwill of a business is not granted"[2] apart from the business.

Goodwill apart from the business is not specifically enforced by the Court for two reasons :

(*i*) uncertainty of subject-matter and

(*ii*) impartibility of the Court to give specific directions as to what is to be done to transfer it.[3]

(15) A contract for the sale of attorney's business and goodwill has been specifically enforced,[4] but it has been doubted whether the contract for the sale of medical practice can be enforced.[5]

(16) As a general rule the Court will not grant specific performance of a contract to carry on a partnership though after part-performance the Court may decree the execution of a proper deed. A contract for the sale of a share in partnership may be specifically enforced.[6]

97. Clause (c)—Pecuniary compensation not adequate relief.—When courts analyse the several elements of injury that may result from an act or commission, courts find that they fall under one of the following seven heads :

1. "The actual pecuniary loss directly sustained", e.g. the actual amount of money wrongfully withheld, the pecuniary value of the property wrongfully detained.

2. "The indirect pecuniary loss", e.g. the loss of profits, loss of credit, loss of reputation, loss of business, etc.

3. "The value of time" spent in establishing the right violated.

4. "The actual expenses or costs of suit."

5. "The mental suffering", e.g. vexation, anxiety and worry.

6. "The bodily suffering" produced by personal injuries, e.g. pain and the consequent illness.

7. "The sense of wrong or insult" felt by the sufferer on account of the act or commission being done with a malicious and deliberate intention.

Courts of equity decree the specific performance of contract not upon any distinction between realty and personalty (immoveable and moveable) but because damages at law may not in the particular case afford a complete remedy. Thus a court of equity decrees performance of a contract for land

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1. Cruttwell *v.* Lye, (1810) 17 Ves. 335 at p. 346; Fry, p. 43 (Northcote Ed.); Dart on *Vendors and Purchasers*, 8th Ed., p. 881; Banerji, *Tagore Law Lectures*, p. 152.
2. Cruttwell *v.* Lye, (1810) 17 Ves. 335 at p. 346 ; *see* Sec. 57, Illus. (*a*) and (*b*).
3. Fry, p. 43; Dart, p 891; Banerji, p. 152.
4. Whittaker *v.* Howe, 3 Beav. 383.
5. May *v.* Thompson, 20 C. D. 705.
6. Dodson *v.* Downey, (1911) 2 Ch. 520.

not because of the real nature of land but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract of goods or stock not because of their personal nature, but because damages at law calculated upon the market price of the stock, or goods, are as complete a remedy of the purchaser as the delivery of the stock, or goods contracted for, inasmuch as with the damages he may purchase the same quantity of the like stock or goods. The distinction between the real and personal property is entirely subordinate to the question whether an adequate remedy can be afforded.[2] But the locality, character, vicinage, soil, easements or accommodations of the land generally may give a peculiar and special value in the eyes of the purchaser, so that it cannot be replaced by other land of the same precise value, but not having the same precise local conveniences or accommodations and therefore a compensation in damage would not be adequate relief[3] The Indian Legislature has attempted to formulate the distinction in the form of a presumption formulated in explanation to Sec. 12 (now explanation to Sec. 10). The first illustration to this clause is the instance of an agreement as regards immoveable property in regard to which under the above-mentioned explanation there is a presumption that the breach of the contract to transfer cannot be adequately relieved by compensation and therefore specific performance should be enforced.[4] The first illustration relates to the ordinary case of sale of immoveables; the second is based on *Storer* v. *G. W. Railway Co.*,[5] this also relates to land; the third relates to moveables where, as will be clear from the explanation to Sec. 12 (now explanation to Sec. 10), specific performance is the exception and not the rule; it is the case of *Adderley* v. *Dixon*,[6] in which distinction was drawn between ordinary stock which can be had at any time in the market and railway shares which being limited in number cannot always be had. The presumption created by the above-mentioned explanation, it must be remembered, is a rebuttable one.[7]

By virtue of the East Africa Order, 1897, Part IV, Art. 11 (*b*), the Indian Contract Act, 1872, is applicable—Section 39 of that Act is as follows :

> "*Section* 39. When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety the promise may put an end to the contract unless he has signified by word or conduct his acquiescence in its continuance."

The section operates in two cases, refusal and self-created disability. The appellant has argued and in their Lordships' opinion rightly argued that it is not every self-created disability that is within the section. If the due date of payment of an instalment has been allowed to pass, the promisor has of course become disabled from making payment on the due date and it may be said that his disability is self-created because it is by reason of his conduct that payment was not made in time. Nevertheless non-payment of an instalment may not be sufficient ground for avoiding the contract. The contention, however, is not relevant to the case before their Lordships. In

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1. Adderley *v.* Dixon, (1824) 1 Sim. & Sit. 607 : 1 Ames 58 ; Adams *v.* Messinger, 14 Mars. 185.
2. Adams *v.* Messinger, *supra.*
3. 2 Story, *Equity*, Sec. 746.
4. New Beerbhoom Coal Co. *v.* Bularam Mohatta, I. L. R. 5 Cal. 932 (P. C.) ; Jetharam *v.* Hazarimal, B. L. R. 1952 Raj. 28 : 1951 R. L. W. 377.
5. 2 Y. & C. C. R. 48.
6. (1843) Sim & Stu. 607 : 57 E. R. 239.
7. Ramji Patel *v.* Rao Kishoresing, 50 C. L. J. 198 (P. C.).

the case put, performance was not impossible, but the plaintiff parting with his oxen and wagons disable himself from performance. True, that after September was past he could not deliver in September the quantity deliverable in September. But he has disabled himself from delivering in the current month of October the amount deliverable in October. The section according to its true meaning refers to either refusal to perform or self-created disability in the promisor to perform a possible act. The plaintiff here by parting with his oxen and wagons had disabled himself from carting the timber at all. Did the defendant then (the promisee) put an end to the contract ? Was the letter of 20th October, a determination? In their Lordships' opinion it was. The plaintiff in para. 10 of his plaint himself says that it was. It stated that the defendant had "been compelled to make other arrangements," and added "so that now we cannot re-engage you under the terms of the contract". If the defendant was entitled to put an end to the contract this letter was in their Lordships' opinion a determination. It remains to consider whether the defendant had "signified by word or conduct his acquiescence in its continuance". Their Lordships cannot find in the facts any such acquiescence. Between the 11th August and the 20th October the defendant at first on 13th August pressed for performance, and subsequently insisted from time to time that the contract had been broken. It has been found that he did not exercise his option to determine the contract for the breach in August but there was another breach in September. On the 20th October the defendant was in a position to avail, and in their Lordships' opinion did avail himself of his right under the section to put an end to the contract.[1]

98. Building contracts.—Tracing the history of the development of law relating to building contracts Banerji in his *Tagore Law Lectures* spoke thus : "The views of the courts of equity seem to have gone through a process of development with regard to the subject of building contracts. To quote Collins, L.J., 'In early times they seem to have granted decrees for specific performance in such cases.[2] Then came a period in which they would not grant such decrees on the ground that the Court could not undertake to supervise the performance of the contract.' Later on, again, they seem to have attached less importance to this consideration, and returned to some extent to the same ancient practice, holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficient manner."[3] So, it is now clearly settled that, subject to certain exceptions, the Court will not specifically enforce contract to build, repair or maintain works or buildings both because specific performance is decreed only where the party wants the thing *in specie*, and cannot have it in any other way and because such contracts are for the most part so uncertain that Court would be unable to enforce its own judgment.[4] But there are special circumstances which will induce the Court to make an exception. Where the works are reasonably defined the plaintiff has a substantial interest in

Development of law.

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1. John Fisher Jones *v.* Edward Scott Grogan, A.I.R. 1919 P C. 190 at pp. 190-91.
2. Banerji, p. 106.
3. (1901) 1 K. B. 515 at p. 523 ; *see* also Fry, 6th Ed., pp. 41, 45, 46.
4. Mayor of Wolverhampton *v.* Emmons, (1901) 1 K. B. 515 : 1 Ames 77 ; City of London *v* Nesh, 3 Atk. 511 ; Wilson *v.* Northampton and Banbury Junction Ry. Co., (1874) 9 Ch. Ap. 279 ; Pomeroy, *Sp. C. S.*, 23, p. 61 ; Ryan *v.* Mutual Tonbine Westminster Chambers Association, (1893) 1 Ch. 116 at p. 128 ; Kennard *v.* Cory Bros. Co., (1922) 2 Ch. 1 at pp. 12, 13. [*See* also earlier authorities to the contrary. Lane *v.* Newdigate, (1804) 10 Ves. 192 : 32 E. R. 818 ; Mosele *v.* Virgin, (1796) 3 Ves. Jun. 184 at p. 185 : 3 E. R. 959.]

the performance of the contract of such a nature as cannot be adequately met by an award of damages, and the land on which the works are to be erected is in the possession of the defendant or the defendant otherwise than in virtue of possession of the land has it in his power to erect the works, the Court will grant specific performance.[1] Thus in one important class a purchaser of land has covenanted, as part of the consideration on his side, to build or execute specified works on that land. Such an undertaking will be enforced if the following conditions are satisfied :

Essential conditions for enforcement of contract to build or execute special works.

(1) the work to be done must be defined with sufficient exactness for the Court to know what it is requiring to be performed ;

(2) the party seeking performance must have a substantial interest of such a nature that damages would not be an adequate compensation ; and

(3) the defendant has by the contract obtained possession of land on which the work is contracted to be done.[2]

The law has been so clearly laid down by the Court of Appeal to the effect just stated that it is of little use even in England to go back to the older authorities.[3] Where there is definite contract by which a person who has acquired land and in consideration thereof has agreed to create on the land so acquired a building of which the particulars are clearly specific and the erection of which is of an importance to the other party which cannot be adequately measured by pecuniary damages, that is a case in which according to the doctrine acted upon by Court of Equity in relation to such matters specific performance ought to be ordered.[4] It is competent to a court of equity to interfere to enforce the specific performance of a contract by a defendant to do defined work upon his property in the performance of which he has material interest and which is not capable of adequate compensation in damages.[5] By far the largest number of cases in which specific performance has been allowed are cases against railway companies for compelling them to carry on building contracts for the convenience of the plaintiffs from whom they purchased the lands.[6] Contracts for repairs alone are seldom enforced.[7] In *Adams* v. *Messinger*,[8] the Court enforced specifically a contract by which the defendant had agreed to furnish and deliver certain patented injectors. It was assumed that they were yet to be made when the contract was entered into but that no skill peculiar to the defendant was required to construct them, and that they could be made by any intelligent artificer in the metals of which they were composed. The Court said : "The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that

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1. Carpenter's Estates, Ltd. *v.* Davies, (1940) Ch. 160 ; Mayor of Wolverhampton *v.* Emmons, (1901) 1 K. B. 515 : 1 Ames 77; Molyneux *v.* Richards, (1906) 1 Ch. 34.
2. Mayor of Wolverhampton *v.* Emmons, (1901) 1 K. B. 515 at pp. 524, 529 : 70 L. J. K. B. 429 : 1 Ames 77, followed in Molyneux *v.* Richards, (1906) I Ch. 34 : 75 L. J. Ch. 39 ; Fry, pp. 46, 47, 395, 396 ; Dart on *Vendor and Purchaser*, (Hewitt Ed.), p. 879 : Banerji, 106 ; Halsbury (Hailsham Ed.), p. 333.
3. Molyneux *v.* Richards, *supra*.
4. Mayor of Wolverhampton *v.* Emmons, (1901) 1 K. B. 515 : 1 Ames 77 ; Molyneux *v.* Richards, *supra* ; Price *v.* Penzance, (1845) 4 H. 566.
5. Storer *v.* G. W. Railway Co., 63 R. R. 73 : 2 Y. K. & C. Ch. 48.
6. *See* Hood *v.* V. N. E. Ry. Co., 5 Ch. 525 : 23 L. T. 206 ; Fortesque *v.* Lostwithiel & F. Ry. Co., (1874) 3 Ch. 62 ; Wilson *v.* Furness Ry. Co., L. R. 9 Eq 28.
7. City of London *v.* Nesh, 2 Atk. 512.
8. 147 Mass. 185.

no difficulty such as has sometimes been experienced could have been found in describing accurately and even minutely, as the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done or work to be performed requiring any payment supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of the contract by the Court."

99. Stocks and shares.—Specific performance of a contract to sell a share in partnership business may be decreed, for the award of damages in such a case would be merely speculative.[1] Again, a right to be admitted as a partner by nomination under a power conferred by the partnership has some similar incidents but is not of the same class.[2] A contract to sell Government stock or any for which there is a regular market cannot be specifically enforced.[3] The reason for this rule of law as pointed out by Parker, C., in *Cuddee* v. *Rutter*,[4] is that one man's stock did not differ from another man's stock, "These sorts of contracts," observed the noble Lord, "are commonly understood to mean no more than to transfer the stock or pay the difference and this fully answers the intention of the parties, and the party has thereby the entire benefit of his contract as fully as if the stocks were actually delivered, for he may buy of any other person and pay no more money out of pocket than if the stock were delivered to him according to agreement. This differs very much from a case of contract for lands, some lands being more valuable than others to the purchaser, but there is no difference in stock, one man's stocks is of equal benefit and convenience as another's. But this does not apply to the transfer of shares in companies for which there is no notorious market, a court will enforce a contract to sell or purchase in a company unless there is free market in the share."[5]

A court has jurisdiction to decree specific performance of a contract either to take shares or to allot shares subject to the same principle which govern suit for specific performance as laid down in the Specific Relief Act.[6]

100. Stocks.— Stocks in the East India Company were treated on the same basis as shares in companies on the ground that such stocks are seldom obtainable in the market and could have no recognized market value.[7]

101. Other cases for specific performance —A contract for sale and delivery of chattels which are essential *in specie* to the plaintiff and which the defendant alone can supply can be specifically enforced for the plaintiff cannot with any amount of damages in his hands go into the market and purchase other articles of the same kind and value.[8] Thus

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1. Dodson *v.* Dawney, 2 Ch. 620.
2. Mulla, p. 763.
3. Duncuft *v.* Albrecht, 12 Sm. 189 : 56 R. R. 46 ; *Re* Schwabacher, (1908) 98 L. T. 127 at p. 128 ; Fry, *Sp. C. S.*, 73 ; Cuddee *v* Rutter, (1720) 5 Vin. Amber. 538 : (1719) P. Wms. 270 : 24 E. R. 521 : 2 Wh. T. L. C (9th Ed.). 368
4. (1720) 5 Vin. Amber. 538 : (1719) P. Wms. 270 : 24 E. R. 521 : 2 Wh. T. L. C (9th Ed.), 368.
5. Duncuft *v.* Albrecht, *supra* : Jackson *v.* Cocker, (1841) 4 Beav. 50 ; Cheale *v.* Kenward, (1858) 3 De G. & J. 27 ; Gardener *v.* Pullen, (1700) 2 Vern. 394: 23 R. R. 853 ; New Burnswick Co. *v.* Muggeridge, 4 Drews 616; Poole *v.* Middleton, 29 Beav. 646.
6. Transport Company Ltd. *v.* Tirumalveli Motor Bus Service Co., I. L. R. (1955) Mad. 528 : (1955) 2 M. L. J. 141.
7. Gardener *v.* Pullen, *supra*.
8. North *v.* Great Northern Ry. Co., (1860) 2 Giff 64 ; Buxton *v.* Lister, 3 Atk. 383 ; Nut Brown *v.* Thornton, (1804) 10 Ves. 159 ; Pomeroy, *Sp. C. S.* 15.

where the defendant contracted to supply timber to a ship-builder who had contracted to complete a ship within a given time for which the timber purchased was necessary and which at that time could not be purchased from elsewhere, the Court enforced specific performance of the contract.[1] A contract by owner of a patent to supply patented machinery which he alone was in a position to supply,[2] a contract to supply natural gas obtainable in the particular locality from the defendant alone,[3] and a contract by a timber company to supply slabs for fuel to a lime company[4] have been specifically enforced. There is, however, authority for the proposition that this doctrine should be confined to cases of necessity and is not to be extended to cases of mere convenience.[5] Thus it has been judicially held that mere convenience of location of defendant's article is no ground for specific performance.[6] A coal company contracted with a steel company to supply coal of a specific quality that the steel company might need, *held* that the contract could not be specifically enforced.[7]

102. Personal services.—As a rule a contract providing for the personal affirmative acts or personal services of the parties are not specifically enforced not because the legal remedy of damages is always sufficiently certain and adequate but because the courts do not possess the means and ability of enforcing their decrees.[8] This rule is based on the impossibility of supervision by the Court[9] and also upon consideration of public policy.[10] But where one person agrees to render personal services to another which require and presuppose a special knowledge, skill and ability in the employee, so that in the case of default, the same services could not be easily obtained from others although the affirmative specific performance is beyond the powers of the Court, its performance will be negatively enforced by enjoining its breach.[11] Conversely, where the person in default is the person possessing special skill (mechanical engineer) and he performed the work (of constructing a machine for making and drying soap chips on the plaintiff's plant) in part and unreasonably refused to perform the rest and when what remained to be done required exercise of special skill it could not be said that he substantially completed his contract.[12]

Contract to enter in o or continue a personal relationship, e. g. of master and servant cannot be specifically enforced.

It is no doubt true that the Court cannot grant specific performance of contracts of service because they depend on the personal qualifications or volition of the parties. It is also true that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. But to this rule the Legislature has enacted an express exception in Sec. 57 (now Sec. 42) where it is laid down that notwithstanding Sec. 56 (*f*) [now Sec. 41 (*e*)] the Court is not precluded from granting an injunction to perform a negative covenant, express or implied,

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1. Buxton *v.* Lister, 3 Atk. 383.
2. Adams *v.* Messinger, 174 Mass. 185 : 17 N. E. 491.
3. Hall *v.* Philadelphia Co., 72 W. Va. 573.
4. White Marble Co. *v.* Consolidated Lumber Co., 205 Mich 634 : 172 W. N. 603.
5. Fry, *Sp. Com.*, Sec. 86.
6. Lewman *v.* Ogden, 143 Ala. 351.
7. Dominion Coal Co. *v.* Dominion Iron & Steel Co , (1909) A. C. 293.
8. Pomeroy, *Sp. Com.*, Sec. 22 ; Frith *v.* Frith, (1906) A. C. 254 at p. 261.
9. Wolverhampton, etc. *v.* London, etc. Ry., (1878) L. R. 16 Eq., 433 at p. 439.
10. De Francesco *v.* Barnum, (1890) 45 Ch. D. 426 at p. 428; Jhonston *v.* Shrewsbury, etc. Ry., (1853) De G. M. & G. 914 at p. 926 : 43 E R. 358.
11. Pomeroy, *Sp. Com.*, Sec. 24.
12. Fairbanks Soap Co. *v.* Sheppard, (1953) 1 S.C.R. 315 at p. 322; Canada Supreme Court case [*per* Cartwright, J., reversing (1951) O. R. 860 of Ontario].

even though it is unable to enforce specific performance of the affirmative covenant provided the applicant has not failed to perform his part of the contract. This illustration goes further than the English decisions where the courts are averse to enforce an implied negative covenant, and to extend the evasion of the rule against specific performance of contracts of service which must to some extent be done by the grant of injunction to perform a negative covenant.[1]

Where in a case there was an express affirmative covenant to serve for three years and an express negative covenant not to serve any other firm or company during that period. This is clearly within the rule laid down in *Lumley* v. *Wagner*.[2]

There is thus no ground for holding that an injunction could not be granted against Sampson provided it was a case in which the Court's discretion should be exercised in favour of the applicant. Had Sampson been in Burma it is clearly a case for the exercise of that discretion in favour of the respondent company. It is urged that as Sampson is in America the Court would be issuing an injunction at which he could snap his fingers and which could not be enforced. But it is clear that if he came to Burma in breach of his contract not to serve any one else it could be served and enforced and if there are no grounds for holding the grant of an injunction against him was not right or justifiable. But even where it is otherwise it would not affect the Court's power to grant an injunction against the appellant company. They had expressed their hope to be able to start work in Burma and their intention to do so in the autumn of this year and Sampson was their Field Manager. This was a clear indication on their part of an intention to bring Sampson out here during the period of his engagement to serve only the respondent company and it led the latter to take immediate action.

It is urged that an injunction should not be granted against them as there is no allegation that they acted fraudulently or with deceit. No such allegation is made but while it is admitted that there must be a cause of action against the appellant company to justify the issue of an injunction against them it is said that there is such a cause of action and that is sufficient to support an injunction. The cause of action alleged is that the appellant company caused and procured a breach of contract on the part of Sampson by harbouring him in that they retained him in their employ after they became aware that he was bound to the respondent company even if they did not know it before and thereby caused loss and damage.

The law on this subject is to be found in *Lumley* v. *Gye*[3] and in subsequent cases and it has been exhaustively considered by the House of Lords in *Allen* v. *Flood*,[4] *Quinn* v. *Leatham*[5] and *South Wales Miners' Federation* v. *Glamorgan Coal Co.*[6] Both parties also rely on *National Phonograph Co.* v. *Edison Bell Phonograph Co.*[7] In this last cited case an injunction was granted

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1. *See* Whitwood Chemical Co. *v.* Hardman, (1891) 2 Ch. 416 : 64 L. T. 716 : 60 L. J. Ch. 423 : 39 W. R. 433.
2. (1852) 91 R.R. 199 : 21 L. J. Ch. 898 : 1 De G. M. & G. 604 : 19 L. T. (O. S.) 264 : 16 Jur. 871 and also clearly within Sec. 57 (old) and Illustration (*d*) thereto.
3. (1853) 2 El. & Bl. 216 : 17 Jur. 827 : 22 L. J. Q. B. 463 : 1 W. R. 432.
4. (1898) A. C. 1 : 77 L. T. 717 : 67 L. J. Q. B. 119 : 46 W. R. 258 : 62 J. P. 595 : 14 T.L.R. 125.
5. (1901) A. C. 495 : 85 L. T. 289 : 70 L. J. P.C. 76 : 65 J. P. 708 : 50 W. R. 139 : 17 T.L. R. 749.
6. (1905) A. C. 239 : 92 L. T. 710 : 74 L. J. K. B. 525 : 21 T. L. R. 441.
7. (1908) 1 Ch. 335 : 98 L. T. 291 : 77 L. J. Ch. 218 : 24 T. L. R. 801.

against the third party company though no case was brought against the factors with whom the plaintiff company had a contract and against whom possibly there was no cause of action.

In *Allen* v. *Flood*,[1] Lord Watson says :

> "There are in my opinion two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first case he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned it may yet be to the detriment of a third party ; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye*,[2] the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party."[3]

Courts have refused to grant injunction to restrain in the breach of an agreement.[4] Where, however, services have been rendered, a suit for specific performance will be competent to obtain the result of such services. The fourth illustration to Cl. (*e*) is a case in point. In this illustration the picture is already painted, i.e. services already performed and the suit is only to obtain the result of that service in the shape of picture. But for the fact that the picture is already painted the relief could not be given as the act depends upon the personal volition of the party and the Court cannot decree that a person shall paint a picture any more than it can decree that a person shall act or sing at a theatre so many nights in the week.

103. Explanation.—The explanation to Sec. 12 (now explanation to Sec. 10) of the Specific Relief Act makes it clear that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money.[5] A contract to convey land is always specifically enforceable by the purchaser.[6] But a contract "for the sale of personal property", on the other hand, is not generally enforced specifically, and a clear case of the inadequacy of damages is necessary in order to obtain relief, except, according to modern decisions it has special value [7]

The presumption is, however, rebuttable.[8] The presumption in the case of contracts for immoveable property always is that damages are not an adequate remedy and that presumption is not rebutted merely by the fact that the parties had provided for recovery of damages by the plaintiff. It has got to be remembered that a party to the contract may sometimes be entitled to damages as one of the considerations in addition to the remedy of specific performance.[9] As already stated, the courts of equity decree the

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1. (1898) A. C. 1 : 77 L. T. 717 : 67 L. J. Q. B. 119 : 46 W. R. 258 : 62 J. P. 595 : 14 T L. R. 125.
2. (1853) 2 El. & Bl. 216 : 17 Jur. 327 : 22 L J. Q. B. 463 : 1 W.R. 432.
3. Indo-Burma Oil Fields, Ltd. *v.* Burma Oil Company Ltd , A.I.R. 1921 L. Bur. 19 at pp. 20-21.
4. Bhikaji *v.* Bhapu Saju, I. L. R. Bom. 550 ; N. C. Sarkat *v.* Barabom Coal Concern Ltd., 16 C. W. N. 289; Nusserwanji *v.* Gordon, I.L.R. 6 Bom. 226.
5. Gaindo Devi *v.* Shanti Swaroop, 167 I. C. 657 : 9 R. A. 554 : 1937 A. L. R. 227 : 1936 A. W. R. 1290.
6. Williston on *Contracts*, Art. 1419, p. 3953.
7. *Ibid.*, Art. 1419, p. 3954.
8. Ramji Patel *v.* Rao Kishore, A.I.R. 1929 P. C. 190 at p. 194 : 33 C. W. N. 899 : 50 C. L. J. 198.
9. Ambalal Kesarbhai *v.* Ranchhodbhai Jethabhai, A. I. R. 1956 Bom. 120 at p. 122.

specific performance of contracts not upon any distinction between moveable and immoveable property but because damages at law may not in particular case afford a complete relief.[1] The Legislature, however, does not intend that persons entering into contracts for transfer of immoveable property should be allowed to escape from them to suit their own convenience by simply alleging that the person in whose favour the contract was made could be compensated in money and with that object has added the explanation requiring the Court to presume that such compensation cannot be adequate relief unless and until the contrary is proved.[2] The word "inadequate" in this connection means adequate in the opinion of the Court based on facts proved on the record of the particular case even though the plaintiff may consider it to be inadequate.[3] Nor can a party be allowed to evade specific performance of a contract relating to transfer of immoveable property merely because the contract provides a penalty to be paid on default and it is for the defendant to show why the Court should not decree specific performance in the exercise of its discretion.[4]

Meaning of the word "adequate" explained.

104. Practice and procedure.—Where in a suit for specific performance of a contract to sell, some of the plaintiffs die and no one is added as their representative, the suit abates. Specific performance to sell cannot be decreed in the absence of all the parties to the contract. Nor is it open to some of the plaintiffs to appeal in such a case.[5]

Death of some plaintiffs and failure to add their representative—Effect.

105. Section 47, C. P. C.—Where a suit for possession is compromised and dismissed upon the defendant agreeing to execute a *kabuliyat* in plaintiff's favour, but no such condition was entered in the decree, the plaintiff's suit for specific performance of the agreement could not be barred by Sec. 47 of the Code of Civil Procedure, Act V of 1908.[6] *A fortiori* that section cannot bar a suit in respect of a compromise subsequent to a decree and relating to property not affected by it.[7]

New	Old
11. Cases in which specific performance of contracts connected with trusts enforceable.—(1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act	**12.** (*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust.

1. Adderley *v.* Dixon, (1824) 1 S. & S. 607; Adams *v.* Messinger, 147 Mass. 185; Cuddee *v.* Rutter, 1 W. T. C. Eq. 853.
2. Brij Ballabh *v.* Mahabir Prasad, A.I.R. 1924 All. 529 : 78 I. C. 167 ; Ramalinga Pillai *v.* Jagadammal, A.I.R. 1951 Mad. 612 at pp. 614-16: (1951) 1 M. L. J. 64 ; Rajammal *v.* Gopalaswami Naidu, A.I.R. 1951 Mad. 767 at p. 768.
3. Brij Ballav *v.* Mahabir Prasad, *supra.*
4. Nawab *v.* Hukam Din, A. I. R. 1925 Lah. 605 at p. 605 : 87 I. C. 511 : 26 P. L. R 731 ; *see* Maung Kyaw *v.* Ma Gauk, 27 I. C. 732 : 8 Bur. L. T. 101 ; M. Rama *v.* M. Annayya, 90 I. C. 605 at p. 605 : A.I.R. 1925 Mad. 144 : 49 M. L. J. 152 ; Sri Ram *v.* Babaji, A.I.R. 1923 Nag. 47 : 71 I. C. 40 ; Brij Ballabh *v.* Mahabir Prasad, *supra.*
5. Aziz Khan *v.* Bhola Nath Srivastava, A. I. R. 1945 All. 21 at p. 22 : 1944 O. W. N. (H. C.) 280 : 1944 A. W. R. (H. C.) 284.
6. Chuni *v.* Hira, 7 C. W. N. 158.
7. Ram *v.* Madhab, 3 W. R. 118 ; *cf.* I.L.R. 13 Mad 346.

New

agreed to be done is in the performance wholly or partly of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Old

21. (*e*) a contract made by trustees either in excess of their powers or in breach of their trust;

Illustration

Of clause (a)—A *holds certain stock in truvt for* B. A *wrongfully disposes of the stock. The law creates an obligation on* A *to restore the same quantity of stock to* B, *and* B *may enforce specific performance of this obligation.*

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1. Legislative changes.—The present section is the result of the amalgamation of the old Secs. 12 (*a*) and 21 (*e*) of the repealed Act. The marginal notes to this section are entirely new.

Sub-section (1) of Sec. 11 of the new Act reproduces the language with slight alterations of Sec. 12 (*a*) of the repealed Act.

The words "in this Act" have been substituted in sub-section (1) of the new Sec. 11 for the words "in this Chapter" which found place in the old Sec. 12. For the word "any" the word "a" has been inserted. The language of old section is reproduced in sub-section (2) of the present section. Illustrations to Sec. 21 (*e*) of the repealed Act have been deleted.

2. General note.—The only reference to trusts so far as specific performance was concerned, were in Secs. 12 (*a*) and 21 (*e*) of the repealed Act. Both of them have been included in the present section.

Clause (*a*) of old Sec. 12 relates to an obligation arising out of a trust. Some jurists consider such an obligation as appertaining to the Law of Contracts but in view of the definition of a trust in the Indian Trusts Acts, such an obligation arises out of an executed contract. The relief by way of specific performance is, on the other hand, available only in respect of executory contracts,[1] to which the other clauses of old Sec. 12 relate.

It seems, therefore, appropriate to delete Cl. (*a*) from Sec. 12 and to place all the provisions relating to trusts together in one section. The

1. Banerji, *Law of Specific Relief*, 2nd Ed., p. 84

only references to trusts, so far as specific performance is concerned, are in Secs. 12 (*a*) and 21 (*e*). Their Lordships propose to include both of them in a new section.

3. Clause (1)—Trust.—If a trust is constituted, be it express, implied or constructive, a court of equity would at the suit of a beneficiary enforce its specific performance ; that relief is given by this clause. The Court would enforce trust but not only against those who are rightfully possessed of trust property as trustees but also against all those who come into possession of property bound by the trust with notice of the trust.[1] In the case of trust specific performance will be granted without reference to the question of sufficiency or practicability of damages. The interposition, however, of courts of equity was not confined to those cases where the articles sought were of some peculiar or intrinsic value, if there subsisted any fiduciary relation between the parties.[2] The creation of a trust imposes duties on the trustees which may be enforced even by strangers to the transaction, who may not even have been in existence at its date.[3]

4. Clause (2)—Trustees.—A trust is an obligation annexed to the ownership of the property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another or of another and the owner. It also includes an obligation in the nature of a trust within the meaning of Chapter IX of the Indian Trusts Act, 1882. The person who accepts the confidence and also every one who holds the property in trust is called trustee.

5. Duty of trustees for sale.—In the execution of trusts for sale, which may be *absolute*, and therefore, to be carried into effect without undue delay, or discretionary or deferred, in which cases the trustees must judge as to the time of sale, and in the exercise of powers of sale, which again may be discretionary, or in effect in the nature of trusts,[4] in all these cases it is the duty of the trustees to act in strict conformity with the terms of the mandate given to them, which, however wide, must be followed for the benefit of the *cestui que trust*, and to deal with perfect fairness as between their several *cestuis que trust*, and to observe the rules laid down by the Court in these matters.[5]

A court of equity will not grant specific performance when a trustee has entered into a contract which is in excess of his powers or which is *ultra vires*.[6]

The test obviously is whether the granting of specific performance would involve a breach of trust.[7]

6. Sales in breach of trust not enforced.—In order to safeguard the interests of beneficiaries against improper sales by their trustees the Court refuses to assist the purchaser by ordering specific performance of the contract, leaving him to pursue against the trustees his remedy by way of

1. Powley *v.* Budd, 14 Beav. 34.
2. W. T. L C. 461-62.
3. Brojo *v.* Huno, I. L R. 5 Cal. 700 : 6 C. L. R 58.
4. Codefroi's *Law of Trusts*, 5th Ed., p. 311, citing *Re* Hotchkys, Freke *v.* Calmody, 32 C. D. 408.
5. *Ibid.*
6. Mohd. Ismail Khan *v.* Nanda Lal, 6 I.C. 390 at p. 391.
7. Gajendra Nath Das *v.* Maulvi Ashraf Hussain, I.L.R. 36 Cal. 48 : 27 C.W.N. 159 ; Narain *v.* Akboy, I. L. R. 12 Cal. 152 ; Dona *v.* Hord, (1883) 25 Ch. D. 586 ; White *v.* Cuddon, (1842) 8 Cl. & Fin. 766 ; Sneesby *v.* Throne, (1853) 3 Eq R. 682 ; Ord *v.* Noel, 5 Madd. 438; Motee *v.* Mudhoo, 1 W. R 4; Sarbesh *v.* Hari, 14 C.W.N. 451.

damages for breach of the contract ; and if the sale purports to be made under a power the terms of which are not strictly complied with, the Court will not lend its aid to supply the defect in the execution of the power to assist either vendor or purchaser. The ground of this rule is that a sale which is in effect a breach of trust, and results in damage to *cestuis que tru t*, gives no right to the purchaser, because it is an act which the trustees are not lawfully competent to do.[1]

The Court will not generally exercise its extraordinary power in compelling a specific performance, where to do so would necessitate a breach of trust or of a prior contract with a third person, or would compel a person to do what he is not lawfully competent to do, even though at the time of the contract, the act might have been lawful, partly, as it seems, on the ground of unfairness and illegal taint of such a contract in itself, and partly of the hardship to which it would expose the person, forced to e:ecute it.[2] "The plaintiff must also," said Lord Redesdale, "show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do ; for if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do complete justice.[3] Even where there is nothing amounting to a distinct breach of trust the Court is usually unwilling to enforce any transaction resulting in injury to third persons and will be delicate of interfering against trustees.[4] In order to defeat an action it is not essential to prove an actual breach of trust. Even where a trustee has acted in an unbusiness-like manner, or failed in reasonable diligence and contracted under circumstances of haste and improvidence, Court of Equity will be slow in giving relief by way of specific performance to other party.[5]

7. Proper and improper sales.—Thus where trustees act hastily, or partially in favour of one *cestui que trust* or conduct the sale so that they do not get the best price, as by changes in the letting without previous notice, then, however fairly the purchaser may have acted, he will not be allowed to enforce his contract specifically. But if the trustees have obtained the best price, according to a previous valuation properly made, the sale will be upheld, although the purchaser may immediately afterwards resell at an enhanced price.[6] Therefore, where trustees under a creditor's deed improvidently sold at an under-value, in order to obtain the speedier payment of a particular creditor the Court refused specific performance.[7] A mistake made by trustees for sale is not allowed to affect the interest of their *cestui que trust*.[8] Where the trustee had negligently misdescribed the property the Court refused specific performance with compensation because the allowance of compensation would be injurious to the *cestui que trust*.[9] Similarly, where the purchaser was to retain out of the property a private debt to him from one of the trustees, the Court refused to enforce the sale.[10] When one of a body of trustees contracts to sell on the supposition that the rest will join in completing the sale the purchaser has no right to compel them so to do.[11]

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1. Codefroi's *Law of Trusts*, 5th Ed., p 311, citing Mortlock *v.* Buller, 10 Ves. 292 ; Goodwin *v.* Fielding, 4 De G. M. & G 90; Wilmott *v.* Barber, 16 C.D. 96, at p. 107; Dunn *v.* Flood, 28 Ch. D. 586; Gas, Light & Coke Co *v.* Towse, 35 Ch. D. 519 ; Bank of Montreal *v.* Sweeny, 12 A. C. 617.
2. Fry, Sec 407.
3. Fry, Sec. 407, citing Hornets *v.* Yielding, (1805) 9 R. R. 98 : 2 Sch. & Lef. 549 ; *see* Byrne *v.* Actin, Bro. P. C. 186 ; Tolson *v.* Shrarad, 5 Ch D. 198
4. Fry, Secs. 411, 413.
5. Goodwin *v.* Fielding, *supra* ; Ord *v.* Noel, 5 Madd. 438.
6. Ord *v.* Noel. *supra* ; Noble *v.* Edwards, 5 Ch. D. 378.
7. Ord *v.* Noel, *supra*.
8. Bridges *v.* Rice, 1 J. & W. 74.
9. White *v.* Cuddon, 8 Cl. & Fin. 766.
10. Thompson *v.* Blackstone, 6 Beav. 470.
11. Sneesby *v.* Thorne, 7 D. M. & G 399.

8. Purchaser need not accept different title.—Where trustees having no power of sale or no power until the death of a tenant for life, enter into a contract for sale, the purchaser is not bound to accept their offer to obtain the concurrence of all the beneficiaries.[1]

9. Duty of purchaser and right to claim damages.—Purchaser from trustees are duty bound to see that the sale itself is not in breach of trust, or that some act done in the course of it will not prevent them from enforcing the contract. They must not rely on a condition intended to prevent the application of the rule that a sale which amounts to a breach of trust will not be enforced.[2] But they might recover damages against the trustees in consequence of being unable to obtain the benefit of their contract.[3] But their right can be no higher than that of a purchaser buying from persons who are not trustees, and they are, therefore, not entitled to damages for loss of bargain.[4]

Before a decree for specific performance is granted the Court has to ascertain whether the contract can be specifically enforced. One of the elements to be considered in this connexion is whether the specific performance of a contract would involve a breach of trust.[5] The Court will not lend its aid to give effect to a contract which is illegal whether it violates the common law or statute law, either expressly or by implication.[6]

10. Sales by persons in fiduciary position, such as, agents, directors, etc.—The principle of the clause does not only apply to persons standing in the position of formal trustees, but it seems, it applies to all cases of trust and confidence, so that, if a contract were the result of a gross breach of duty by an agent towards his principal, the Court would not, it seems, enforce the consequences of that act.[7] Therefore, besides the case of sales by trustees properly so called, sales by other persons in a fiduciary position, such as, agents[8] will not be enforced if made so as to prejudice the rights of principals, shareholders, or others entitled to be protected by them.

11. Injunction.—The Court may grant an injunction at the instance of a beneficiary to restrain an improper sale by trustees.[9]

The Court will not, in a fictitious action for specific performance against trustees who submit to the order of the Court, determine a question arising on the interpretation of the trust.[10]

12. Sales, leases and repairs by trustees.—In the execution of trusts for sale, which may be absolute, and therefore, to be carried into effect without undue delay, or discretionary or deferred, in which cases the trustees may judge as to the time of sale, and in the exercise of powers of sale, which again may be discretionary, or in effect in the nature of trusts.[11] In all these

1. *In re* Bryant and Burmingham, 44 Ch. D. 218; *In re* Head and Macdonald, 45 Ch. D. 310.
2. Fry, *Spec. Perf.*, 3rd Ed., p. 189 ; but *see* Nicholls *v.* Corbett, 3 D. J. & Sm. 18.
3. *See* Noble *v.* Edwards, 5 Ch. D. 378.
4. *See* Bain *v.* Fothergil, L. R. 7 H. L. 158; Gas, Light and Coke Co *v.* Towse, 35 Ch. D. 519 at p. 543.
5. Mohd. Israil Khan *v.* Nandu Lal, 16 I. C. 390.
6. Sarbesh *v.* Haridayal, 11 C. L. J. 346 : 14 C.W.N. 451.
7. Mortlock *v.* Buller, 10 Ves. 292 ; Fry, Secs. 413 414 ; Sarbesh *v.* Haridayal, *supra*.
8. Mortlock *v.* Buller, 10 Ves. 292 at p. 313 and Directors, Shrewsbury Rail Co. *v.* N. W. Rail Co , 6 H. L. C. 113.
9. Marshall *v.* Sladden, 4 De G. & Sm. 468.
10. Equitable Mortgage Co. *v.* Grenfell, 1899 W. N. 228.
11. As to which *see Re* Hotchkys, Freke *v.* Calmody, 32 Ch. D. 408.

cases it is the duty of the trustees to act in strict conformity with the terms of the mandate given to them, which, however wide, must be followed for the benefit of the *cestui que trust* and to deal with the perfect fairness as between their several *cestui que trust*, and to observe the rules laid down by the Court in those matters.

The Court does not permit the interests of beneficiaries to be effected by improper sales by their trustees ; and in such cases refuses to assist the purchaser by ordering specific performance of the contract, leaving him to pursue against the trustees his remedy by way of damages for breach of the contract; and if the sale purports to be made under a power, the terms of which are not strictly complied with, the Court will not lend its aid to supply the defect in the execution of the power to assist either vendor or purchaser. The ground of this rule is that a sale which is in effect a breach of trust, and results in damage to *cestui que trust*, gives no right to the purchaser, because it is an act which the trustees are not lawfully competent to do.[1]

If, therefore, trustees act hastily or partially in favour of one *cestui que trust*, or conduct the sale so that they do not get the best price, as by changes in the lettering without previous notice, then, however fairly the purchaser may have acted, he will not be permitted to enforce his contract If, on the other hand, the trustees have obtained the best price, according to previous valuation properly made, sale will be upheld, although the purchaser may immediately afterwards resell at an enhanced price.[2]

Specific performance was, therefore, refused where trustees under a creditors' deed improvidently sold at an undervalue in order to obtain the speedier payment of a particular creditor.[3] Where the purchaser was to retain out of the price a private debt due to him from one of the trustees, the sale was not enforced.[4]

On the same principle, where the trustee had negligently misdescribed the property, specific performance, with compensation, was refused, because the allowance of compensation would be injurious to the *cestui que trust*,[5] and a mistake by trustees for sale is not allowed to effect the interests of their *cestui que trust*.[6] So, if one of a body of trustees contracts to sell on the supposition that the rest will join in completing the sale, the purchaser has no right to compel them so to do.[7]

The result of the cases is that purchasers from trustees are bound to see that the sale itself is not a breach of trust, or that some act done in the course of it will not prevent them from enforcing the contract. They must not rely on a condition intended to prevent the application of the rule that a sale which amounts to a breach of trust will not be enforced.[8] The purchaser might recover damages against the trustees in consequence of being unable to obtain the benefit of his contract in these cases,[9] but his right can be no higher than that of a purchaser buying from persons who are not trustees,

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1. Mortlock *v.* Buller, 10 Ves. 292 ; Goodwine *v.* Fielding, 4 De G. M. & G. 90 ; Wilmott *v.* Barber, 15 Ch. D. 96, 107 ; Dunn *v.* Flood, 8 Ch. D. 586; Gas, Light & Coke Co. *v.* Towse, 35 Ch. D. 519 ; Bank of Montreal *v.* Sweeny, 12 A. C 617.
2. Ord. *v.* Noel, (1820) 5 Mad. 438 ; Noble *v.* Edwards, 5 C. D. 378.
3. Ord. *v.* Noel, *supra*.
4. Thompson *v.* Blackstone, 6 Bom. 470.
5. White *v* Cuddon, 8 Cl. & F. 766.
6. Bridger *v.* Rice, 1 J. & W. 74.
7. Sneesby *v.* Thorne, 7 D. M. & G. 399.
8. Fry on *Specific Performance*, 3rd Ed. p. 189 ; but *see* Nicholls *v.* Corbett, 3 D. J. & Sm. 18.
9. *See* Noble *v.* Edwards, 5 Ch. D. 378.

and he is, therefore, not entitled to damages for loss of bargain according to the rule in *Bain* v. *Fothergill*.[1]

It has been held that where trustees having no power of sale or no power until the death of a tenant for life, enter into a contract for sale, the purchaser is not bound to accept their offer to obtain the concurrence of all the beneficiaries.[2]

Besides the case of sales by trustees properly so called, sale by other persons in fiduciary position, such as, agents,[3] and directors[4] will not be enforced if made so as to prejudice the rights of principals, shareholders, or others entitled to be protected by them. The Court will not, in a fictitious action for specific performance against trustees who submit to the order of the Court, determine a question arising on the interpretation of the trusts.[5]

New	Old
12. Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract.	**17. Bar in other cases of specific performance of part of contract.**—The Court shall not direct the specific performance of a part of contract except in cases coming under one or other of the three last preceding sections.
(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.	**14. Specific performance of part of contract where part unperformed is small.**—Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

1. L. R. 7 H. L. 158 ; *see* Gas Light and Coke Co. *v.* Towse, 35 Ch. D. 519, 543.
2. *Re* Bryant and Burmingham, 44 Ch. D. 218 ; *Re* Head and Macdonald, 45 Ch. D. 310, *Secus*, if the sale was made at their request ; *Re* Baker and Selman, (1907) 1 Ch. 238.
3. Mortlock *v.* Buller, 10 Ves. 292 at p. 313.
4. Shrewsbury Rail Co. *v.* N. W. Rail Co., 6 H.L.C. 113.
5. Equitable Mortgage Co. *v.* Grenfell, 1889 N. W. 228.

New

Old

Illustrations

(a) A *contracts to sell* B *a piece of land consisting of* 100 *bighas. It turns out that* 98 *bighas of the land belong to* A, *and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the* 98 *bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money.* A *may be directed, at the suit of* B, *to convey to* B, *the* 98 *bighas ; and to make compensation to him for not conveying two remaining bighas ; or* B *may be directed, at the suit of* A, *to pay to* A *on receiving the conveyance and possession of the land the stipulated purchase money less a sum awarded as compensation for the deficiency.*

(b) *In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.*

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(*a*) forms a considerable part of the whole, though admitting of compensation in money ; or

(*b*) does not admit of compensation in money ;

he is not entitled to obtain a decree for specific performance ; but the Court may, at the suit of the other party, direct the

15. Specific performance of part of contract where part unperformed is large.—Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform,

New

party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(*i*) in a case falling under Cl. (*a*) pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under Cl. (*b*), the consideration for the whole of the contract without any abatement; and

(*ii*) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought

Old

provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damages sustained by him through the default of the defendant.

Illustrations

(a) A *contracts to sell to* B *a piece of land consisting of* 100 *bighas. It turns out that* 50 *bighas of the land belong to* A, *and the other* 50 *bighas to a stranger, who refuses to part with them.* A *cannot obtain a decree against* B *for the specfic performance of the contract, but if* B *is willing to pay the price agreed upon, and to take* 50 *bighas which belongs to* A, *waiving all rights to compensation either for the deficiency or for loss sustained by him through* A's *neglect or default,* B *is entitled to a decree directing* A *to convey those* 50 *bighas to him on payment of the purchase money.*

(b) A *contracts to sell to* B *an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that* A *is unable to convey the garden.* A *cannot obtain a decree against* B *for the specific performance of the contract, but if* B *is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through* A's *neglect or default,* B *is entitled to decree directing* A *to convey the house to him on payment of the purchase money.*

16. Specific performance of independent part of the contract.—When a part of a contract, which taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from

New

not to be specifically, performed, the Court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.

Old

another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

13. Contract of which the subject has partially ceased to exist.—Notwithstanding anything contained in Sec. 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter existing at its date, has ceased to exist at the time of the performance.

Illustrations

(a) A *contracts to sell a house to* B *for a lakh of rupees. The day after the contract is made the house is destroyed by a cyclone.* B *may be compelled to perform his part of the contract by paying the purchase-money.*

(b) *In consideration of a sum of money payable by* B, A *contracts to grant an annuity to* B *for* B's *life. The day after the contract has been made,* B *is thrown from his horse and killed.* B's *representative may be compelled to pay the purchase money.*

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1. Legislative changes.—Sub-section (4) corresponds and reproduces old Sec. 16 without any change.

Explanation to the new section corresponds to old Sec. 13. The words "Notwithstanding anything contained in Sec. 56 of the Indian Contract Act, a contract is not wholly impossible of performance because," have been substituted by the words "For the purposes of this section a party to a contract shall be deemed to be unable to perform the whole of his part of it". Illustrations under the old Sec. 13 have been omitted.

2. General note.—Sections 14 to 17 of the old Act have been grouped together in the present section and old Sec. 13 is appended in a modified form as an explanation thereto. The Law Commission of India, in their Report on the Specific Relief Act while giving reasons for their suggestions say :

> "It is not clear from the language of Sec. 13 (old) where the section has an independent existence or has to be read along with the succeeding sections relating to partial performance. Collett[1] as well as Banerji[2] have taken the latter view. We think it should be made clear that the principle embodied in Sec. 13 (old) is a general principle which has to be borne in mind while applying Secs. 14 to 16 (old). We propose to amalgamate Secs. 14 to 17(old) into one section and to append Sec. 13 (old) in a modified form as an explanation thereto, omitting the reference therein to Sec. 56 of the Contract Act. While Sec. 17 (old) enunciates the general rule that the Court will not enforce specific performance of a part of a contract Secs. 14, 15 and 16 (old) provide exceptions to this general rule, and the Privy Council has held[3] that Secs. 14 to 17 (old) taken together constitute a complete Code and that any claim for specific relief of a part of a contract must be brought within the terms of these sections. In these circumstances, it is desirable to amalgamate Secs. 14 to 17 (old) into one section and to provide that the Court shall not direct the specific performance of a part of a contract except as provided therein. No change in principle is required in Secs. 14, 16 and 17 (old). Section 15 (old) contemplates two types of cases, namely, (*i*) where the part, which must be

1. *Law of Specific Relief*, p. 117.
2. *Specific Relief*, 2nd Ed., p. 282.
3. Graham *v.* Krishnachandra Dey, I.L.R. 52 Cal. 335 at p. 338 (P. C.).

left unperformed, forms a considerable portion of the whole but admits of compensation in money, and (*ii*) where it does not admit of compensation. In our opinion, the principle embodied in the section, as it stands, is inequitable so far as the former case is concerned for, where monetary assessment of the part unperformed is possible, there is no reason why the plaintiff should not get a proportionate abatement of the consideration when he is to relinquish all claim to further performance or any further compensation for the breach. In the latter case, on the other hand, no question of abatement arises because apportionment of the consideration is not possible."[1]

3. Section does not have retrospective operations.—In the case of *Moulvi Hossain Mian* v. *Raj Kumar Haldar*,[2] it is stated :

> "Moreover the Specific Relief Act embodies what in essence is adjective law and the substantive law must be looked for elsewhere".

It may be that the Specific Relief Act, by and large, may be said to deal with procedural aspect of the law of specific performance ; but that in itself does not mean that none of the provisions of the Act deal with or confer rights on the parties. The Code of Civil Procedure is in its essence a law of procedure. Nevertheless the right of appeal, provided for in the Code, has been consistently held to be a provision conferring substantive rights on the parties. It is not the general nature of the Act as a whole which is really relevant for our purpose. What is of real importance is to see whether Sec. 15 of the old Act is substantive law or is adjective law or is an amalgam of both. It may be stated that in the Full Bench Decision of the Patna High Court in the case of *Tika Sao* v. *Harilal*,[3] Fazl Ali, J., referring to Sec. 27-A, Specific Relief Act of 1877, stated that the section "confers an active title on the lessee provided that the contract of lease was entered into after 1st April, 1930". It would thus be seen that at least in respect of one of the provisions of the Act it has been held that it deals with substantive rights. Section 15 of the old Act is exclusively neither the one nor the other but a combination of both the substantive law and the procedural law. Similarly is the position with respect to Sec. 12 of the Specific Relief Act of 1963 which embodies Secs. 14 to 17 of the Act 1877 with certain amendments and alterations. It would be noticed that sub-section (3) of Sec. 12 brings about a change in a very vital aspect as compared to the Act of 1877. Whereas in the earlier Act the party seeking specific performance under the corresponding provisions of Sec. 15 had to pay the entire amount of consideration stipulated in the agreement even where he was seeking enforcement of a part of the contract, under the present Act he has to pay only a part of the consideration after abatement in the amount of consideration as mentioned in the section. This change on a vital aspect is not really a change in respect of procedural aspect but on the other hand it fixes and specifies the mutual rights of the parties which may properly be classified under the head substantive law. It may be stated that the observation that the "substantive law may be looked for elsewhere" made in *Hossain Mian* v. *Raj Kumar Haldar*[4] was made with reference to Sec. 27 (*b*) of the Act of 1877, as will be apparent from the lines that follow which are :

> "In our judgment the substantive law, the foundation for specific relief provided for in Sec. 27 (*b*), Specific Relief Act, is to be found in para. 2 of Sec. 40, Transfer of Property Act."

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1. Report of the Law Commission on *Specific Relief Act*, pp. 10-11.
2. A.I.R. 1943 Cal. 417 at p. 426.
3. A I.R. 1940 Pat. 385.
4. A.I.R. 1943 Cal. 417.

A perusal of Sec. 27 (*b*) will clearly show that the said provision deals exclusively with procedure and in that situation it was rightly pointed out that the substantive law may be looked for elsewhere. The argument that Sec. 12 of the Act of 1963 only lays down a new or amended remedy and is thus truly speaking procedural in nature is also not correct. It is true that provisions introducing new remedies have been classified with provisions as to procedure, but as has been pointed out in Halsbury's *Laws of England* (3rd Ed., Vol. 36, p. 428) :

> "The reference to new remedies should on principles be taken to be confined to remedies granting of which would not alter the substantive rights of the parties. Thus in the Iron sides (1862) Lush 458 the new remedy consisted of no more than an alternative mode of enforcement."

It may also be referred to the observation of Lord Wright, M. R. in a *Debtor*, ex parte *Debtor*[1] ;

> "Thus while an appellate court is able, and bound, to give effect to new remedies which have been introduced by enactments passed after the order appealed from was made by the Court of first instance, yet with regard to substantive rights it is well established that the Appellate Court must give effect to the same law as that which was in force at the date of earlier proceeding".[2]

4. Sub-section (1)—Scope and application.—Sub-section (1) of the present section lays down the general principle that it is of the essence of specific performance that part only of an agreement ought not to be performed.[3] Except under that special circumstances mentioned in the section which embody the exceptions to the general rule and exhaust all the circumstances under which a partial performance of a contract will be enforced.[4] Parties when they enter into a contract do not contemplate a partial or lopsided performance of it. Therefore, equity requires that if there is to be a specific performance, it should be that of the contract in its entirety. The Court should abstain from remodelling the contract. A court cannot ask a party to do an act the effect of which would be to compel a third party to bring a suit.[5] Having regard to the reason of the thing and to the language of sub-sections (2) and (3) of this section it does not seem applicable to a case where all the rest of the contract has already been performed. Neither can it be used, it seems, to override an express agreement of the parties.[6] Perhaps the object of sub-section (1) was to prevent that remodelling of contracts which has sometimes been carried to excess in English cases.[7] What would amount to oral agreements constituing a condition precedent as contemplated by proviso 3 to Sec. 92, Evidence Act, has been explained in numerous cases. In *Rowland* v. *Administrator-General*,[8] a collateral oral

1. 1939 Chancery 237 at p. 243.
2. Girdhar Das Anandji *v.* Jivaraj Madhavji Patel, (1971) B. L. J. R. 828 at pp. 835-36.
3. Cutts *v.* Brown, I. L. R. 6 Cal. 328 ; Merchants Trading Co. *v.* Banner, L. R. 12 Eq. 18 ; *see* also 23 W. R. 434 : I. L. R. 24 Cal. 895.
4. Srinivasa *v.* Sivarama, I. L. R. 32 Mad. 320 : 4 I. C. 506.
5. Hussain *v.* Jahan, 58 P. R. 1913 ; Govinda *v.* Apathsahya, I.L.R. 37 Mad. 403 : 1912 M.W.N. 87 : 11 M.L.T. 87 : 22 M.L.J. 257 : 13 I. C. 471.
6. Secretary of State *v.* Volkart Bros., I. L. R. 51 Mad. 885 P. C.) : 111 I. C. 404 : A. I. R. 1928 P. C. 258 : 55 I. A. 423 : 33 C. W. N. 33 : 55 M. L. J. 646: 1928 M. W. N. 754 : 28 L. W. 803 : 26 A. L. J. 1229 : 48 C. L. J. 431 : 30 Bom. L. R 1578.
7. Fry on *Specific Performance* ; *see* also I. L. R. 37 Mad. 40 ; S. K. Buty *v.* Sriram Hari, A. I. R. 1954 T.-C. 65 at p. 68.
8. A. I. R. 1938 P. C. 198 : 32 Sind L. R. 810 (P. C.).

agreement not to enforce a promissory-note until a certain specified condition was fulfilled, was held to be an oral agreement constituting a condition precedent attaching to obligation arising out of the note and as such coming within proviso 3 to Sec. 92, Evidence Act.

In *Shivlal* v. *Bai Sankli*,[1] a Hindu widow's claim for arrears of maintenance due to her on the strength of a written agreement between herself and her brothers-in-law, providing for payment of annuity to her at a specified rate was resisted by the brother-in-law by setting up an oral agreement that the payment of the amount was conditional upon their being satisfied of the widow's continued good conduct. It was found that the written contract had already come into effect and that payments were already made to the widow during the first four years from the date of the agreement and accordingly it was held that the oral agreement set by the defendants could not be allowed to be proved because it did not constitute a condition precedent to the attaching of the obligation under the written agreement.

In *Chaganlal* v. *Jagjivandas*,[2] the agreement pleaded was to the effect that the promissory-note sued on could not be enforced, but that the amount thereof was to be adjusted in the making up of the partnership accounts of the firm of which the plaintiff was stated to be a partner. It was pointed out that the oral agreement set up had the effect of a total denial of the legal liability arising out of the promissory-note and that such an agreement would not come under proviso 3 to Sec. 92, Evidence Act.

In *Sahadeo Shrawan* v. *Namdeo Atmaram*,[3] the suit for specific performance of an agreement for sale of moveable properties was resisted by setting up an oral agreement that the contract for sale was subject to the condition of the plaintiff executing another deed of conveyance in favour of the defendant. Evidence in proof of such an oral agreement was held to be admissible under the aforesaid proviso to Sec. 92, Evidence Act and it was further held that the oral agreement was not one to defeat the contemplated sale-deed or to vary the terms thereof ; but that it related only to the condition on the happening of which alone the contract for sale was to come into force.

The same distinguishing feature of a contemporaneous oral agreement constituting the condition precedent to the attaching of the obligation under the written contract has been pointed out and explained in the comparatively recent decision in *Dungarmull* v. *Sambhu Charan*.[4]

The objection that such an oral agreement cannot be allowed to be proved is unsustainable. Such evidence was rightly admitted and it has conclusively established the fact that the agreement embodied in Ex. D was subject to the condition of defendent 1 being able to persuade his lesseee to surrender possession the suit properties within the time fixed for the execution of the contemplated sale-deed. It is also conclusively established by the evidence on record that defendant 1 tried his best to persuade his lessee to surrender possession of the properties, but that the lessee was not prepared to yield. On the other hand, the lessee insisted on his rights to hold on for the full period originally fixed in the lease deed and also for the further period of five years as provided in the document, by exercising the option given to him in respect of that matter. Thus defendant 1 as lessor could not under law and in fact secure possession of the properties

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1. A.I.R. 1931 Bom. 297 : 132 I.C. 444.
2. A.I.R. 1940 Bom. 54 : 187 I.C. 41.
3. A. I. R. 1949 Nag. 15 : I. L. R. (1948) Nag. 900.
4. A. I. R. 1951 Cal. 55 : 87 Cal. L. J. 251.

from the lessee so as to be in a position to execute the sale-deed in favour of the plaintiff and to put him in possession of the properties within the time stipulated. The condition precedent attached to the contract having thus failed the contract itself has ceased to be operative and the same cannot therefore be made the basis of a decree for specific performance.

Reference may in this connexion be made to the decision of the Privy Council in *Dalsukh* v. *Guarantee Life and Employment Insurance Co.*[1] In that case also the agreement for sale was made subject to the condition of the Court which placed an attachment over the properties covered by the agreement giving its approval to the proposed transaction. But it transpired that such approval was refused by the Court. It was ruled by the Privy Council that the contract for sale was only a contingent contract and as the contingency failed there was no contract which could be made the basis of a decree for specific performance and that the plaintiff's suit for such a relief had only to be dismissed.

The sustainability of the contract as the basis for the suit for specific performance has also to be tested in the light of the provision contained in Sec. 56, Indian Contract Act. In para. 2 of that section it is stated that—

> "a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

The doctrine of frustration known to the English law has thus been statutorily recognized under the Indian law.

In *Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust Ltd.*,[2] this doctrine has been explained as follows :

> "Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement."

For the application of this doctrine it is essential to ascertain the facts assumed by the parties as forming the fundamental basis of their contract and then to see how far the subsequent developments have resulted in the determination of the very basis of the contract, thereby rendering its performance impossible.

So far as the contract is concerned, it has already been found that the contracting parties were fully aware of the subsistence of the lease in favour of Neelacanda Iyer and that he was actually in possession of the properties under that arrangement. It was with full knowledge of these facts that the agreement for sale was entered into with particular emphasis laid on the clause requiring the vendor to put the purchaser in possession of the properties immediately on the registration of the document. The execution of the document, as also the dealings of the parties were both to be made within

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1. A. I. R. 1947 P. C. 182 : 51 Punj. L. R. 104.
2. (1945) A. C. 221 at p. 228 : (1945) 114 L. J. K B. 110.

the time fixed and it was expressly stated that time was to be the essence of the contract. Getting of possession of the properties was obviously considered by the purchaser as the all important factor in this transaction. In fact the whole contract proceeded on that basis.

In *Ganga Saran* v. *Firm Ram Charan*,[1] it has been pointed out that it is open to the Court to infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted. In the present case the parties entered into the contract in the hope and belief that defendant 1 would be successful in persuading the lessee to surrender the properties. Soon after the execution of the agreement defendant 1 tried his best to persuade the lessee to make such a surrender of possession ; but he failed in such attempt, and in view of the rights created in favour of the lessee to surrender possession of the properties.

Thus there was no default on the part of defendant 1, and yet the result of the situation as it developed was that the implementation of the agreement according to the governing intention of the parties had become absolutely impossible and that fact was duly communicated by defendant 1 to the plaintiff. The doctrine of frustration as enunciated in Sec. 56, Contract Act, is attracted to such a situation and the result is that the contract under Ex. D has become void on account of the supervening impossibility of performance. It follows, therefore, that specific performance of the agreement as contained in Ex. D. cannot be decreed. To pass such a decree, would obviously be to direct defendant 1 to perform an impossibility.

An exception as it were to the doctrine of frustration as enunciated in Sec. 56, Indian Contract Act, is provided for in Sec. 13 (old), Specific Relief Act. Section 13 (old) runs as follows :

> "Notwithstanding anything contained in Sec. 56, Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance."

This provision is considered now in Sec. 12, explanation of the Specific Relief Act, 1963.

It is obvious that this section as it is framed is intended to govern cases where, in spite of the loss or destruction of a portion of the subject-matter of the contract, substantial performance of the contract is still possible. The facts of the present case are such that the situation as it exists cannot be brought under Sec. 13 (old), Specific Relief Act.

This is not a case where any portion of the subject-matter of the contract ceased to exist. On the other hand, the whole of the subject-matter continues to exist as it was on the date of the contract. All the same the dominant intention of the parties that the purchaser shall be put in actual possession of the properties at the time of the execution of the sale-deed cannot be put into effect on account of the third party-lessee's insistence to strictly adhere to his legal rights under the lease deed and to retain possession for the full term available under it. Thus it is clearly a case where contract as conceived by the parties has become wholly impossible of performance and not one where there is the possibility of substantial performance. The

1. A. I. R. 1952 S. C. 9

contract is, therefore, hit by the provision contained in para. 2 of Sec. 56, Contract Act.

The plaintiff has prayed that without prejudice to his contentions regarding the truth, legality and enforceability of the alleged lease-hold rights defendant 1 may be directed to execute a sale-deed in respect of all the plaint properties as an alternative to the plaint prayer. Such a part-performance of the contract is asked for under the latter part of Sec. 15, Specific Relief Act and as required by the proviso to that section the plaintiff has relinquished all claims to further performance of the contract and all rights to compensation. The rule as enunciated in Sec. 17 [new Sec. 12 (1)], Specific Relief Act, is that the Court shall not direct the specific performance of part of a contract except in cases coming under one or other of the three last preceding sections, viz. Secs. 14 to 16 (old). The question of the specific performance of a contract in whole or in part can arise only when it is found that the contract itself subsists as a valid and legally enforceable contract. It has already been found that the contract which is the basis of the present suit was only a contingent contract and that it fell through on account of the failure of the contingency. There is therefore no contract to be specifically enforced in whole or in part.

A plaintiff seeking relief under the latter part of Sec. 15 (old), Specific Relief Act, has to strictly comply with the conditions specified in the proviso to that section. In the statement filed by the plaintiff urging the alternative relief by way of a decree for partial performance of the contract, he has made several representations and the relief claimed is expressly made subject to those reservations. Even though he has agreed to give up claim for further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of defendant 1, what he has mentioned at the close of the statement is that he will be satisfied with a decree for specific performance of so much of the contract as defendant 1 could perform, together with "such other relief incidental to the same as the Court may grant". Such reservations and qualifications are inconsistent with the unconditional undertaking required by the proviso to Sec. 15 (old) from a plaintiff seeking the special relief the granting of which is permitted by the latter part of that section. In this view of the matter also, the plaintiff's claim for partial performance of the contract must fail.

On behalf of the appellants it is urged that the plaintiff is not entitled to invoke the aid of Sec. 15 (old), Specific Relief Act, in view of the special provisions contained in the agreement for sale. The argument is that Secs. 14 and 15 (old), Specific Relief Act, are only intended to cover cases where the inability to perform the whole contract was not contemplated by the contracting parties and that these sections have no application where the obstacle to the full performance of the contract was known to the parties and yet no provision was made to meet the eventuality. Reliance is placed on the ruling in *Sardaprasad* v. *Sikander*,[1] in support of this position.

In that case also the occupancy rights over the property agreed to be sold could not be transferred to the plaintiff as contemplated by the parties to the contract because such transfer could be made only with the requisite sanction under Sec. 45, C. P. Tenancy Act and because the defendant's application for such sanction had been refused by the authorities concerned.

1. A. I. R. 1915 Nag. 15 : 34 Ind. Cas. 461

The question for consideration was whether the plaintiff's offer to accept the sale without the occupancy rights over the property on payment of the whole consideration could be accepted and a decree for specific performance of so much of the contract could be granted in his favour. On the facts the Court found that the parties were fully aware of the possibility of the contract becoming impossible of performance on account of the failure to obtain the requisite sanction for the transfer of the occupancy rights over the property agreed to be sold, but did not care to provide for such a contingency.

In considering the question as to how far Secs. 14 and 15 (old), Specific Relief Act, could be made applicable to such a situation, it was ruled in that case that these sections apply only to cases where the inability to perform the whole contract was not contemplated by the contracting parties, and not to cases where the contracting parties know of and contemplated the possibility of the whole contract being incapable of performance, for reasons beyond the control of either party. It appears that this is too broad a proposition and with all respect to the learned Judge who decided that case, it may be pointed out that there is nothing in Secs. 14 and 15 (old) to warrant any such limitations and restrictions being placed on their scope and applicability. The sections being worded in general terms, they must apply to all cases coming within their scope unless the parties have expressly contracted out of the provision of those sections. The provisions contained in these sections are intended merely to confer certain rights and benefits on parties to contracts for sale of immoveable properties ; but these provisions do not involve any questions of public policy. It is, therefore, perfectly open to the contracting parties to waive the benefits conferred by these sections and to restrict and regulate their rights, by inserting suitable provisions in the contract.

Construing the several provisions contained in the agreement for sale as a whole, it is clear that the parties to this contract did not want to avail themselves of the general rights conferred by Secs. 14 to 16 (old), Specific Relief Act, but wanted to restrict their rights and liabilities within the limits expressly provided for in the agreement for sale. It is clear that they conceived of a contingency of the sale with immediate delivery of possession becoming impossible within the time stipulated in the agreement for sale and accordingly to meet the situation that may come about on account of defendant's inability to effect the sale in the manner agreed to, it was provided that in addition to the returning of the earnest money he must pay a sum of Rs. 5,003 by way of liquidated damages to the plaintiff. No doubt an ordinary provision for damages in an agreement for sale cannot by itself be construed to mean that the parties have abandoned their right to insist on specific performance of the contract and have elected to be satisfied with a claim for recovery of damages. It has to be seen whether there are other decisive provisions in the contract to indicate that the parties had really bargained for a settlement of their disputes with the payment of the agreed amount by way of damages.

Such decisive provisions contained in the agreement for sale are the provision by which time was expressly stipulated to be of the essence of the contract and the provision defining the agreed amount of Rs. 5,003 as the liquidated damages payable by the defendant. Even if a period has been fixed for the execution of the sale-deed the plaintiff could under normal circumstances have asked for specific performance of the agreement within a reasonable time after the expiry of that period, because in the absence of an express provision in the contract time will not be taken to be of the essence of

the contract for the sale of immoveable properties. In this case a comparatively short period was fixed for the execution of the sale-deed and the parties deliberately inserted a provision in the agreement for sale that time should be of the essence of this particular contract. This shows that if sale with immediate possession was possible it had to be effected within the time fixed and not at any time thereafter.

This provision taken along with the provision for payment of a sum of Rs. 5,003 as liquidated damages in cases of defendant 1's failure to effect the sale within the time fixed, clearly shows that the parties have deliberately contracted out of the provisions of Secs. 14 to 16 (old), Specific Relief Act and that by waiving the general rights available under these sections they have restricted their rights to the special provisions inserted in the agreement for sale. Where the terms of the contract are thus clear and specific as defining and regulating the rights of the parties to it, they have to stand by such express provisions and are not entitled to ignore those provisions and to seek to enforce the rights normally available under the general law of contracts. Consistent with this view it has to be held that the agreement for sale does not permit of a relief by way of specific performance of the contract in part under Sec. 15 (old), Specific Relief Act.

There is yet another reason why specific performance of the contract under the agreement for sale cannot be decreed. Some of the items covered by the agreement for sale consist of moveable properties. These also were surrendered to the lessee when that lease arrangement was entered into. It is not now known as to whether these items do not really exist and if so in what condition. At any rate, defendant 1 is not now in a position to deliver these items to the plaintiff. Without such delivery, there could be no completed sale in respect of these moveable properties. The plaintiff has not stated that he is prepared to accept the sale in respect of defendant's title to the remaining items of immoveable properties only. So long as it is not possible for defendant 1 to hand over these moveables to the plaintiff and to effect a sale of them, the provision in the agreement for sale that the plaintiff should execute a mortgage in favour of defendant 1 in respect of all the properties to be included in the sale-deed, to secure the deferred consideration of Rs. 35,000 cannot also be implemented.[1] As observed by their Lordships of the Privy Council Secs. 14 to 17 (Cls. 1 to 4 of new Sec. 12) are both positive and negative in their form. Taken together they constitute a complete Code, within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this breach of English jurisprudence, the language of the sections must ultimately prevail.[2]

The question of specific performance of a contract in whole or in part can arise only when it is found that the contract itself subsists as a valid and enforceable contract. Consequently in case of contingent contract, if it fell through on account of the failure of the contingency there is no contract, to be specifically enforced in whole or in part.[3]

5. Sub-section (2)—Applicability.—Under sub-section (2) performance may be enforced by either the promisor or the promisee, provided that

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1. T. V. Kochuvareed *v.* P. Marriappa Gounder, A. I. R. 1954 T.-C. 10 at pp. 19-21, 22-23.
2. Graham *v.* Krishna Chandra, I.L.R. 52 Cal. 350 (P. C.) : 52 I. A. 90 : 86 I. C. 232 : A.I.R. 1925 P. C. 45 : 48 M. L. J. 172 : 29 C. W. N. 919 : 3 Pat. L. R. 93: 1925 M. W. N. 138 : 27 Bom. L. R. 704: 21 L. W. 390 : 29 A. L. J. 709.
3. T. V. Kochavareed *v.* Marriappa, *supra.*

(*i*) the part which cannot be performed (*a*) is considerable, and (*b*) may be compensated for in money; and (*ii*) provided that such compensation is paid. This rule holds good even where the deficiency in area is discovered after the execution of the conveyance and the vendee is entitled to compensation.[1]

Section 12 (2) (old Sec. 14) of the Specific Relief Act is based on the English law on the subject, which has been summed up by the Privy Council in *Rutherford* v. *Acton Adams*,[2] in the following words :

> "If a vendor sues and is in a position to convey substantially what the purchaser has contraeted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy."[3]

This and the following clauses refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties. They do not apply to the case where the obstacles to the full performance is known to the parties and no provision is made to meet it.[4] This is not a suit for specific performance and for compensation. It is a suit in which the plaintiffs having affirmed and indicated their intention to abide by the sale-deed are asking for compensation by way of damages, at the same time retaining and affirming the contract. The alleged deficiency, namely, the difference between 85 and 99 or 14 grounds, cannot be said to be a small proportion of the whole.

Though, as pointed out, this is not a suit for specific performance, the principles must be the same and when a party wishes to affirm, as these plaintiffs do, a contract and the deficiency is not inconsiderable, they are not entitled to compensation for any deficiency that there may be But the matter does not rest there. If one looks again at the English case, *Joliffe* v. *Baker*,[5] there was a considerable proportion of deficiency. In *Winch* v. *Winchester*,[6] the deficiency was 6 acres, namely, 35 instead of 41, and relief was not given.[7] Where the performance of a contract is dependent on the consent of a third person and such consent cannot be obtained, specific performance will not be decreed even of so much of the contract as is possible on abatement of consideration or even on the full-stipulated consideration.[8] Where the property to be sold was clearly described by boundaries, numbers and area, but was found on measurement to be incorrect in area, the purchaser cannot claim specific performance with compensation for the area by which the property was found to be less.[9] "We cannot agree with the learned Judge's conclusion that the plaintiff entered into the agreement for the purchase of property subject to Ratan's right of maintenance. Even if he knew that Bai Ratan had a claim against the first defendant for maintenance, there would be nothing in that fact to put the plaintiff on notice that there was an incumbrance on the suit property, and even if the first defendant sold the property he would still be liable to maintain the widow of his brother out of the sale-proceeds, which would, in spite of the sale, retain the character of ancestral

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1. Gangavenkattareddy *v.* Jamal Ahmed Sahib, 29 I. C. 394 : 29 M. L. J. 122 : 18 M.L.T. 864 : 1915 M.W.N. 422.
2. (1915) A C. 866 : A.I.R. 1915 P.C. 113.
3. *See* also Parthasarathi *v.* V. Kondiah, A. I. R. 1963 Mad. 106 at p. 108.
4. Kota Krishnayya *v.* Matoori Subraya, (1911) 10 I. C. 678 at p. 679.
5. (1883) 11 Q. B. D. 255 : 52 L. J. Q. B. 609 : 48 L. T. 966 : 32 W. R. 59 : 47 J. P. 678.
6. (1812) 1 V. & B. 375 : 12 R. R. 238.
7. D. Kondal Rao Naidu *v.* Dhanakoti Ammal, A. I. R. 1938 Mad. 81 at pp. 84-85.
8. Sarda Prasad *v.* Sikandar, 34 I. C. 641 : 12 N. L. R. 69.
9. Tota Industrial Bank Ltd. *v.* Rustomji Byramji Jeejebhoy. 57 I. C. 957 : 22 Bom. L. R. 849.

property. It seems to us that this case now comes within Sec. 14 of the Specific Relief Act, and that the plaintiff is entitled to compensation for the burden, which is imposed upon the property he contracted to buy owing to the decree passed in favour of the widow. What the amount of compensation would be must be decided by the Trial Court. The plaintiff is entitled to be indemnified against any claim the widow may make against him for maintenance, and the compensation in the ordinary course would take the form of a sum of money sufficient to purchase an annuity equal to the amount of annual maintenance awarded to her."[1] Where the vendor agreeing to sell land, undertook to give security against any claim set up by reversioners, it was held that the contract could not be specifically enforced as the portion of it relating to security could not be compensated for in money under sub-section (2).[2]

This section is applied to a case where a party to a contract is unable to perform the whole or part of it. But two conditions are necessary before this section can be applied, namely the part which must be left unperformed bears only a small proportion to the whole in value, that is, so small that it is inconsiderable, such as small mistake or inaccuracy, and it may be compensated in money by allowing an abatement of the purchase money by calculating the difference between what was contracted to be done and what can actually be done or sold. In other words, where a substantial part of the contract is capable of performance, then enquity will enforce specific performance of that part.

To make this section applicable, it has to be shown (1) that the contract can be split up into parts, (2) that there is a part of the contract which taken by itself can and ought to be specifically performed and (3) that the said part stands on a separate and independent footing from the other part of the same contract. Before a court can exercise the power given in the section, it must have before it some material tending to establish these propositions. This section cannot be applied on a mere surmise that if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient.[3]

In *Khali Panigrahi* v. *Kamala Devi*,[4] it was held that where the defendant has only a share in the property Court should not direct the specific performance, unless the other co-sharers are made parties to the suit.

Specific performance of a part of contract.—In India, the power and jurisdiction of the Court to grant specific performance of a part of a contract was limited and circumscribed by the provisions in Secs. 14 to 17 of the repealed Act of 1877. Under the new Act of 1963, those provisions have been amalgamated and are contained in Sec. 12, sub-sections (1) to (4) with some modifications. Section 12 of the present Act which has taken the place of Secs. 14 to 17 of the repealed Act constitutes a complete Code in respect of a elaim for specific performance of a part of a contract. In this respect, the law in India is not in complete consonance with the law in England as laid down by the English courts. In a limited sense, when a court decrees specific performance of a part of a contract, it virtually amounts to the Court making a new bargain for the contracting parties which they never would have made

1. Chhotabhai Hirachand *v.* Maganabhai Naginbhai, A.I.R. 1923 Bom. 271 at p. 272.
2. Narayan Pillai *v.* Alamelu Achi, 27 I. C. 449.
3. A. L. Parthasarathi Mudaliar *v.* Venkata Koudials Chettials, A. I. R. 1965 Mad. 180 at pp. 189-90 : 77 M. L. W. 647 : (1965) 1 M. L. J. 224.
4. A.I.R. 1967 Orissa 100 at p. 102.

for themselves, and it is for this reason that it is only in special cases, subject to certain conditions, that a party can claim specific performance of a part of a contract, though the English courts have exercised jurisdiction in a wider area of cases. So far as India is concerned, it is settled law and beyond question that the provisions of Secs. 14 to 17 of the repealed Act are both positive and negative in their form, and taken together, they constitute a complete Code, within the terms of which relief by way of specific performance must be sought if it is to be granted at all and that even though assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail.[1] This rule applies even now and Sec. 12 (1) of the new Act which corresponds to Sec. 17 of the repealed Act, expressly declares "that the courts shall not direct specific performance of a part of a contract except as provided in Sec. 12, sub-sections (2) to (4)".

Section 12 (2) deals with a case where that part of a contract which remains unperformed bears only a small proportion to the entirety of the contract. Sub-section (3) corresponds to Sec 15 of the repealed Act, while sub-section (4) corresponds to Sec. 16 of the repealed Act. The material change introduced in sub-section (3) of Sec. 12 is that a party (who is not in default) is entitled to specific performance of a part of a contract even where the portion unperformed is considerable part of the entire contract, and there will be an abatement in the price payable. Under Sec. 15 of the repealed Act, the plaintiff, in whose favour the decree for specific performance of a part of a contract is granted, is bound to pay the entire purchase price besides giving up or relinquishing his claims to the performance of the remaining part and to any right to compensation or loss or damage sustained by him on account of the default of the defendant. In other words, under Sec. 15 of the repealed Act, if at all, the Court granted a decree for specific performance of a part of a contract even where the part unperformed bears a considerable proportion to the entirety of the contract, the plaintiff must pay the entirety of the consideration while, under the new provision, i. e., sub-section (3) of Sec. 12 of the new Act, the plaintiff is not bound to pay the entire purchase price, but there will be proportionate abatement thereof.

The provision in the repealad Act compelling the purchaser to pay the entire price even though specific performance of a part of a contract was alone granted, was, indeed, a stringent and drastic condition besides being a wide departure from the English law. Under the present law, this condition has been eliminated and in this aspect the law has been brought into conformity with the English law. In a decision of the Privy Council in *Rutherford* v. *Acton-Adams*,[2] Viscount Haldane observed:

> "If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to considerations of hardship, he may elect to take all he can get and to have a proportionate abatement from the purchase money."

The view that a party to a contract in Sec. 12, sub-section (3) and a party against whom specific performance of a part of contract is decreed must be the same and identical, is opposed to the principle and against the views taken in several decisions in England and in the various High Courts in India.[3]

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1. *Vide* William Graham *v.* Krishna Chandra Dey, 48 M. L. J. 172 at p. 176 : A.I.R. 1925 P. C. 45.
2. 1915 A. C. 866 at p. 870 : A. I. R. 1915 P. C. 113.
3. Subramani *v.* Kannappa Reddiar, A. I. R. 1973 Mad. 393 at p. 394 : 86 M. L. W. 58.

7. Unable to perform.—Inability to perform the contract may be by reason of deficiency in quantity of the subject-matter or variance in quality, defect in title or of some other legal prohibition or even lapse of time.[1] In other words, this inability may be traceable to the fact that the part with reference to which the defect exists is (*i*) a considerable portion of the entire subject-matter, or is (*ii*) in its nature material to the enjoyment of the part in which there is no defect, or (*iii*) the property is contracted for, which has for the purchaser a peculiar value not capable of pecuniary compensation.[2] Sub-sections (2) and (3) (new) of the section are not to be confined to cases where the inability to complete the contract is due to a legal defect, such as want of title. The wide and simple language of the section cannot be limited in such a manner.[3] Where sale is by metes and bounds or in any other analogous manner by which the particular subject-matter is identified, and the purchaser has received the very parcel which he intended to buy and there has been no misleading conduct on the vendor's part, a deficiency in the supposed amount will not prevent an enforcement of the contract unless it should be so very great as to destroy or defeat the whole object of the purchase and render the agreement a virtual nullity.[4] In *Tata Industrial Bank Ltd.* v. *Rustomji Byramji*,[5] the plaintiffs contracted to purchass certain property from the defendants, the former owners, for Rs. 7 lakhs. The property was specifically described in the agreement by names, boundaries, numbers and area, the last being mentioned as 1,480 square yards. Subsequently, however, it was discovered that the property measured only 1,280 square yards. The plaintiff sued for specific performance of contract of sale together with compensation for the shortage in area. It was held that the property being otherwise sufficiently described and having been known to the plaintiff, the mention of 1,480 square yards as the area was merely a false description which had prejudiced no one. The area was not the basis of the price settled between the parties. The sale was for a lump sum. The area was no more than a false demonstration and not a restriction of the description of the whole property, and there being no possible doubt as to the property agreed to be sold, the defendants could not be said to have been unable to perform the whole of the contract within the meaning of Sec. 12 (2) (new).[6]

Meaning of the words "unable to perform" explained.

8. Small proportion.—"Small" means immaterial or non-essential.[7] "It is scarcely possible that there may not be some small mistake or inaccuracy ; as that of lease represented to be for 21 years, may be for 20 years and 9 months; some of those little inconveniences that would defeat an action at law and yet lie so clearly in compensation that they ought not to prevent the execution of contract." The doctrine of equity is that the essence of the contract should be capable of performances.[8]

In *Anant Ram* v. *Surju Prasad*,[9] the learned Subordinate Judge dismissed the appeal of defendant 2 but allowed the plaintiff's appeal in part. While maintaining the decree for specific performance in respect of half the house on payment of Rs. 600 he gave the plaintiff a decree for Rs. 300 as damages

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1. Dr. Banerji's *Tagore Law Lectures*, App. C, p. 49.
2. Waterman, Sec. 502, p. 705, quoted by Dr. Banerji in *Tagore Law Lectures*, p. 175, footnote.
3. Hiralal Lachmiram Pardeshi *v.* Janardan Govind Nerlekar, A. I. R. 1938 Bom. 134 at p. 136.
4. Promeroy, *Sp. Com.*, Sec. 352.
5. 57 I. C. 957 : 22 Bom. L. R. 849.
6. *Ibid.*
7. Mortlock *v.* Buller, 10 Ves. 292 at p. 305 ; Halsey *v.* Grant, 13 Ves. 73.
8. Mortlock *v.* Buller, *supra*, *per* Lord Thurlow.
9. A.I.R. 1935 Oudh 453.

for breach of contract on the part of defendant 1 and authorized the plaintiff to deduct this amount of compensation from the sale price.

The only contention urged on behalf of the defendant-appellant is that on the findings arrived at by the Lower Appellate Court it was wrong in awarding compensation to the plaintiff. The contention is correct and ought to succeed. It is no longer disputed by the plaintiff that he is entitled to a decree for specific performance in respect of only the half share of defendant 1 in the house in suit. Sections 14 to 17 (old), Specific Relief Act, contain provisions in regard to cases of specific performance of a part of the contract. In *William Graham* v. *Krishna Chunder Dey*,[1] their Lordships of the Judicial Committee referring to these sections observed that :

> "Taken together they constitute a complete Code, within the terms of which relief of the character in question must be brought, if it is to be granted at all."

As the portion of the contract which must be left unperformed is equal to the other portion in respect of which the decree for specific performance has been given, it is impossible to say that the part unperformed is small. Section 14 (old) cannot in the circumstances apply to the case. The case is therefore governed by Sec. 15 (old), Specific Relief Act.

Illustration (*a*) of Sec. 15 (old) is also practically on all fours with the present case. This provision of the Specific Relief Act seems to have been overlooked by the Lower Appellate Court. It clearly shows that if, in the circumstances of this case, the plaintiff desires to have a decree for specific performance of part of the contract he must relinquish all claim to compensation for the default on the part of the defendant. Section 19 (old) of the same Act on which reliance has been placed by the Lower Appellate Court makes general provision as regards the awarding of compensation in certain cases. It is to be read subject to the provisions of Secs. 14 and 15 (old) when the case is one of specific performance of part of the contract. *Held* tnat the order of the learned Subordinate Judge awarding Rs. 300 by way of compensation is incorrect.[2]

9. Admits of compensation.—In English practice cases which are for "specific performance with compensation" are confined to contracts for transfer of immoveable property. These are almost always complicated by special terms of agreement, or conditions of sale if the sale was by auction, the effect of which on the general rules has to be considered ; and the arguments and judgments of course assume knowledge of English tenures, conveyancing and habits of dealing. Therefore English decisions on the subject should be used with great caution in India. Moreover the Indian legislation has deliberately declined to follow the system of the English Court in its minute distinctions. The general tendency of earlier authorities has now been discredited in later cases, wherein strong remarks have been made by eminent Judges on unfortunate adventures of courts of equity in "making bargains for the contracting parties which they never would have made for themselves".[3]

English decisions should be used with great caution.

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1. A.I.R. 1925 P. C. 45 : 86 I. C. 232 : 52 I. A. 90 : I.L.R. 52 Cal. 335.
2. Anant Ram *v.* Surju Prasad, A. I. R. 1935 Oudh 453 at p. 454.
3. Pollock and Mulla's *Specific Relief Act*, 7th Ed., p. 672, citing Arnold *v.* Arnold, (880) 4 Ch. D. 270 at pp. 279, 280 and Fry on *Specific Performance*, Sec. 1217.

10. Meaning of the words "admits of compensation" explained. —In order to attract the application of Sec. **14** [which corresponds to Sec. **12** (2) of the present Act] the part unperformed must be not only small or immaterial but it must be one admitting of compensation, i.e. not merely a matter of arbitrary damages. Compensation means abatement of purchase money as distinguished from damages. The abatement from the price should be such as to allow the vendee precisely what he has lost by reason of the inability of the vendor to convey the land as agreed ; that is, the money and the land conveyed should together be equivalent to the land agreed to be conveyed.[1] As a general rule when a person can only partially perform a contract into which he has entered, he must respond in damages to the extent of the difference in value between that which the other party receives and that to which the contract entitled him, and this is found by taking the market value of the whole subject of the contract.[2] The right of the purchaser is to have what the vendor can give, with an abatement out of purchase money for so much as the quantity falls short of the representation.[3] The phrase "admits of compensation" implies that (*i*) there are data for ascertaining a fair and reasonable amount as the money value of the difference between what can be performed and the express subject-matter of contract, and (*ii*) there has been no fraud,[4] or misrepresentation.[5] In computing compensation for a misdescription the rough calculations of a jury are unsuitable ; the interests of the vendor have to be considered as well as those of the purchaser and if the compensation does not admit of pecuniary valuation which shall be as fair to the vendor as it is to the purchaser, Court will probably refuse to make a rough estimate or an educated guess.[6] But it is not necessary that the measure of damages be mathematically accurate. The objection that the compensation is unascertainable is one which the Court is unwilling to entertain and it grants relief with compensation in many cases, in which the ascertainment of the amount, to be paid cannot be said to be certain or exact, but only the reasonable estimate from the evidence of competent persons.[7]

11. Bears only small proportion.—The word "small" means unsubstantial or immaterial[8] or non-essential.[9] "The words 'the part which must be left unperformed bears only a small proportion to the whole value' do not leave, and doubtless were intended not to leave, so much discretion to the Court as result on the whole from the English authorities."[10] Mere smallness of area by itself is not always a criterion to decide whether specific performance should be granted or not for the part which the vendor cannot convey though small may be material to the enjoyment of the rest. If the title fails to a portion of the land, however small, which is material to the vendee's possession and enjoyment of the remainder to which title can be made, the vendor must fail of obtaining specific performance.[11] Again, where a contract in addition to the main and substantial subject-matter for which a certain price is fixed includes also something as an *adjunct* which is *necessary* for the full use and enjoyment of the main subject-matter, the vendor's inability to convey it will defeat his right to specific performance even with compensation, though in the same case if the adjunct be small in value and not material to the use and enjoyment of the main subject-matter the failure of vendor's title

1. Harsha *v.* Reid, 45 N. Y. 415.
2. Whetherbee *v.* Bennet, 2 Allen 418.
3. Hill *v.* Buckley, 17 Ves. 394.
4. As to fraud, *see* Sec. 17, Contract Act.
5. As to conditions under which misrepresentation will in general make a contract voidable, *see* Secs. 18 and 19, Contract Act. Dr. Banerji's *Tagore Law Lectures*, App. C, p. 49.
6. 3 L. W. R. 57, cited by Dr. Banerji in *Tagore Law Lectures*, App. C, p. 49.
7. Fry, *Specific Performance*, Sec. 1278.
8. Halsey *v.* Grant, 13 Ves. 73.
9. Mortlock *v.* Buller, 10 Ves. 292 at p. 305.
10. Pollock and Mulla's *Specific Relief Act*, 7th Ed., pp. 673-74.
11. Pomeroy, *Sp. Com.*, Sec. 347.

to the adjunct or his inability to convey it will not prevent him from compelling specific performance in respect of the principal subject-matter.[1] Specific performance will also be refused if the vendor's failure is such as to defeat the very object and purpose of the purchase.[2]

12. Suit by either party.—Under sub-section (2) a suit for specific performance may be either brought at the instance of the vendor or the purchaser.

13. Suit by vendor.—A vendor may obtain specific performance with compensation against purchaser under a contract of sale even where the vendor is unable to fulfil the exact terms of the bargain, provided (*i*) that the purchaser will on completion obtain substantially what he bargained for, and (*ii*) that the difference in value between the thing contracted for and the thing sold can be fairly computed.[3] If the vendor's failure to comply with the terms of the contract either with respect to a defective title or a deficiency in the subject-matter is not material but is rather formal in its nature, so that the purchaser will get substantially what he contracted for, then the vendor can obtain a decree for the specific performance with compensation even against an unwilling vendee.[4] Where a vendor is unable from any cause not involving *mala fides* on his part to convey each and every parcel of the land contracted to be sold and it is apparent that the part which cannot be conveyed is of small importance or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, the vendor may insist on performance with compensation to the purchaser or a proportionate abatement from the agreed price if that has not been paid.[5] In other words, where a vendor is able to perform the contract in its substance but is unable to perform it literally in all its parts he may sue the purchaser for its specific performance.[6] The underlying principle is that if the purchaser gets substantially that which he contracted for, a slight variation or deficiency will not entitle him to recede from the contract when compensation can be made in money for the difference.[7] But a purchaser cannot be compelled upon the principle of compensation to take something substantially or materially different from that for which he contracted.[8] If the portion to which the title fails is small, unnecessary and immaterial to the possession and reasonable enjoyment of the rest and is susceptible of compensation [e.g. Illustration (*a*) to (old) Sec. 14], the vendee will be compelled to accept that which can be conveyed with a proportionate abatement from the price. But if such part would be material to the possession and enjoyment of the rest, then the vendor cannot force the acceptance of the residue upon an unwilling vendee [e.g. Illustration (*b*) to (old) Sec. 15].[9] When the vendor agreeing to sell land undertook to give security against any claim set up by reversioners it was held that the contract could not be specifically enforced as the portion of it relating to security cannot be compensated for in money under Sec. 14 [corresponding to Sec. 12 (2) of the present Act].[10] The rule embodied in Sec. 14 which corresponds to Sec. 12 (2) of the present Act] holds good even when the deficiency in area is

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1. Pomeroy, *Sp. Com.*, Sec. 348.
2. Dykes *v.* Blake, 4 Bing. N. C. 446.
3. Halsbury's *Laws of England*, 2nd Ed., Vol. 27, p. 99.
4. Pomeroy, *Sp. Com.*, Sec. 450.
5. Foley *v.* Crow, 37 Mad. 51.
6. Fry on *Specific Performance*, p. 506.
7. Foley *v.* Crow, *supra* ; King *v.* Wilson, 6 Beav. 124 ; Halsey *v.* Grant, 13 Ves. 73.
8. Arnold *v.* Arnold, 14 Ch. D. 279 ; Peers *v.* Lambert, 7 Beav. 546 ; Halsey *v.* Grant, *iupra* ; Drewe *v.* Coop, 9 Ves. 368.
9. Pomeroy, *Sp. Com.*, Sec. 452.
10. Narayana *v.* Alam, 27 I. C. 449.

discovered after the execution of the conveyance and the vendee is entitled to compensation.[1]

14. When vendee can resist vendor's suit.—A purchaser may resist his vendor's suit for specific performance on two grounds ; (1) Absence of vendor's title to a material part of the estate, and (2) difference in the nature of the estate conveyed and purporting to be conveyed. It is settled law that a purchaser may resist a vendor's suit for specific performance on the ground of no title being shown to a material part of the estate, such materiality consisting either in the proportion which such part bears to the entirety [e.g. Illustration (*a*) to (old) Sec. 15] or in its being important with regard to the enjoyment of the residue [e. g. Illustration (*b*) to Sec. 15 (old)] or as possessing an adventitious value in the estimation of the purchaser.[2] Where the vendor has not got substantially all that he has contracted to sell he cannot sue for specific performance, but the purchaser may generally insist on taking what the vendor has.[3] In other words, if the inability of the vendor to fulfil his part affects a material part of the contract, that is, if the defect in his title or the deficiency in the subject-matter is substantial and not merely a failure to literally comply with the exact terms of the agreement ; in short, if the vendee will not get substantially what he contracted for, then the vendor will not be permitted to force such a partial performance even with compensation upon an unwilling purchaser.[4] Where the deviation in fact is not substantial the courts will allow specific performance with compensation.[5] But if the part which is defective is material for the enjoyment of the rest no specific performance will be allowed.[6] The purchaser of an estate may resist specific performance where the property is sold as without encumbrance but it transpires subsequently that it was subject to encumbrance.[7] Where the sale is by metes and bounds or in any other analogous manner, by which the particular matter is identified, and the purchaser receives the very parcel which he intended to buy and there has been no misleading conduct on the vendor's part, a deficiency in the supposed amount will not prevent an enforcement of the contract, unless it should be so very great as to destroy or defeat the whole object of the purchase and render the agreement a virtual nullity.[8] Thus when the contract mentioned that the area sold was 1,480 square yards, but on the spot it was discovered to be 1,280 square yards it was held that the area was not the basis of the contract and the deficiency being a considerable one the purchaser could enforce specific performance only if he waived all rights to compensation.[9] If a person contracts to purchase one thing and does not get that thing or substantially the same thing, he can, if he chooses, refuse to accept another thing without being bound to give any reason or explanation for his refusal. If therefore a person agreed to purchase a property of one tenure, he cannot be compelled to purchase another of which the tenure or material part of it is different, unless he is able to show that the two are

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1. Venkatareddy *v.* Jamal, 29 I.C. 349 : 1915 M W.N. 422: 29 M. L. J. 122 : 18 M. L. T. 364.
2. Dart, Vol. 11, p. 1087; *see* also Knatchbull *v.* Grueber, I. L. R. 1 Mad. 167 ; Stewart *v.* Marq Conygham, (1851) 1 Ir. Ch. R. 534 ; Halsey *v.* Grant, (1806) 13 Ves. 73.
3. Fry on *Specific Performance*, p. 506.
4. Drewe *v.* Coop, 9 Ves. 368 ; Halsey *v.* Grant, (1806) 13 Ves. 73 ; *see* Rayson, (1917) 1 Ch. 613; Arnold *v.* Arnold, 14 Ch. D. 279 ;Pucket *v.* Smell, (1902) 2 Ch. 258.
5. Halsey *v.* Grant, *supra* ; Drewe *v.* Hanson, 6 Ves. 675 ; Lee *v.* Sheer, (1914) 8 Alt. L. R. 161 ; *Re* Fawell and Holmes, 42 Ch. D. 150.
6. Peers *v.* Lambert, 2 Beav. 546: 40 E. R. 1178.
7. Smith *v.* Folcher, (1828) 4 Russ. 302 : 38 E. R. 819.
8. Pomeroy, *Sp. Com.*, Sec. 352.
9. Tata Industrial Bank Ltd. *v.* Rustomji, 57 I. C. 957.

substantially the same.[1] Thus a vendor cannot be granted specific performance if the contract is for a free-hold estate and the land is a lease-hold.[2] The same is the case where the contract is for the lease-hold and the property is actually held under lease.[3] Again, where a person contracts to purchase an estate as copy-hold he should not be compelled to take it if it transpires subsequently to be partly free-hold even if the contract provides that errors in description should not vitiate the sale.[4]

A plaintiff could sue either for specific performance or in the alternative for damages, came to the conclusion that Sec. 19 (old), Specific Relief Act, laid down the same law which exists in England. They said :

> "The section embodies the same principle as Lord Cairns' Act and does not any more than did the English statute enable the Court in a specific performance suit to award 'compensation for its breach' where at the hearing the plaintiff has debarred himself by his own action from asking for a specific decree.
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> "And on looking at the plaint in this suit, their Lordships can have no doubt, any more than the English Court of Appeal had with reference to the statement of claim in *Hipgrave* v. *Case*,[5] that it is framed with reference to Sec. 19 and that the alternative claim for damages thereby made is in the plaint conditioned just as it is conditioned in the section. It follows that in their Lordships' judgment there was after the letter of 19th March, 1924, no power left in the Trial Judge, without an apt and sufficient amendment of the plaint, to award the plaintiff at the hearing any relief at all."[6]

15. Suit by vendee.—As already stated it is not only the vendor but purchaser as well who might file a suit for specific performance and the general doctrine is well settled that a vendor whose estate is less than or different from that which he agreed to sell or who cannot give the exact subject-matter embraced in his contract will not be allowed to set up his inability as a defence against the demand of a purchaser, who is willing to take what he can get with a compensation.[7] The general rule, subject to some qualifications, undoubtedly is that where a party has entered into a contract for the sale of more than he has, the purchaser, if he thinks fit to accept that which it is in the power of the vendor to give, is entitled to a performance, to that extent.[8] If a man having a partial interest in one estate, chooses to enter into a contract, representing it and agreeing to sell it as his own, it is competent to him afterwards to say, though he has valuable interests, he has not the entirety, and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement, and the Court will not hear any objection by the vendor that the purchaser cannot have the whole.[9] But where the part left unperformed is considerable or does not admit of compensation, the buyer can compel specific performance no doubt, but he can do so only if he pays the price agreed upon and takes

General doctrine.

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1. Krishnaji *v.* Ram Chandra, A. I. R. 1932 Bom. 51 ; Flight *v.* Booth, (1834) 1 Bing. N. C. 370 ; Ayles *v.* Cox, (1852) 16 Beav. 23: 96 R.R. 13.
2. Drewe *v.* Coop, 9 Ves. 368.
3. *Re* Lloyds Bank Ltd. and Lillington's Coniract, (1912) 1 Ch. 601.
4. Ayles *v.* Cox, *supra*.
5. (1885) 28 Ch. D. 356 : 54 L. J. 399 : 52 L. T. 242.
6. Mangal Singh *v.* Pandit Dial Chand, A. I. R. 1940 Lah. 159 at p. 161 : 42 P. L. R. 185.
7. Pomeroy, *Sp. Com.*, Sec. 438.
8. Graham *v.* Oliver, 3 Beav. 124 : 49 E.R. 48.
9. Mortlock *v.* Buller, 10 Ves. 292, *per* Lord Eldon, approved in Promothonath *v.* Gosta Behari, A. I. R. 1929 Cal. 380 : 118 I. C. 849 : 33 C. W. N. 354.

the property which belonged to the seller, waiving all right to compensation either for the deficiency or for loss sustained by him through the seller's neglect or default. It follows, therefore, that when the seller is unable to transfer all that he had agreed to do, the buyer is entitled as a matter of right, in all cases to specific performance of whatever interest the seller might have provided he pays the full contract price. If the buyer is willing to accept whatever interest the seller might have and waives his claim to compensation or proportionate abatement in price for deficiency, the seller cannot oppose his claim for specific performace of that much which he can convey. And it has been held that though the difference between the property contracted to be sold and that which the vendor can actually convey may be great, the Court will generally, notwithstanding this circumstance, enforce the contract where the vendee is willing to take whatever interest the vendor has.[1] It is possible to conceive cases where a person who has contracted to convey more than what it is in his power to convey ought to be decreed to convey what he can, either with or without compensation for such part as the vendor is unable to convey.[2] Where misrepresentation has been made as to the quantity, though innocently, the purchaser is entitled to have what the vendor can give with an abatement of price in respect of the portion the vendor is unable to convey.[3] In India, however, a vendee can claim compensation if the part which the vendor cannot perform is a small one and admits of compensation in money,[4] and the vendee must waive his right to compensation or damages, if the part which cannot be performed is a considerable one or does not admit of compensation in money.[5]

In the words of Venkataramayya, J. (as he then was), "If there is any error in the statement of the extent of the property agreed to be sold the purchaser can claim specific performance with compensation if he can bring his case under Sec. 14 [now Sec. 12 (2)], Specific Relief Act, but if the contract has been completed by the execution of the sale-deed, then the purchaser can claim compensation if he establishes fraud or if there is special agreement for making compensation for errors in quantity or if there is a warranty that the extent covered by the sale-deed is correct. Apart from such cases he has no right to compensation."[6]

16. Bhumidhari rights in sirdari land—Power of Court to compel the defendant to obtain.—The Court has the power and jurisdiction under Sec. 13 (*b*) (Sec. 12, new) of the Specific Relief Act to compel the defendant to take steps and obtain *bhumidhari* rights in the *sirdari* land agreed to be sold.[7]

17. Plot of land sold to two different persons—Right of subsequent vendee to enforce specific performance—Section applicable.—Where *A* agreed to sell one of his plots of land to *B* and on a later date agreed to sell all his four plots of land to *C* including the plot agreed to be sold to *B*, and where after *B* had sued on his agreement and obtained a consent decree for sale of the item concerned, *C* filed a suit for specific performance of the agreement in his favour, held that the question whether

1. Jones *v.* Evans, 17 L. J. Ch. 469; Hooper *v.* Smart, L. R. 18 Eq. 683; Barnes *v.* Wood, L. R. 8 Eq. 424.
2. Price *v.* Griffith, (1851) 1 De G. M. & G. 80.
3. Hill *v.* Barclay, 18 Ves. 56 : 11 R. R. 113.
4. *Vide* Sec. 14.
5. *Vide* Sec. 15.
6. Delli Gramini *v.* Ramchandran, (1951) 2 M. L. J. 611 at p. 618 : 1951 M W.N. 869 (Hill *v.* Buckley, 17 Ves. 394: 11 R. R. 109 foll., I L.R. 18 All. 322: 12 Bom. H. C. R. 10 distg.).
7. Pahunchi Lal *v.* Man Singh, 1971 A.W.R. (H. C.) 338 at p. 343.

plaintiff was entitled to relief depended on the application of Secs. 14 to 17 (now Sec. 12) which constitute a complete Code within the terms of which relief of the character in question must be brought, if it is to be granted at all, that by reason of the prior agreement in favour of *B*, *A* was as much unable to carry out the whole of his part of the original agreement within the meaning of [Secs. 14 and 15 [now Sec. 12 (2) and (3)] as he had no legal title to the common plot in question ; that Sec. 14 [now Sec. 12 (2)] did not apply as it could not be said that the plot in question bore only a small proportion to the whole, that Sec. 15 [now Sec. 12 (3)] also did not apply as the plaintiff had expressed his unwillingness to pay the purchase price for the remaining plots, on payment of which alone, the plaintiff could get the specific performance ; that Sec. 16 [now Sec. 12 (4)] could not be said to apply, for there was only one contract to sell, and in the absence of evidence to the contrary, the presumption was that it was an entire contract intended to be dealt with as a whole and not piecemeal.[1]

18. Abatement and compensation.—Though the terms "abatement" and "compensation" are used interchangeably, there is a distinction between the two terms. The quetion of abatement comes in if the price has not been paid already and it is to be reduced on account of a part of the contract being left unperformed, while that of compensation comes in if the price has already been paid and the vendor has to pay back the money. The term "compensation" does not mean damages. It simply means *pro tanto* reduction in price, if the plaintiff is vendor or an addition of the same to the property delivered actually, if the plaintiff is a vendee.[2]

Distinction between the meaning of the terms "abatement" and "compensation".

19. Collateral representation.—The right to abatement or compensation can be claimed only in respect of deficiency in the subject-matter described in the contract, but not in respect of a claim to make good a representation about the subject-matter made not in the contract but collaterally to it in which case the remedy is rescission or a claim for damages for deceit where there has been fraud or for breach of a collateral contract if there has been such a contract.[3] In exercising jurisdiction of enforcing specific performance the Court of Equity looks at the substance and not merely at the letter of the contract. If the vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation *for any small and immaterial deficiency* provided that the vendor has not by misrepresentation or otherwise disentitled himself to his remedy. If the purchaser is suing, he may elect, subject to condition of hardship, to take all that he can get and to have a proportional abatement from the purchase money.[4]

Right to claim abatement or compensation.

20. Property subject to encumbrance.—If the land contracted to be sold turns out to be subject to charges, easements, rights of user or encumbrances which extend to the whole estate and cannot be compensated for and removed by an application of the purchase money, the vendee is not entitled to enforce the contract ; but if the charge is a slight and immaterial one and specially if it be an encumbrance by mortgage and judgment which can be

Right of vendee to enforce specific performance.

1. Hira Lal *v.* Janardan, 174 I. C. 75 : 39 Bom. L. R. 1299 : I. L. R. 10 Bom. 417.
2. Peers *v.* Lambert, (1844) 7 Beav. 546.
3. Halsbury's *Laws of England*, Vol. 27, 5th Ed., p. 99.
4. Rutherford *v.* Acton Adasm, 32 I. C. 41 (P.C.).

paid and removed by means of the purchase money, the Court may decree specific performance making provision in the decree for removing the encumbrance.[1] The plaintiff entered into an agreement with the defendant for purchase of certain property. But before the sale-deed was executed the defendant's brother's widow obtained a decree for her maintenance which was made a charge on the said property. It was held that the plaintiff was entitled to a decree for execution of a sale-deed by the defendant and also to compensation for the burden imposed upon the property owing to the decree passed in favour of a widow.[2] "The plaintiff," observed the Hon'ble Judges in the above-noted case, "is entitled to be indemnified against any claim the widow may make against him for maintenance and the compensation in the ordinary course would take the form of a sum of money sufficient to purchase an annuity equal to the amount of an annual maintenance awarded to her." As stated above, there may be cases in which the presence of encumbrance would be fatal to a suit for specific performance. The following are illustrations of such cases.

21. Instances where encumbrance, charge or easement is fatal to a suit for specific performance.—(1) A right of sporting over land.[3]

(2) A liability to keep a channel in repair.[4]

(3) A liability to keep the fences, water-courses, etc. upon the land itself.[5]

(4) A right of digging on or over the land for mines and minerals.[6]

(5) A right of way over land sold and bought for the purpose of erecting building on it.[7]

(6) An easement of water with right to take water from springs with power of entry for the purpose of making, opening or cleaning water-courses making reservoirs.[8]

(7) A purchaser of an estate, sold as tithe-free is not liable to take it subject to tithe on payment of compensation.[9]

22. Injunction to restrain the breach of a negative stipulation in a contract of personal service.—Now what is the position when an employer does not seek specific performance of a contract of personal service but asks for an injunction to restrain the breach of a negative stipulation contained in the contract of personal service ? The relief by way of injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act, 1963. Section 36 of that Act places the grant of an injunction in the discretion of the Court, a discretion to be exercised of course as the discretion of courts always is. The discretion is not arbitrary but sound and reasonable governed by judicial principles and capable of correction by a court of appeal. Section 38, sub-section (1) provides that subject to the other provisions contained in or referred to by Chapter VIII, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication and sub-section (2) of that section declares that when any such obligation

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1. Pomeroy, *Sp. Com.*, Sec. 452 ; *see* Fry, *Sp. Com.*, Sec. 123.
2. Chhotabhai *v.* Maganabhai, A. I. R. 1923 Bom. 271.
3. Burnell *v.* Brown, 1 J. & W. 168.
4. Hornible *v.* Shirly, 13 Ves. 51.
5. Larkin *v.* Lord Rorse, (1846) 10 Ir. Eq. R. 70.
6. Seaman *v.* Wardrey, 16 Ves. 390.
7. Dykes *v.* Blake, Bing. N. C. 463.
8. Shakleton *v.* Sutcliffe, 1 De G. & Sim. 609.
9. Binks *v.* Rokbay, (1818) 2 Swan. 277.

arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II.[1]

23. Sub-section (3)—Scope and application.—It is of the essence of the specific performance that except under special circumstances part only of an agreement ought not to be deemed to be performed.[2] The general rule is that the Court will not order specific performance of a part of a contract.[3] Under Sec. 14 (old) performance of a contract may be enforced by either the promisor or promisee, provided (*i*) the part which cannot be performed (*a*) is inconsiderable and (*b*) may be compensated for in money, and (*ii*) provided that such compensation is made. Under Sec. 15 (old) the party in default may claim specific performance without compensation, where the part left unperformed is small in value and it admits of compensation, but he cannot have specific performance where such part is considerable and does not admit of compensation ; the party not in default, however, may have specific performance with compensation in the first case, but specific performance without compensation in the second case.

Under Sec. 16 (old), where a contract consists of several parts, which are separate from, and independent of, one another, and some of which cannot and ought not to be performed, such part or parts, as can and ought to be performed, may alone be specifically enforced. This is on the principle that such a contract, though nominally one, is actually divisible, and when the Court enforces what is apparently a part of the contract it really enforces an entire and complete contract. The question, therefore, whether a contract is divisible or indivisible is one of construction, depending upon the nature and circumstances of each individual contract.

In the case of *Rutherford* v. *Acton Adams*,[4] the principles on which the Court will act in a suit for specific performance are thus stated by their Lordships of the Judicial Committee of the Privy Council :

> "In exercising its jurisdiction over specific performance, Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages

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1. Messrs. Lalbhai Dalpatbhai & Co. *v.* Chitaranjan Chandulal Pandiya, A.I.R. 1966 Guj. 189 at pp. 193 94 : (1965) 2 Lah. L. J. 284 : (1965) 11 Fac. L. R. 299.
2. Cutt *v.* Brown, I.L.R. 6 Cal. 328.
3. Abdul Haq *v.* Yehia Khan, A.I.R. 1924 Pat. 81 at p. 83.
4. (1915) A. C. 866: 84 L.J.P.C 238.

for deceit where there has been fraud, or for breach of a collateral contract, if there has been such a contract."

The principle is well settled and it was held as early as in *Mortlock* v. *Buller*,[1] that "If a man, having partial interest in an estate, chooses to enter into a contract, representing it and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety ; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction the person contracting under these circumstances is bound by the assertions in his contract ; and if the vendee chooses to have as much as he can have, he has a right to that, and to an abatement ; and the Court will not hear an objection by the vendor that the purchaser cannot have the whole.

It has been even held that though the difference between the property contracted to be sold and that which the vendor can actually convey may be great the Court will generally, notwithstanding this circumstance, enforce the contract where the vendee is willing to take whatever interest the vendor has.[2]

No doubt if the vendee is, from the first, aware of the vendor's incapacity to convey the whole of what he has contracted for, he cannot, generally, insist on having, at an abated price, what the vendor can convey. In this case, however, it is not suggested that the vendee was aware of the defendant's incapacity to convey the whole of what was contracted for ; indeed we have, as has already been pointed out, the defendant's own statement that he did not disclose that one of the properties belonged to his wife. The representation, such as it was, therefore, by the defendant was that the entirety of the properties mentioned in the schedule to the agreement belonged to him. The learned Advocate-General, however, argues that there can be no abatement of the price in a case under Sec. 16 (old) of the Specific Relief Act and that if the vendee wishes to take plot *A* then he must pay the entire sum mentioned in the contract.

There is nothing of which the defendant can complain. It is his own fault if he has assumed an obligation which he cannot fulfil, and it cannot be inequitable to require him to perform, as far as it is in his power, so much of the contract as relates to plot *A*. In no just sense can it be said that in requiring the defendant to perform the contract with reference to plot *A*, a new contract is being made by the Court for the parties. The defendant is not compelled to convey anything which he did not agree to convey and the vendee pays for what he gets according to the rate established by the agreement between the parties. The defendant ought to be compelled to convey to the plaintiff plot *A* of the schedule to the agreement with an abatement in the price agreed upon.[3] The use of the word "may" clearly indicates that even in a case where the conditions laid down by sub-section (3) of the present section are fulfilled the granting of a decree for part-performance is discretionary with the Court. Thus where there has been a great

1. (1804) 10 Ves. 292: 32 E.R. 857.
2. *See* Jones *v.* Evans, (1848) 17 L. J. Ch. 469 : 80 R. R. 192 ; Barnes *v.* Wood, (1869) 8 Eq. 424 : 38 L. J. Ch. 684 : 22 L. T. 227 : 17 W. R. 1080, and Hooper *v.* Smart, (1874) 18 Eq. 683 : 43 L. J. Ch. 704.
3. Krishna Chandra Dey *v.* W. Graham, A. I. R. 1923 Cal. 694 at pp. 697-98 : 27 C W. N. 693, on appeai I. L. R. 52 Cal. 335 : 86 I. C. 232 : 52 I. A. 90 : A. I R. 1925 P. C. 46 : 48 M. L. J. 172 : 1925 M.W.N. 138 : 29 Bom. L. R. 740 : 27 A.L.J. 709 : 21 L. W. 390 : 3 Pat. L. R. 93.

delay in attempting to enforce a contract and circumstances have greatly changed either from a rise in prices or some other causes in the interval, the courts would be justified in refusing to give effect to an inequitable arrangement.[1] The courts will adopt the same attitude where to enforce the contract would have detrimental effect on the rights of the third parties.[2] An action under sub-section (3) (old Sec. 15) is not limited to any particular stage of the proceedings. It is open to the plaintiff to relinquish his claim to any part of the property in suit on the conditions specified in that sub-section at any time before the suit is finally decided even by the Court of Appeal.[3]

Where a person makes a contract on his behalf and on behalf of somebody else and it has been found that the contract is not enforceable in law so far as that somebody was concerned, to such a case Sec. 12, sub-clause (3) has no application. It was observed in *Rameshwar Prasad Sahi* v. *Mst. Anandi Devi*,[4] "If he had held himself out and contracted as the owner of the whole, the case would have been different. But in the absence of misrepresentation or misconduct the general rule is that where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share."

The plaintiff's case is that by virtue of the agreement for sale executed in his favour on 3rd May, 1104, by Krishna Pillai Parameswaran Pillai who had become the purchaser of the equity of redemption of the plaint property under Ex. C, dated 28th April, 1104, he had acquired an interest akin to a charge in this property and that therefore he was a necessary party to the suit O. S. 3 of 1107 instituted by Venkitachalam Iyer Neelakanda Iyer who had an earlier mortgage dated 24th February, 1104, in respect of the same property.

The answer to this contention is given by the last clause of Sec. 54, Transfer of Property Act. That clause states that a contract for the sale of immoveable property does not of itself create any interest in or charge on such property. In view of such a clear statutory provision it is idle to contend that the plaintiff had acquired a charge on the property by virtue of the agreement for sale in his favour and that in the first mortgagee's suit for foreclosure the plaintiff was a necessary party so that there could be an effective sale of the property in that suit. Unless and until the agreement for sale in favour of the plaintiff fructified into a sale-deed, he could not claim to have acquired any title to the property. Till that stage was reached the person who had contracted to sell the property to him was the proper person to represent the equity of redemption of the property and the decree obtained by the mortgagee with that person on record was a perfectly valid decree in execution of which the title to the property could validly be sold.

This position is unaffected by the mere fact of the plaintiff's having instituted a suit for specific performance of the contract for sale and of having obtained a decree in his favour. The decree Ex. E which the plaintiff had obtained was based on a compromise between himself and the defendant in that suit. Such a decree is also a creature of the agreement between them and as such it has no greater force or significance than the earlier contract

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1. Gormda *v.* Apathasbaya, I.L.R. 37 Mad. 403 : 13 I. C. 471 : 1912 M. W. N. 87 : 22 M.L.J. 257: 11 M L.T. 87.
2. Abdul Haq *v.* Mohd. Yahia Khan, A.I.R. 1924 Pat. 81 at p. 83.
3. Waryam Singh *v.* Gopi Chand, I. L. R. 11 Lah. 69 ; Kalyanpur Lime Works *v.* State of Bihar, A. I. R. 1954 S. C. 165 at p. 170 (approving I. L. R. 11 Lah. 69).
4. A.I.R. 1956 Pat. 53 at p. 57.

between them. The decree embodies in it the contract between the parties with the command of the Court superadded to it enabling the plaintiff to have the agreement enforced through Court. All the same title to the property continued to remain in the defendant himself, and such title passed on to the plaintiff only when the sale-deed was executed on the defendant's behalf by the Court. The title thus obtained does not relate back to the date of the contract for sale.

In *Jahar Lal* v. *Bhupendra Nath*,[1] a contrary view appears to have been taken. That decision was followed in *Dina* v. *Gujaba*.[2] Their Lordships were unable to accept the view taken in those cases. These decisions were referred to and dissented from by the Nagpur High Court in *Shewanti Bai* v. *Vishwas Rao*,[3] where it was ruled that a decree for specific performance of an agreement for sale by itself was not effective to transfer title and that so long as the sale-deed is not executed in favour of the successful party either by the defendant himself or by the Court, the title continues where it was before the passing of the decree.

In *J. V. Kochuvareed* v. *P. Mariappa Gounder*,[4] the view taken is to the same effect. Consistent with this view it has to be held that the plaintiff did not acquire any title to or charge over the suit property until the date of the sale-deed in his favour.[5]

24. Unable to perform.—The learned Subordinate Judge dismissed the appeal of defendant 2, but allowed the plaintiff's appeal in part. While maintaining the decree for specific performance in respect of half the house on payment of Rs. 600 he gave the plaintiff a decree for Rs. 300 as damages for breach of contract on the part of defendant 1 and authorized the plaintiff to deduct this amount of compensation from the sale price.

The only contention urged on behalf of the defendant-appellant is that on the findings arrived at by the Lower Appellate Court it was wrong in awarding compensation to the plaintiff. It is no longer disputed by the plaintiff that he is entitled to a decree for specific performance in respect of only the half share of defendant 1 in the house in suit. Sections 14 to 17 (old), Specific Relief Act, contain provisions in regard to cases of specific performance of a part of the contract. In *William Graham* v. *Krishna Chunder Dey*,[6] their Lordships of the Judicial Committee referring to these sections observed that :

> "Taken together they constitute a complete Code, within the terms of which relief of the character in question must be brought, if it is to be granted at all."

As the portion of the contract which must be left unperformed is equal to the other portion in respect of which the decree for specific performance has been given, it is impossible to say that the part unperformed is small. Section 14 [now Sec. 12 (2)] cannot in the circumstances apply to the case. The case is therefore governed by Sec. 15 [now Sec. 12 (3)], Specific Relief Act. The second sentence of this section runs as follows :

> "But the Court may at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract

1. A.I.R. 1922 Cal. 412.
2. A.I.R. 1926 Nag. 95: 89 Ind. Cas. 14.
3. A. I. R. 1953 Nag. 167 : 1952 Nag. L. J. 406.
4. A.I.R. 1954 T. C. 10.
5. Sankaran Vishnu Nambudhiri *v.* Neelakanda Iyer Venkitchalam Iyer, A. I. R. 1955 T.C. 195 at pp. 196-97.
6. A.I.R. 1925 P.C. 45 : 52 I.A. 90.

as he can perform provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss of damage sustained by him through the default of the defendant."

Illustration (*a*) of the section is also practically on all fours with the present case. This provision of the Specific Relief Act seems to have been overlooked by the Lower Appellate Court. It clearly shows that if, in the circumstances of this case, the plaintiff desires to have a decree for specific performance of part of the contract he must relinquish all claim to compensation for the default on the part of the defendant. Section 19 (now Sec. 21) of the same Act on which reliance has been placed by the Lower Appellate Court makes general provision as regards the awarding of compensation in certain cases. It is to be read subject to the provisions of Secs. 14 [now Sec. 12 (2)] and 15 [now Sec. 12 (3)] when the case is one of specific performance of part of the contract.[1]

The sale by defendant 1 as guardian of defendant 3 was void *ab initio* as the parties are Mohammedans and defendant 1 is the mother of defendant 3. This is undoubtedly correct. Thus there can be no suit for specific performance of such a sale, as the property is undivided.[2] In any event under Sec. 15 (old), Specific Relief Act, the plaintiffs might have specific performance of the sale, so far as the shares of defendants 1 and 2 are concerned, only if they consented to pay the full price. There could, of course, be no specific performance against a minor.[3]

25. Considerable portion.—In order to see whether the vendor can claim a decree for partial performance at all or whether either party is entitled to such a decree with compensation, two points have to be considered: first, the proportion which the deficiency bears to the whole, and secondly, the possibility of compensation in money. Unless it is found that the proportion is small and the deficiency can be made good in money, the vendor's suit must be dismissed altogether and the purchaser's must be dismissed so far as it claims compensation.[4]

26. Instances where area not conveyed considered considerable or material.—In the following cases area not conveyed was considered considerable or material :

(1) Where the property contracted to be conveyed was stated to be 753 sq. yards but in fact was only 573 sq. yards.[5]

Where the sale-deed described the land accurately by boundaries, and stated it to be "about 99 grounds" though the land actually measured 85 grounds, it was held that the principles of Sec. 15 [new Sec. 12 (3)] are applicable and the question of exact area was immaterial, and the vendee could not successfully claim compensation in respect of the deficiency.[6]

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1. Anant Ram *v.* Surju Prasad, A. I. R. 1935 Oudh 453 at p. 454.
2. Abdul Haq *v.* Mohd. Yahia Khan, A. I. R. 1924 Pat. 81.
3. Pokhar Das *v.* Mela Ram, A. I. R. 1927 Lah. 773 (1) at p. 773.
4. Cunningham and Shephard, *Specific Relief Act*, p. 662.
5. Portman *v.* Mill, (1826) 2 Russ. 570.
6. Kondal Rao Naidu *v.* Dhankoti Ammal, A.I.R. 1938 Mad. 81 at p. 85 : 46 L. W. 797 : 1937 M. W. N. 1027 : 11 R. M. 37 : 176 I. C. 173 ; *see* also 57 I. C. 597.

(2) Where the property sold was wharf and jetty and no title could be made to the jetty.[1]

(3) Where the vendor could not convey 12 acres.[2]

(4) Where the area which cannot be conveyed is in frontage or is otherwise material for enjoyment of the rest.[3]

(5) In the case of a building land a deficiency inconsiderable as regards actual quantity may be material by reason of its interfering with the profitable user of the land.[4]

(6) Where a contract in addition to the main and substantial subject-matter for which a certain price is specified—as for example, an estate includes also something as an adjunct, which is small in value, and not material to the use and enjoyment of the main subject-matter, the failure of the vendor's title to this adjunct, or his inability to convey it will not prevent him from compelling a specific performance in respect of the principal subject-matter. When, however, the adjunct is necessary to the full use and enjoyment of the main subject-matter, the vendor's inability to convey it will defeat his right to a specific performance even with compensation.[5]

(7) *See* also *Bank of Bengal* v. *Akshoy Kumar*,[6] *Narayana* v. *Alamder*[7] and *Kot Krishnayya* v. *Matoori Subbraya*.[8]

27. Contract by co-sharer.—In England where a person is jointly interested in an estate with another person and purports to deal with the property in its entirety specific performance will not be granted against him even as regards his share, in the absence of any proof of misrepresentation or misconduct.[9] This rule of law was followed by the Patna High Court in one of its cases.[10] But the principle of joint tenancy is unknown to Hindu law except in a joint Hindu family governed by the Mitakshara school of law under which the property passes by survivorship.[11] Accordingly a sale of portion of the property by a member of the joint family could or could not be enforced specifically according as an alienation by one member of his interest without the consent of the other members is or is not permissible in the different States.[12] In India, if a person contracts to sell an estate in its entirety and if it transpires that he is not competent to do so and he has only a small share in the estate, specific performance in respect of his share will be granted at the instance of the vendee.[13] If the Court, in the exercise of its discretion, could grant a decree for specific performance covering either the whole or a two-third's share of the house in question. These two issues

1. Peers *v.* Lambert, 7 Beav. 546 ; Drew *v.* Hanson, 6 Ves. 6 8.
2. Knatchbull *v.* Grueber, 46 E. R. 48 : 3 Mer 124.
3. Peers *v.* Lambert, 7 Beav. 546 ; Drew *v.* Hanson, 6 Ves. 678 ; Perkins *v.* Ede, (1852) 16 Beav. 193.
4. Brewer *v.* Brown, (1884) 28 Ch. D. 309
5. Pomeroy, *Sp. Com.*, Sec. 348 ; Dykes *v.* Blake, 4 Bing. N. C. 446.
6. 6 C. W N. 365.
7. 27 I. C. 449.
8. 10 I. C 678.
9. Lumley *v.* Ravenscroft, (1895) 1 Q. B. 983 ; Price *v.* Griffith, (1851) 1 De G. M. & G. 8 ; Thomas *v.* Derling, (1837) 1 Keen 739.
10. *See* Hindu Law.
11. *Ibid* ; in Bombay. Madras, C. P. States it is permitted ; but not permitted in Bengal, U. P., Bihar and Orissa, the Punjab, Oudh and Patna.
12. Abdul Haq *v.* Mohd. Yahia Khan, A. I. R 1924 Pat 81.
13. Promothonath Mitra *v.* Gostha Behari Sen, 118 I. C. 849 : 33 C. W N. 314 ; Ponaka Subba Rami Reddi *v* Seshachalam Chetty, I. L. R. 33 Mad. 359 at pp. 361-62 : 20 M. L J. 328 : 5 I. C. 79 ; Baluswami Aiyar *v.* Lakshmana Aiyar, A.I.R. 1921 Mad 172 at p. 175 (F. B.) : I. L. R. 44 Mad. 605 (share for full value).

together are covered precisely by a Full Bench ruling of the Madras High Court in *Baluswami Aiyar* v. *Lakshmana Aiyar*,[1] where it is held that :

> "The managing member of a joint Hindu family, who for purposes not binding upon the other coparceners and without their concurrence, agrees to convey a specific item of joint-family property, cannot 'perform' his contract in its entirety and the case falls within the provisions of Sec. 15 of the Specific Relief Act. The purchaser, in such a case, cannot enforce specific performance of the entire contract. But courts will grant specific performance by a conveyance of the share which the vendor had in the property at the date of the contract, if the purchaser elects to pay the entire consideration, and the share should be specified in the decree."

The conditions for such part-performance is given in Sec. 15 of the Specific Relief Act, 1877.

In *Singhai Ramlal* v. *Kannayalal*,[2] the claim to specific performance of the full contract has not been abandoned and the right to compensation has not been surrendered, thus the appeal fails.[3] But where a contract for sale of an entire property is made by only one of the co-sharers of that property and the other co-sharers refuse to sell their shares, specific performance of the contract would not be enforced in part for the reason that there is obvious injustice in compelling the purchaser of the entirety to take undivided part of share of the property.[4] Where the defendant who agrees to sell to the plaintiff certain property belonging to himself and other co-owners and undertakes to obtain their consent, is unable to perform the whole of his contract, the plaintiff cannot be given a decree for sperific performance under Sec. 15 [now Sec. 12 (3)] when he is not willing to take a sale-deed of the defendants interest in the property and does not agree to relinquish all claim to further performance and all right to compensation.[5] But if the contract is not concluded the case is different.[6] Where a co-sharer professed to grant a lease of the entire estate in the property of which he had a share only, in the belief that the lessee had already obtained the consent of the other co-sharers, it was held by their Lordships of the Privy Council that it could not be deemed that there was a concluded contract, whereby the co-sharers undertook a binding obligation on behalf of himself and the other co-sharers to obtain the lease of the property and no suit for specific performance to execute a *kabuliyat* and give possession can lie against the entire body of the properties.[7] It was further held, that even assuming that there was a concluded contract, specific performance of the agreement in part could not be decreed under Sec. 15 [now Sec. 12 (3)] as the plaintiff had not relinquished all claim to further performance and all right to compensation.[8] Thus, provided these conditions of Sec. 15 [now Sec. 12 (3)] are satisfied there is no impediment to grant specific performance of that part of lease property to which the promisor

Lease.

1. A. I. R. 1921 Mad. 172 : I. L. R. 44 Mad. 605.
2. A. I. R. 1926 Nag. 493.
3. Singhai Ramlal *v.* Kanhayalal, A.I.R. 1926 Nag. 493 at pp. 493-95.
4. Mangal Singh *v.* Dial Chand, 183 I. C. 383 : 12 R. L. 524 : 42 P. L. R. 185 : A. I. R. 1940 Lah. 159.
5. Mohammad Khan *v.* Bapumoiya, Subba Reddy *v.* Venkáeami Reddi, A. I. R. 1943 Nag. 313 at p. 314 : 1943 N. L. J. 452 ; I. L. R. (1944) Nag. 33 : 210 I. C. 579 : 16 R. N. 166 ; *see* also A. I. R. 1915 Mad. 740.
6. Ramsaran *v.* Sashibhushan, 65 I. C. 594 ; Imam Din *v.* Mohd. Din, 89 I C. 422 : A I.R. 1926 Lah. 136 ; Harendra Chandra *v.* Nanda Lal Roy, A. I. R. 1933 Cal. 98 at p. 101 : 141 I. C. 708 : 36 C.W.N. 1002 ; 57 C.L.J. 1.
7. Promothonath Mitra *v.* Gostha Behari Sen, I. L. R. 59 Cal. 1025 (P. C.) : 59 I. A. 47 : 136 I. C. 405 : A. I. R. 1932 Cal. 43 : 36 C. W. N. 231 : 55 C. L. J. 46 : 62 M. L. J. 248 : 35 L. W. 825.
8. *Ibid.*

is entitled to grant.[1] But a lease of undivided moiety is a very different thing from a lease of the whole colliery. It would work hardships on the party to do so in such a case.[2] The question whether a contract is divisible or not for the purpose of enforcing specific performance depends on the fact and circumstances of each particular case and the question is essentially one of fact.[3] It may be noticed that the nature of a contract, whether it was divisible or not, must be determined upon the facts and circumstances of each particular case; and the question was essentially a question of fact. An agreement between the plaintiff and defendants for sale, does not come within the general rule that where a person is jointly interested in an estate with another person, and purports to deal with the entirety, specific performance will not be granted against him as to his share.[4]

Lease of colliery.

Whatever might be the position in an ordinary suit where it is a question of ordering specific performance it is for the Court to decide whether any relief should be given. Whether a decree for specific performance should be granted in respect of the share of defendant No. 1. The plaintiff has offered to purchase the share of defendant No. 1 alone on payment of the entire consideration, i. e. Rs. 5,600. There is authority for such a proposition, for example, see *Mahmud Ali* v. *Yawar Beg*[5] and *Panoa Subba Rani Reddy* v. *Vadamadi Seshachellam Chetty*.[6] In the latter case it was held that the purchaser in such a case will be entitled, on offering to pay the whole purchase money to a decree directing the adult party to convey all his interest in the properties.[7] In the above-noted case, the Privy Council case, *Promothonath Mitra* v. *Gostha Behari Sen*,[8] was distinguished on the ground that there the contract was on the footing that all the owners of the property would consent to the lease and in the absence of such consent there was no concluded contract of lease with respect to the land in question. Where a person agreed to sell property belonging to himself and his minor nephew whose property he had no right to sell, the vendee was held entitled to a decree for specific performance in respect of the share of the uncle on offering to pay the entire sale-price.[9]

28. Contract of sale by all co-sharers, one unable to perform.— Now the question is settled where the contract of sale is by all the co-sharers and one of them is unable to perform, say by reason of incapacity. The point directly arose in *Abdul Karim* v. *Gladys Murial*,[10] in which three persons agreed to sell certain property belonging to them as tenants-in-common and one of them was found to be incompetent to enter into the agreement. Lord Reid decreed specific performance of the agreement against the other two in respect of their shares.

A person having a share in the house, contracts to sell the whole house for a certain sum of the money. He fails to execute the conveyance for the

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1. Abdul Karim *v.* Gladys Murial, (1950) 54 C W. N. 770 at p. 777 (P. C.) (English cases discussed and distd.).
2. Promothonath Mitra *v.* Gostha Behari Sen, A. I. R. 1929 Cal. 380 at p. 381: 33 C. W. N. 314: 118 I. C. 849 (*see* English cases discussed).
3. Harendra Chandra Das *v.* Nanda Lal Roy, 141 I. C. 708: A. I. R. 1933 Cal. 98: 36 C. W. N. 1002: 57 C. L. J. 1.
4. *Ibid.* at pp. 100-1.
5. (1915) 13 A. L. J. 739.
6. I. L. R. 33 Mad. 359: 7 M. L. T. 187: 20 M. L. J. 328.
7. Imam Din *v.* Mohd. Din, A. I. R. 1926 Lah. 136 at p. 137.
8. A. I. R. 1929 Cal. 380 at p. 381: 33 C.W.N. 314: 118 I. C 849.
9. Imam Din *v* Mohd. Din, 89 I. C. 422: A. I. R. 1926 Lah. 136.
10. 54 C. W. N. 770 at p. 777.

whole house, the plaintiff brings a suit for the specific performance of the agreement. He is however willing to take the share of the contracting co-sharer for the full consideration agreed to. The Court should under the circumstances give the plaintiff the option to obtain the conveyance for the share in the property for the consideration stipulated by the plaintiff even though the plaintiff has not expressly made his claim under Sec. 15 [sub-clause (13) of the present section] of the Specific Relief Act.[1]

29. Relinquishes all claim to further performance.—In a suit for specific performance falling under sub-section (3) of the present section (old Sec. 15) the plaintiff claiming specific performance must relinquish all claim to further performance or of the part which must be left unperformed. The plaintiff must indicate in his plaint that he is willing to relinquish all claim to further performance, and all right to compensation. In the absence of such an averment, he is entitled to a decree for specific performance.[2] This view can no longer be maintained in view of the recent Supreme Court decision in *Kalyanpur Lime Works Ltd.* v. *State of Bihar*,[3] according to which the relinquishment to further performance can be be made at any stage of the litigation. But this statement of the law cannot possibly cover a case where the plaintiff sues for specific performance of the contract as a whole and the facts relating to the impossibility of performance of a part come to light or come up for decision in the suit in which case it would be unreasonable to deny the plaintiff the benefit of sub-section (3) of the present section on the sole ground that the plaintiff does not aver his willingness to abandon his further claims. In such a case it has been held by Gentle, C. J., in *Narayan Murthy* v. *Madharya*,[4] that when the Trial Court holds that he cannot obtain an order in respect of the whole but only part of the property, the subject-matter of the contract, sought to be enforced, the plaintiff at that stage itself must make up his mind what he will do if he considered that the decision of the Trial Court is incorrect ; that he cannot call in aid (old) Sec. 15 of the Act [corresponding to sub-section (3) of this section] and at the same time to proceed to obtain the remainder of the property or damages as it would not be relinquishment of all claims that the section requires ; that if he is content to take what the section gives him he must abandon all further claim and all further rights, including the right of appeal which ordinarily would be open to him when the Trial Court has held that the agreement in suit could not be ordered to specifically perform but that the contracting party was able to perform a part of it ; that injured party must then and there make up his mind whether he will ask the Court to pass a decree giving him relief provided by Sec. 15 (old) of the Act [corresponding to sub-section (3) of this section] and, as to condition to the Court granting a decree to forego all further claim and right to enforce performance of the contract or to compensation for loss or damage. According to this view, the plaintiff who invites the Trial Court to pass a decree contemplated by (old) Sec. 15 of the Act [corresponding to sub-section (3) of this section] and is granted the decree, is not competent to challenge by resort to appeal the Trial Court's finding on the issue whether the specific performance of the whole contract can or cannot be given in the case. In the same case Horwill, J., has not subscribed to the extreme view taken by the learned Chief Justice and has said that in saying that he intended to appeal, the plaintiff was not refusing to give the

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1. Tara Bai Rao Ji *v.* Yestar Tukaram Natho Ji, A. I. R. 1956 Bom. 679 at p. 680.
2. Kakturuvenkatarami *v.* Venkatareddi, I.L.R. 8 Mad. 1187.
3. A.I.R. 1954 S.C. 165 at p. 170 (reversing Dalmia Jain & Co. *v.* Kalayanpur Lime Works Ltd., A. I. R. 1952 Pat. 393 at p. 408 and approving Waryam Singh *v.* Gopi Chand, A.I.R. 1930 Lah. 34 at p. 36) : I.L.R. 11 Lah. 69.
4. 1947 M.W.N. 629 : 69 L. W. 620 : (1947) 69 M. L. J. 336.

undertaking required by the proviso to Sec. 15 (old) in the event of its being held in appeal that the section applied. With respect, it is submitted that the view taken by Horwill, J., commends itself to us. The recent Supreme Court decision which says that relinquishment may be made at any stage of the litigation lends support to this view.[1] Where two brothers executed an agreement to sell a certain vacant site, and further agreed that they would obtain the signatures of the rest of the heirs, but they failed to do so, it was held that as they were unable to perform the whole of their contract, the Court would under (old) Sec. 15 of the Act [corresponding to sub-section (3) of this section] direct them to perform so much of the contract as they could perform provided that the plaintiff relinquished all claim to further performance and all right to compensation.[2]

Where a plaintiff seeks to bind the interests of the other coparceners as in this case by asking for specific performance of the agreement of sale of the joint property agreed to be sold by the manager of the joint family, it matters not if the other coparceners have not been impleaded, for the question of specific performance of an agreement upon the application of Sec. 15 (old), Specific Relief Act. The words of the section apply where a member of an undivided family agrees to sell part of the joint property in which he has only a share ; and the present case is a particularly plain one, because according to the plaintiff's own evidence defendant 1 agreed to get the other members of the family to execute the sale-deed.[3]

30. Incomplete contract.—Where there is no completed contract between the parties a court cannot decree specific performance. When plaintiff sued to enforce specific performance of a contract for sale of certain land by the two defendants and it was found that one of them had never agreed to sell, the contract could not be specifically enforced.[4]

31. Contract already performed.— Sub-section (3) (old Sec. 15) applies only before the contract has been executed. Therefore, when the contract of sale has been performed by the execution of a sale-deed and delivery of possession, the rights of the parties are not governed by sub-section (3) (old Sec. 15) but by Sec. 55 of the Transfer of Property Act.[5] A purchaser is entitled to compensation even after the sale is completed by execution of a conveyance.[6] Sub-sections (2) and (3) of the present section (old Secs. 14 and 15) are inapplicable where whole cannot legally be performed. Sub-sections (2) and (3) of the present section refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties. They have no application where the obstacle to the performance of the contract is known to the parties and no provision is made to meet the eventuality.

32. Declaration of unlawful termination and restoration in case of contract of employment.—A case which relates to the relationship

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1. Kalvanpur Lime Works Ltd. *v.* State of Bihar, A. I. R. 1954 S. C. 165 at p. 170.
2. Mohammad Khan *v.* Bapumiya, 1943 N. L. J. 452 : 16 R. N. 166 : I. L. R. (1944) Nag. 33 : 210 I. C. 579, relying on A. . R. 1915 Mad. 70 ; (*see* also I. L. R. 33 Mad. 259 at p. 362 : A. I. R. 1926 Lah. 136 : A. I. R. 1929 Cal. 308, dist.).
3. Ghulam Nabi Kishinchand *v.* Shivaldas, A. I. R. 1949 Sind 18 at p. 20 ; *see* also Anant Ram *v.* Surju Prasad, A. I. R. 1935 Oudh 453 : 15 I. C. 570 ; T. V. Kochuvareed *v.* P. Mariappa Gounder, A. I. R. 1954 T. C. 10.
4. Ram Saran Roy *v.* Shashi Bhushan, 65 I. C. 594.
5. Shalig Ram *v.* Narayan, 45 I. C. 689 : 4 N. L. J. 221.
6. Whitmore *v.* Whitmore, L. R. 8 Eq. 603.

of master and servant is governed purely by contract of employment and as pointed out by the Supreme Court in the case of *Sirsi Municipality* v. *Cecelia Kom Francis Tellis*,[1] any breach of contract in such cases is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of contract of employment is not capable of finding a declaratory judgment of subsistence of employment. It is needless to add that, a declaration of unlawful termination and restoration in a case of contract of employment would amount to the specific performance of the contract for personal service and such a declaration is not permissible under Sec. 14 (1) (*b*) of the Specific Relief Act, 1963.[2]

33. The provisions in the contract whether override provisions in sub-sections (2) and (3).—Where a contract provides that no compensation will be claimed for, or paid for errors or misdescription, the vendor is entitled to the benefit of this provision only if the error or misdescription is not material. But where the difference is material, the terms of contract do not override the general law that a vendee cannot be compelled to take something materially different from that which he had contracted to purchase.[3] In *Whitmore* v. *Whitmore*,[4] there was an execution sale. The property sold was described as measuring 753 sq. yards or thereabout and one of the conditions of the sale provided that if any error, misstatement or omission should be disclosed it would not annul the sale nor would any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 sq. yards. It was held that the condition applied to small errors only and the error in the case being a big one the purchaser was entitled to compensation even after the sale is completed by execution of a conveyance.[5] A condition in a contract of sale providing for compensation in cases of errors or mistakes can be enforced in case of innocent errors or accidental slips and not in cases where the subject-matter of the contract is materially different in substance from what it was represented to be.[6] Thus where it is sought to enforce specific performance of a contract of sale against a purchaser at the instance of the vendor, a condition in the contract providing compensation in the event of any error or misstatement in particulars applies only where the purchaser will on completion get substantially what he contracts for.[7] In *Bank of Bengal* v. *Abhoy*,[8] it was held that where there is a substantial deficiency in the area of a property sold at a Registrar's sale, so that the purchaser would not have offered what he did, the Court will not compel the purchaser to take the property with compensation even where the condition of sale was that if any error or misstatement shall appear to have been made in the particulars or description of the property such error or misstatement shall not annul the sale, nor entitle the purchaser to be discharged from the sale or to receive any compensation.[9]

When provision in a contract is to errors or mis-statement, etc. may be enforced.

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1. (1973) 1 S. C. R. 409
2. Shanabhai Desaibhai Patel *v.* Chhotabhai Shankerbhai Patel, (1975) 16 Guj. L. R. 256 at pp. 261, 262.
3. Williams *v.* Edwards, 2 Sim. 78 ; Winch *v.* Winchester, 42 Ch. D. 150 : 61 L. W. 105 : 58 L. J. Ch. 763 ; Whitmore *v.* Whitmore, L. R. 8 Eq. 603 ; Palmer *v.* Johnston, L. R. 13 G. B. D. 351 ; Kissory Mohan *v.* Kali Charan, 1 C.W. N. 106 ; Bank of Bengal *v.* Abhoy, 6 C. W. N. 356.
4. L. R. 8 Eq. 306.
5. Tanner *v.* Sheleton, L. R. 13 Ch. D. 130.
6. Madeley *v.* Booth, 2 De Ge. & Sm. 713 ; Ayles *v.* Cox, 16 Beav. 23 ; Brewer *v.* Brown, 28 Ch. D. 399 ; Dunmock *v.* Hallet, 2 Ch. 29 ; Tecry *v.* Whit, 32 Ch. D. 14.
7. *Ibid.*
8. 6 C. W. N. 365.
9. *Ibid.* (Jacobs *v.* Revell, 2 Ch. D. 858 foll.).

34. Principle.—Sub-section (4) is traceable to the English decision, *Ogden* v. *Fossick*.[1] This sub-section provides the third exception to the rule of general law provided in sub-section (1), that the Court shall not direct the specific performance of a part of contract, the other two exceptions being covered by sub-sections (2) and (3) (old Secs. 14 and 15). The basic principle of sub-section (4) (old Sec. 16) is that when a contract consists of several parts which are separate from and independent of one another and some of which cannot or ought not to be performed, such part or parts, as can and ought to be performed, may alone be specifically enforced. Such a contract though nominally one, is actually divisible and when the Court enforces what is apparently a part it really enforces an entire and complete contract.[2] The question whether a contract is divisible or indivisible is one of construction, depending upon the nature and terms of each individual contract.[3] Where it is really indivisible the Court will not take it up itself to separate its parts and enforce them piecemeal,[4] or allow some only of the joint contracts to sue,[5] nor can a contract be enforced against only some of the defendants.[6] It is not for the courts to artificially cut up one indivisible agreement into various parts and enforce one or more of them.[7] Sections 14 to 17 (old) inclusive, of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete Code, within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English Jurisprudence, the language of the sections must ultimately prevail. Section 17 (old) prescribes that there shall be no grant of specific performance except in cases coming within one or other of the three previous sections. It was not proved that the part of the contract which was left unperformed bore only a small proportion in value to the whole within Sec. 14 (old) and the purchaser had declined to accept relief on the terms of Sec. 15 (old). Accordingly, Sec. 16 (old) (which appears to be novel in the width of the power which it confers) afforded the only ground on which the Court could help him. To make this section applicable it had to be shown that there was a part of the contract, to wit, that relating to plot *B*, which (*a*) "taken by itself could and ought to be specifically performed," and (*b*) "stood on a separate and independent footing" from the other part of the contract which admittedly could not be performed. Their Lordships think that before a court can exercise the power given by Sec. 16 (old) it must have before it some material tending to establish these propositions, and cannot apply the section on a mere surmise that, if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient ; and that the words of the section, wide as they are, do not authorize the Court to take action otherwise than judicially, and in particular do not permit it to make for the parties, or to enforce upon them, a contract, which in substance they have not already made for themselves.

When the whole contract is enforced in one way or another, as to the greater part by the remedy of specific performance and as to a small

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1. (1862) 32 L. J. Ch. 73 : 135 R.R. 228 : 4 De G. F. & J. 426: 45 E. R. 1249.
2. Contract Act, Secs. 27, 57, 58 ; Krishna Chandra Dey *v.* Graham, A. I. R. 1923 Cal. 694 at pp. 697-98 : I. L. R. 50 Cal. 700 ; Abdul Haq *v.* Mohd. Yahia Khan, A. I. R. 1924 Pat. 81 at p. 83.
3. Krishna Chandra *v.* Graham, *supra*.
4. Rayan *v.* Mutual W. Y. C. Association, (1893) 1 Ch. 116 ; Underwood *v.* Barker, (1899) 1 Ch. 300.
5. Safiru *v.* Mahramunnissa, I.L.R. 24 Cal. 832.
6. Kolpulli *v.* Sajja, 13 I. C. 315.
7. Underwood *v.* Barker, *supra*.

residue by compensation it is not necessarily making a new contract to select from among the remedies, which the Court can grant, one for the major and another for the minor part of the contract. For this jurisdiction Sec. 14 (old) specifically provides and Sec. 17 (old) forbids any extension beyond it. Hence Sec. 16 (old) both because it must be something not covered by Sec. 14 (old) and because no court can act unjudicially without either statutory warrant or consensual authority must be limited and the expression "stands on a separate and independent footing" points to a limitation, which would exclude any new bargain that cannot be said to be contained in the old one.[1] If there is one entire consideration for two or several contracts and one of these contracts is for the performance of an illegal act, the whole is void. But if there are several considerations for separate and independent covenants in the same instrument and one is good and the other bad, the one may stand and be enforced although the other falls.[2] In case of mutual though several distinct agreements, if the subject-matter of the one is connected with that of the other, the courts will enforce both or neither. Where, however, the contracts, though contained in the same instrument, are really independent, the breach of one is no defence to an action for specific performance of another.[3]

35. Contract by member of joint Hindu family.—Formerly it was held by the Madras High Court if a *karta* of a joint Hindu family contracts to sell certain property belonging to the family to a third person, other members not being parties to the contract, the proper course for the Court is to give a decree for specific performance of the whole contract without determining whether the sale bound the interests of those members of the family who were not parties to the contract and dismiss the case against such members leaving it, however, to be settled by future litigation as to what passed under the conveyance.[4] In subsequent cases, however, it has been laid down that a finding should be given whether or not the conveyance was binding on other members of the family and if the finding be that there was no necessity for the sale no decree should be passed, even against the member party to the contract and the suit should be dismissed in its entirety.[5] "I do not think the Court ought to pass a decree directing a sale of the property ordered to be conveyed when it finds that the person agreeing to convey was only a coparcener with other and the agreement would not bind their interest. Where the person contracting is the father or managing member of the family he stands in a fiduciary relationship to the other members,[6] and his contract to sell entire item of joint-family property for purposes not binding on them is a breach of duty and I do not think the Court ought to compel execution of a sale-deed in such cases of the entire item of property leaving to the other members to incur the expense and go through the trouble of filing a suit.[7] A decree against *karta* for the specific performance of the contract of sale of joint family property in a suit against him only does not preclude other members from challenging the

1. William Graham *v.* Krishna Chandra Dey, A. I. R. 1925 P. C. 45 at p. 46 : 23 A. L. J. 709 : 3 Pat. L. R. 93 : 7 Bom. L. R. 704.
2. Collett, *Specific Relief Act*, 5th Ed., p. 364.
3. Dart, Vol. II, p. 1060.
4. Kosuri *v.* Ivalury, I. L. R. 26 Mad. 74 ; Shrinivasa *v.* Shivarama, I. L. R. 32 Mad. 320.
5. Nagia *v.* Venkatarama, I.L.R. 37 Mad. 387 : 15 I. C. 623 : 14 M. L. T. 199 ; Davvur Suba Reddi *v.* Kakaturi, I.L.R. 38 Mad. 1187 : 26 I. C. 983 : 16 M L.T. 370 ; Govinda *v.* Apathashaya, I. L. R. 37 Mad. 400.
6. Annamalai *v.* Murugesa, I.L.R. 26 Mad. 544 (P. C.) ; Saburam *v.* Bhup Singh, I.L.R. 39 All. 437 (P. C.).
7. Guruswami *v.* Gangapathia, I. L. R. 5 Mad. 337 (F. B) ; Baikuntha *v.* Shibdas, 2 C.L.J. 121 ; Govinda *v.* Apathasahaya, I.L.R. 37 Mad. 400.

sale afterwards.[1] There is, however, a difference of opinion as to whether if the vendee is willing to pay the whole price and demands a transfer of the interests of the *karta* alone in the property, the Court has power under the present section to decree specific performance as regards *karta*'s interests. The answer given in some cases is in the affirmative,[2] while others hold the contrary view.[3] It is submitted that the answer should be in the affirmative in all States where an alienation by a member without the concurrence of the other members is permitted in that State and in the negative where this is not permitted under the Hindu law prevailing in that State[4] In all cases where the vendee elects to take the share on payment of full consideration agreed upon the share of the vendor on the date of the contract has to be given to the vendee.[5]

In *Nethiri Menon* v. *Gopalan Nair*,[6] the Bench consisting of Spencer and Coutts-Trotter, JJ., held that if a document is drawn up in the name of several persons and it is the intention of the parties that all should execute it, it will become incomplete and inoperative till all have done so ; but it is a question of fact in each case as to what was the intention of the parties. During the course of the discussion, a distinction was pointed out and it was held that if the person who actually executed the document did so on the understanding that it would become operative only if the others had signed it, then it would become inoperative if the others did not put in their signature ; and as it is held that the question of intention in each case is a question of fact it was not a matter for interference in second appeal unless the finding of the Lower Appellate Court is not justified by the evidence on record. To the same effect are the earlier cases in *Krishnamachariar* v. *Narasimhachariar*,[7] and *Sethuram Sahib* v. *Vasantha Rao*.[8] In *Bangaraswami Aiyangar* v. *Somasundaram Chettiar*,[9] Sadasiv Aiyar and Tyabji, JJ., held that where a document recites that it was executed by *A*, *B* and *C* but only *A* and *B* executed it, actually, the question whether *A* and *B* agreed to be liable only if *C* also joined is a question of fact to be decided according to the circumstances of each case and cannot be the subject of a second appeal unless there is no evidence to justify the finding of the Court below. The learned Judges considered the cases in *Sivaswami Chetty* v. *Sevugan Chetty*,[10] and *Krishnamachariar* v. *Narasimhachariar*.[11] A clear exposition of the principle of law applicable to such cases can be found in *Umar Bakhsh* v. *Mulraj*,[12] where Dilip Singh, J., put the point in the following way :

> "If the intention of the parties to an agreement to sell is that nobody would agree to sell his share, unless all the others also agreed to sell their shares, it cannot be held that where one of them had failed to sign the document it was complete document. On the other hand, if the sales are not independent in the sense that each vendor might well have sold his share of the property without reference to the sale by others and what really should have been a number of separate sales are rolled into one because of convenience, then the

1. Nasir-ud-din *v.* Ahmad Husain, 31 C. W. N. 538 (P C.).
2. Nagia *v.* Venkatarama, I. L. R. 37 Mad. 387 : 15 I. C 623 : 14 M. L. T. 199 ; Baluswami Aiyar *v.* Lakshman Aiyar, I. L. R. 344 Mad. 605 : 63 I. C. 374 ; *see also* I. L. R. 10 Bom. 169 (F. B.) ; I. L. R. 5 Cal. 148 (P. C.).
3. Shrinivasa *v.* Shivarama, I. L. R. 32 Mad. 320 ; Divvur Suba Reddi *v.* Kakaturi, I. L. R. 38 Mad. 1187 : 26 I. C. 983 : 16 M. L. T. 370.
4. *See* Hindu Law.
5. Chinnu Pillai *v.* Kalimuthu Chetty, I. L. R. 35 Mad. 47 (F. B.).
6. I.L.R. 39 Mad. 597.
7. I.L R. 31 Mad 114.
8. I.L R. 34 Mad. 314.
9. 27 M. L. J 176.
10. I.L.R. 25 Mad. 389.
11. I.L.R. 31 Mad. 114.
12. A.I.R. 1942 Lah. 86.

> fact that in the agreement to sell one of the vendors had not joined would not affect its validity as between the vendee and the vendor who had signed the agreement to sell. The question of intention has to be settled by reference to the terms of the document and to the circumstances of the case."

It is also useful in this connexion to refer to a recent pronouncement of the House of Lords in *Lady Naas* v. *Westminster Bank Ltd.*,[1] where all the noble Lords who took part in that decision were of opinion that the statement of Sir George Jessel, M. R., in *Luke* v. *South Kensington Hotel Co.*,[2] that

> "It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the .other parties to the deed, the deed does not bind in equity if the third refuses to execute"

is expressed far too widely. At page 389 Lord Russel of Killowen discusses this aspect of the case and in the same tenor discussion is found in the speeches of the other noble Lords as well especially that of Viscount Maugham, the presiding noble Lord. In view of the repeated pronouncements of this Court explaining the principle, it is unnecessary to deal at great length with this House of Lords pronouncement ; but since the earlier cases in India had been based to some extent upon the dictum of Sir George Jessel, M. R., it is advisable to show that dictum has been later on criticised and considered by the House of Lords.[3]

As to the remedy the preponderance of authority is in favour of the view that an alienee from a member of a joint Hindu family is not entitled to possession of the alienor's share as a tenant-in-common, but his remedy lies in a suit for partition.[4] The general remedy of an alienee is ordinarily a suit for general partition, but when the other coparceners have alienated their shares also, he can sue and get his share by partition of the item in which only the other purchasers are interested.[5] Since Hindu law regarding the powers of a coparcener to sell the joint-family property is not uniform throughout India, it is advisable to examine the rulings of the various High Courts separately.

(*a*) *Allahabad view.*—If one of the coparceners agrees to sell coparcenary property but others refuse to join in the sale, the vendee can enforce specific performance of contract in respect of the share of the contracting coparceners.[6]

Now it is settled law so far as the State of Uttar Pradesh and the States governed by the Banaras school of Hindu law are concerned that one member of a joint Hindu family cannot transfer even his own share of the joint Hindu family property before partition. *A fortiori* such member cannot enter into an agreement of sale with regard to his own share of joint Hindu family property. There being no question of legal necessity involved in the case, the agreement of sale made by defendant was

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1. (1940) A. C. 366.
2. (1879) 11 Ch. D. 121.
3. Chunduru Kanniah Gupta *v.* Pallamparthi Subbarami Reddi, A. I. R. 1952 Mad. 687 at pp. 688-89.
4. Maharaja of Bobbili *v.* Venkatarama Anjulu, I. L. R. 39 Mad. 265 ; *see* also I. L. R. 38 Mad. 684 : 31 M. L. J. 275 (F. B.).
5. Iburamsa *v.* Theruvenkataswami, I.L.R. 34 Mad. 269 (F.B.) ; *see* also I. L. R. 44 Mad. 605 (F.B.).
6. Mohd. Ali *v.* Yawar Beg, 29 I. C. 628 : 13 A. L. J. 739.

wholly unauthorized in respect of the share of another defendant and also in respect of his own share. Section 15 (old), Specific Relief Act, does not make it obligatory upon the Court to enforce a contract of sale entered into by one member of the joint Hindu family in respect of his own share. Leaving aside the proviso, the section authorizes the Court to direct the defendant, who has entered into a contract of sale of a property, which he could sell, to execute a sale-deed in respect of that portion of the property in respect of which the defendant could have executed the sale-deed. The words "as he can perform" are important. If the defendant could not sell even his own share of the property by reason of a rule of Hindu law because the property was joint-family property he could not be said to be in a position to perform the contract in respect of even that part of the property. Section 15 (old), therefore, cannot apply to the case of a member of joint Hindu family who enters into an agreement of sale of joint-family property and who cannot transfer his own share in the joint-family property. Further, the Lower Court has held that the plaintiff did not relinquish all claim to further performance of contract, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant, as provided in the proviso to Sec. 15. This is also correct. If the plaintiff relied upon Sec. 15 (old) he should have satisfied the requirements of the proviso.[1]

(*b*) *Bombay view.* – In the Bombay Presidency, a coparcener governed by the Mitakshara school of Hindu law can alienate his own share and if he has in the contract mixed up others' shares with his own share, the alienee is entitled to specific performance as regards the alienor's share with or without compensation according as the case falls under Sec. 14 or Sec. 15 [now Sec. 12 (2) or (3)].[2]

(*c*) *Nagpur view.*—Admittedly the sale-deed has not yet been executed, and the question whether the plaintiff gave notices to the defendants intimating the plaintiffs' willingness to fulfil the contract does not arise. If the plaintiffs established that they were in fact willing to fulfil the contract throughout that period of fifteen days they were entitled to sue for specific performance. But the question whether they would get decree for specific performance is quite another matter, and that is the only question that arises in this appeal. If the Court, in the exercise of its discretion, could grant a decree for specific performance covering either the whole or a two-thirds share of the house in question. These two issues together are covered precisely by a Full Bench ruling of the Madras High Court in *Baluswami Aiyar* v. *Lakshmana Aiyar*[3] where it is held that :

> "The managing member of a joint Hindu family, who, for purposes not binding upon the other coparceners and without their concurrence, agrees to convey a specific item of joint-family property, cannot 'perform' his contract in its entirety and the case falls within the provisions of Sec. 15 of the Specific Relief Act. The purchaser, in such a case, cannot enforce specific performance of the entire contract. But Court will grant specific performance by a conveyance

1. Raghunandan Lal *v.* Sheodhan Das, A. I. R. 1953 All. 594 at pp. 594-95 : 1953 A. L. J. 270.
2. Pandurang *v.* Bhagwan Das, I. L. R. 44 Bom. 341 : 22 Bom. L. R. 120 ; Naru *v.* Paragowda, I. L. R. 41 Bom. 347 : 39 I. C. 23 : 19 Bom L. R. 69 ; Harnam Das *v.* Valabhdas, I. L. R. 43 Bom. 17 : 20 Bom. L. R. 472 ; Pandu *v.* Goma, I.L.R. 43 Bom. 472 : 21 Bom. L.R. 213 : 50 I. C. 765.
3. A. I. R. 1921 Mad. 172 : I. L. R. 44 Mad. 605.

of the share which the vendor had in the property at the date of the contract, if the purchaser elects to pay the entire consideration, and the share should be specified in the decree."

The conditions for such part-performance is given in Sec. 15 of the Specific Relief Act, 1877.

In *Singhai Ramlal* v. *Kanhayalal*,[1] the claim to specific performance of the full contract has not been abandoned and the right to compensation has not been surrendered. The appeal, thus, fails.[2]

In *Mohammad Khan Najjumiya* v. *Bapumiya Mahbubmiya*,[3] the plaintiff asked that the defendants should be compelled to execute a sale-deed of the entire site in dispute, or of their share in the entire family property (which was not the contract) and apparently contemplated a suit for partition of the entire family property in the hope that the site in dispute will be allotted at this partition to the defendants. The defendants are unable to perform the whole of their contract, and therefore under Sec. 15 (old), Specific Relief Act, the Court may direct the defendants to perform specifically so much of the contract as they can perform provided that the plaintiff relinquishes all claim to further performance and all right to compensation. The plaintiff has no where indicated that he is willing to relinquish all claim to further performance and all right to compensation, and therefore, he is not entitled to a decree for specific performance. The decision in *Subba Reddi* v. *Venkatarami Reddi*[4] is in point. In that case defendant 1 undertook to sell certain property, of which part or all was joint-family property, and the plaintiff offered to pay the full amount for a conveyance to him of the lands that were the separate property of defendant 1 and defendant 1's interest in the family lands. The Court refused to allow this on the ground that this would require determination of the question whether any of these lands formed the separate property of defendant 1 and would lead to litigation. Here too there would be litigation in which the defendants and their brothers and sisters would be involved, for all would be necessary parties to a partition suit. If the plaintiff had been willing to take a sale-deed of the defendant's interest in the site in dispute and had agreed to relinquish all claim to further performance and all right to compensation, then he might have been entitled to a decree for specific performance. As however he wants a sale-deed of the entire site in dispute and is not willing to relinquish all claim to further performance and all right to compensation, he cannot be given a decree for specific performance.[5] This rule will have no application where the agreement by the *karta* is for the benefit of the family in which case it is enforceable entirely.[6]

In *Sham Lal* v. *Jesaram*,[7] the Division Bench after surveying exhaustively the case-law on the point, preferred the law laid down in *Singhai Ram Lal* v. *Kanhaya Lal*[8] which followed an earlier Full Bench decision of the Madras High Court in *Baluswami Aiyer* v. *Lakshmana Aiyer*[9] it was observed at page 335 of the report, "In *Singhai Ram Lal* v. *Kanhaya Lal*,[10] it was held following the Full Bench decision of the Madras High Court in *Baluswami Aiyer* v.

1. A.I.R. 1926 Nag. 493.
2. *Ibid*. at pp. 493-94.
3. A.I.R. 1943 Nag. 313.
4. I.L.R. 38 Mad. 1187: A.I.R. 1915 Mad. 740 : 26 I. C. 983.
5. Mohammad Khan Najjumiya *v.* Bapumiya Mahbubmiya, A. I. R. 1943 Nag. 313 :at pp. 313-14 : I. L. R. (1943) Nag. 33.
6. S. K. Buty *v.* Shriram Hari, A. I. R. 1954 Nag. 64 at p. 69 ; *see* Hindu law.
7. A.I.R. 1954 Nag. 334 at p. 335.
8. 96 I. C. 949 : A. I. R. 1926 Nag. 493.
9. A.I R. 1921 Mad. 172 at p. 173.
10. 96 I. C. 949 : A.I.R. 1926 Nag. 493.

Lakshmana Aiyer[1] that the managing member of a joint Hindu family, who, for purposes not binding upon the other coparceners and without their concurrence, agreed to convey a specific item of the joint Hindu family property could not perform the contract in its entirety and the case fell within the purview of Sec. 15 (old) of the Act [now Sec. 12 (3)]. It was ruled that the purchaser in such a case could not enforce specific performance of the entire contract without satisfying the conditions laid down in the proviso to that section. To the same effect is the decision in *Panchananda Kundu* v. *Rajni Kanta Pal*[2] though it was given under Dayabhag."

(*d*) *Sind view.*—According to the Sind Court, the application of Sec. 15 (old) is attracted where an undivided member of a coparcenary sells more than his own interest.[3]

Where a vendor agrees to sell certain property to vendee but he is not legally entitled to sell the whole property, the vendee may claim specific performance of the contract in respect of so much of the property as the vendor may legally alienate provided the vendee is prepared to pay the full price.[4] Similarly, it has been held that where a person agrees to sell an undivided plot of land owned by himself and a stranger to the agreement who subsequently refuses to join in the sale, he can be forced to sell his share of the land provided the vendee is prepared to relinquish all claims to further performance and compensation for the deficiency.[5] In another case a person had agreed to sell property belonging to himself and his minor nephew whose property he had no right to sell. The vendee filed a suit for specific performance. It was held that the vendee could enforce specific performance in respect of the alienor's share on payment of the whole purchase-money.[6]

(*e*) *Madras view.*—The trend of decisions as to the application of Sec. 15 [now Sec. 12 (3)] has not been uniform in Madras High Court. In some of the cases, e.g. *Davvur* v. *Kakaturi*[7] and *Shrinivasa* v. *Sivaram*,[8] it was held that Sec. 15 [now Sec. 12 (3)] was not applicable to sales by the members of a joint Hindu family and that the decree should be for the whole area sold for the whole consideration without determining whether the sale is binding on the non-contracting coparceners. But in the under-mentioned cases,[9] it was held that in cases of this kind Sec. 15 [now Sec. 12 (3)] does apply. This conflict was set at rest by a Full Bench decision in *Baluswami* v. *Lakshmana Iyer*,[10] which lays down that where the managing member of a joint Hindu family enters into a contract to sell an item of family property and that contract is not proved to be binding on the other members, the case falls within the scope of Sec. 15 [now Sec. 12 (3)] and specific performance of the contract cannot be granted so as to direct execution of the conveyance of the entire

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1. A.I.R. 1921 Mad. 172 at p. 173.
2. A. I. R. 1931 Cal. 463 at p. 467.
3. Daluram *v.* Badaldas, 35 I. C. 478 : 10 S. L. R. 34.
4. Mst. Kishandei *v.* Ram Chand, A.I.R. 1927 Lah. 773 at p. 774 : 102 I. C. 755.
5. Sita Ram *v.* Balkishen, I. L. R. 6 Lah. 221 : 88 I. C. 472 : 26 P. L. R. 365 : I. L. R. 44 Mad. 607 (F. B.) ; 63 I. C. 34 : 13 L. W. 56 : 41 M. L. J. 129 : 1921 M. W. N. 316 : 29 M. L. T. 306 (foll.).
6. Imam Din *v.* Mohammad Din, A. I. R. 1926 Lah. 136 at p. 137 : 89 I. C. 422.
7. I.L.R. 38 Mad. 1187 : 26 I. C. 983.
8. I.L.R. 32 Mad 320.
9. Nagia *v.* Venkatarama, I. L. R. 37 Mad. 387 : 15 I. C. 623 : 14 M. L. T. 199 ; Poraka *v.* Vadlamudi, I. L. R. 33 Mad. 359 : 5 I. C. 79 : 7 M. L. T. 137 : 20 M. L. J. 328 ; Govinda *v.* Apathasahaya, I. L. R 37 Mad. 403 : 22 M. L. J. 257 : 11 M. L. T. 87 : 1912 M. W. N. 87 : 13 I. C 47 ; Kondapanoni *v.* Gangarau, 1913 M.W.N. 995 : 14 M. L. T. 495.
10. I. L. R. 44 Mad 605 (F.B.): 41 M. L. J. 129 : 12 L. W. 562 : 29 M. L. T. 386 : 1921 M.W.N. 316.

property but it is open to the purchaser to get specific performance so far as the share of the vendor is concerned on payment of the full consideration agreed upon without any abatement in price.

(*f*) *Calcutta view.*—According to Mitakshara school of Hindu law as applied in Bengal, a coparcener cannot alienate even for value his undivided interest in the coparcenary property without the consent of other coparceners unless the alienor is a father or father's father and the alienation has been affected for necessity and antecedent debt untainted with immorality.[1] Therefore when a member of a joint family purports to transfer coparcenary property specific performance cannot be granted even in respect of his own share and the plaintiff's appropriate remedy is an action for damages.[2] The position, however, is different under the Dayabhaga school. According to this school where one member of joint Hindu family purports to sell not only his own share but those of his coparceners, the vendor is not able to give good title to anything more than his own individual share in the property. If the purchaser desires to have a remedy by way of specific performance, he cannot claim more than the share of the actual contracting member of the joint family and he can only obtain even that share if he is prepared to pay not merely a proportionate part of the purchase price but the whole of the sum originally agreed upon as consideration for the sale of the entire property in question. When the whole contract cannot be performed, specific performance with regard to a small portion of the property on payment of a proportionate part cannot be allowed as it would amount to making a new contract for the parties.[3]

(*g*) *Orissa view.*—In *Hate Pratihari* v. *Alekh Mohapatra*,[4] the law has been summarized by the Division Bench in the following words : "It is very well known that the undivided interest of a coparcener of a joint Mitakshara family under the school to which we belong cannot be the subject-matter of alienation be it for consideration or gratuitous. In view of the settled position the plaintiff in the present suit cannot obtain a decree for specific performance of contract to sell undivided interest of a coparcener." Referring the Full Bench decision of the Madras High Court given in *Baluswami Aiyer* v. *Lakshmana Aiyer*,[5] the Division Bench observed, "the view of the Madras High Court as expressed in the full decision in the case of *Baluswami Aiyer* v. *Lakshmana Aiyer*,[6] is that in Madras in such a case Sec. 15 (old), Specific Relief Act, may apply and the Court may pass a decree in respect of the interest of one or more of the coparceners relying on the position that in Madras the interest of a coparcener is alienable. But the position of law of alienation in respect of his undivided interest of a coparcener in our province is different. The plaintiff cannot place reliance on the provision of Sec. 15 (old)."

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1. Madho Pershad *v.* Mehrban Singh, I. L. R. 18 Cal. 157 (P. C.) : 17 I. A. 194; Sadabart Pershad *v.* Foobash Koer, 3 B. L. R. 31 : 13 W. R. 1 (F. B.); Appovier *v.* Rama Suba, 11 M.I.A. 75; Sham Charan *v.* Kumud Dasi, 42 I. C. 378 : 27 C. L. J. 611.
2. Abul Rahman *v.* Jadunandhan, 21 I.C. 528 : 18 C. L. J. 344, rel. Lumlay *v.* Ravenscroft. (1895) 9 Q. B. 683 : 64 L.J.Q.B. 441 : 14 R. 347 : 72 L. T. 382: 43 W. R. 584 : 59 J. P. 279.
3. Panchananda Kundu *v.* Rajani Kanta Pal, A. I. R. 1931 Cal. 463 at p. 467 : 131 I. C. 849 : 35 C. W. N. 40; Dina Nath *v.* Gouri Nath, 82 I. C. 965 : A. I. R. 1925 Cal. 434; Mahindra *v.* Kailash, I. L. R. 55 Cal. 841 : 109 I.C. 298 : 47 C. L. J. 376 : 32 C. W. N. 439; Gaj Kumar *v.* Lachman Ram, 14 C. L. J. 627; Puran Chandra *v.* Gopendra, 91 I. C. 517 : A. I. R. 1926 Cal. 744; Krishna Chandra *v.* Graham, 27 C. W. N. 693.
4. A.I.R. 1954 Orissa 136 at p. 139.
5. A. I. R. 1921 Mad. 172.
6. *Ibid.*

36. Who is party in default to a contract.—"The party in default" is the party who is "unable to perform the whole of his part of" the contract and not the party by whose default the inability was caused.[1]

37. Vendee's refusal to accept.—Section 15 [now Sec. 12 (3)] was enacted for the benefit of the purchaser and cannot operate to his detriment. It gives the purchaser option and if he declines to accept the offer whereby he has to pay the entire price for a fraction of the property, which is a losing bargain, he cannot be regarded to have "improperly declined to accept delivery of property" within the meaning of Sec. 55, Transfer of Property Act, and the purchaser's lien is not extinguished although he rejects or puts an end to the contract, as in such a case failure of performance is attributable to the vendor.[2]

Section 55, Transfer of Property Act, inapplicable.

38. Pardanashin lady.—Where a contract of sale was entered into with a semi-illiterate *pardanashin* woman and it was found that she had no independent advice in the matter, that the consideration was entirely inadequate and it is also found that the allegation by the vendee that he paid the consideration was false, it was held that the contract could not be specifically enforced.[3] Where a contract to sell was entered into by a widow and her executor in pursuance of a power given to her by her husband's will, but later on the probate was revoked, it was held that if the contract was one which could otherwise be specifically enforced, it could be enforced against the widow's interest in the property provided there was nothing in the plaintiff's conduct to abandonment, waiver or acquiescence and the defendant's position had not been altered by the plaintiff's delay in bringing the suit.[4]

39. Time, whether essence of contract.—In the case of a contract for the sale of land time is not of the essence unless expressly so stipulated at the time of the contract. Failure to keep to the dates assigned will not disentitle a party to a relief unless the delay has been gross.[5] The substance of the agreement should be considered to find whether the time was to be of the essence of the contract.[6] Where under the terms of an agreement to sell the vendor was to submit the title-deeds within certain time and the vendee to give a final reply within another period of time, while the purchase itself was to be completed within a certain time and the delay was caused by the vendor himself, it was held that the time was not of the essence of the contract.[7] But an unexpected delay for one year or even less being gross is sufficient to negative the rights of a party to obtain specific performance.[8] Even where

Ordinarily time is not of the essence of contract relating to immoveable property but gross delay may be fatal.

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1. Venkiteswara Rai Rama Rai *v.* Luis, A. I. R. 1964 Ker. 125 at p. 127 : 1963 Ker. L. J. 986 : 1964 Ker. L. T. 971 : I. L. R. (1963) 2 Ker. 541 ; *see* also Jogesh Chundra Hota *v.* Bibhutibhusan Sahani, A. I. R. 1967 Orissa 95.
2. Sultan Kani Rowthen *v.* Mohammad Meera Rowthen, A. I. R. 1929 Mad. 189 at p. 190.
3. Kidar Nath *v.* Manu Bibi, 13 I. C 879 : 6 C. W. N. 247, relying on Bose *v.* Watson, (1864) 10 H. L. C. 67 ; Whitbread & Co. Ltd. *v.* Watt, (1902) 1 Ch. 835.
4. *Ibid.*
5. Khoodaram Irani *v.* Burjorji Dhanjibhai, I. L. R. 40 Bom. 289 (P. C.) : 43 I. A. 26 : 32 I. C. 246 : 20 C. W. N. 744 : 1 M. W. N. 229 : 14 A. L. J. 225 : 19 M. L. T. 184 : 18 Bom. L. R. 163.
6. Sadiq Hussain *v.* Anup Singh, A. I. R. 1924 Lah. 151 at p. 153: I. L. R. 4 Lah. 327 : 5 Lah. L. J. 462.
7. Krishna Chandra Dey *v.* W. Graham. I. L. R. 50 Cal. 700 : A. I. R. 1923 Cal. 694 : 27 C. W. N. 693.
8. Shankar Sakharam Tagdale *v.* Ratanji Premji, A.I.R. 1923 Bom. 441 at p. 445: I. L. R. 47 Bom. 607 : 25 Bom. L.R. 328.

time is of the essence of the contract and a party has failed to perform his part of the contract, a court of equity may decree specifie performance if justice so demands : but where the parties have expressly provided that the rule was not to apply to them the Court will refuse relief except where they have expressly or by necessary implication waived the previous provisions. An agreement to sell provided that payment be made by instalments, and on default the contract be forfeited and determined at the option of the vendor, time being agreed to be of the essence .of the contract. On default being made the vendor by notice cancelled the contract. On a suit for specific performance by the purchaser it was held that the decree could not be granted for specific performance but the stipulation forfeiture being penal, the vendee should be relieved against it.[1] *See* note to Sec. 22 (now Sec. 20).

40. Contingent contract.—Where parties enter into a contingent contract dependent for its performance on a future event, if the future event provided for becomes impossible, the contract falls through.

Contingent contract falls through where event provided for becomes impossible.

Where the possibility of completing a contract is dependent on the will of a third person, a defendant who has entered into the contract to the performance of which such consent is necessary will not, if such consent cannot be procured, be decreed to obtain it and thus perform an impossibility.[2] A contract to enter into a contract cannot be enforced specifically.[3]

In such a case, specific performance will not be decreed for partial performance of so much of the contract as is possible on abatement of price or even for the full stipulated consideration under Sec. 14 or Sec. 15 of the Act, which corresponds to sub-sections (2) and (3) of the present Act.

41. Sections 14 and 15 [now sub-sections (4) and (5) of Sec. 12] are inapplicable where whole contract cannot legally be performed.—Sections 14 and 15 (old) of the Act refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties. They have no application where the obstacle to the performance of the contract is known to the parties and no provision is made to meet the eventuality.

The defendant agreed to sell his 4 annas share in a village without reservation of occupancy rights to the plaintiff for Rs. 4,500 after obtaining the requisite sanction under Sec. 45 of the Central Provinces Tenancy Act. The defendant applied for sanction as aforesaid, but the sanction to sell with occupancy rights was refused. Plaintiff sued defendant for specific performance of the agreement, or, in the alternative, for conveyance without cultivating rights on abatement of Rs. 1,000. The District Judge refused both the reliefs, the latter, on the ground that the value of the cultivation rights did not bear only a small proportion to the value of the whole property within the meaning of Sec. 14 (old) of the Specific Relief Act. On appeal, the plaintiff offered to submit to a decree for specific performance without occupancy rights on payment of the full consideration of Rs. 4,500, it was

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1. Steedman *v.* Drinkle, 33 I.C. 323 (P.C.): 8 L. J. 79 (P. C.).
2. Sharda Prasad *v.* Sikandar, 34 I. C. 461; Mansingh *v.* Rampiare, 8 Ind. Cas. 481; 6 N. L. R. 185; Rudra Das Chakravarti *v.* Kamakhya Narayan Singh, A. I. R. 1925 Pat. 259 at p. 274.
3. *Ibid.*

held that the contract between the parties could not be enforced for want of sanction and that there was no alternative contract to meet the event of its being refused, and further that no partial performance could be decreed under Secs. 14 or 15 of the Specific Relief Act [sub-sections (2) and (3) of Sec. 12 of the present Act], which did not apply to this contract.[1] But this view is not followed in *Kochuvareed* v. *Mariappa*.[2] According to this case Secs. 14 and 15 [sub-sections (2) and (3) of Sec. 12 of the present Act] apply equally to cases where the parties originally knew that there was likelihood of the impossibility of performance. It is open to the parties to contract out of the provisions of these sections.

42. Scope and application of sub-section (4) (new).—To understand the full significance of sub-section (4) (new) it must be read with the other sub-sections (1), (2) and (3) (new). To make the sub-section applicable it has to be shown that there was a part of the contract which (*a*) taken by itself could and ought to be specifically performed, and (*b*) stood on a separate and independent footing from the other part of the contract which admittedly could not be performed.[3] Before a court can exercise the power given by this sub-section it must have some material before it to establish that there is a part of the contract which taken by itself can and ought to be specially performed and stands on a separate and independent footing from the other part of the contract.[4] The Court cannot apply the sub-section on a mere surmise that if opportunity was given for further enquiry such materials might be forthcoming. The words of the sub-section, wide as they are, do not authorize the Court to take action otherwise than judicially and in particular do not permit it to make for the parties or to enforce upon them, a contract which in substance they have not already made for themselves.[5] When the whole contract is enforced one way or another, as to the greater part by the remedy of the specific performance and as to a small residue by compensation, it is not necessarily making a new contract, to select from among the remedies, which the Court can grant, one for the major and another for the minor part of the contract.[6] For this jurisdiction sub-section (2) (old Sec. 14) specifically provides and sub-section (1) (old Sec. 17) forbids any extension beyond it. Hence sub-section (4) (corresponding to old Sec. 16) both because it must be something not covered by sub-section (2) (old) and because no Court can act unjudicially without either statutory warrant or Sec. 14 (old) consensual authority must be limited and the expression stands on a separate and independent footing, points to the limitation which would exclude any new bargain, that cannot be said to be contained in the old one.[7] Section 16 [new Sec. 12 (4)] does not stand isolated and for understanding its full significance it must be read in conjunction with certain other sections which

1. Sharda Prasad *v.* Sikandar, 34 I. C. 561.
2. A. I. R. 1954 T.-C. 10 at p. 23.
3. William Graham *v.* Krishna Chandra Dey, A. I. R. 1925 P. C. 45 at p. 46; S. K. Buty *v.* Shriram Hari Tamle, A.I.R 1954 Nag. 65 at p. 69.
4. William Graham *v.* Krishna Chandra Dey, A. I. R. 1925 P. C. 45 at p. 46 : I. L. R. 52 Cal. 335 (P. C.) : 52 I. A. 90 : 80 I. C. 232 : 48 M L. J. 172 : 29 C. W. N. 919 : 3 Pat. L. R. 93 : 1925 M. W. N. 138 : 27 Bom. L. R. 704 : 21 L. W 390 : 23 A. L J. 709.
5. William Graham *v.* Krishna Chandra Dey, A. I. R. 1925 P. C. 45 at p 46 : I. L. R. 52 Cal. 335 (P. C.) : 52 I. A. 90 : 80 I. C 232 : 48 M. L. J. 172 : 29 C. W. N. 919 : 3 Pat. L. R. 93 : 1925 M W N. 138 : 27 Bom. L. R. 704 : 21 L. W. 39 : 23 A. L. J. 709 ; Seshayya *v.* Hammayamma, A. I. R. 1927 Mad. 1109 at p. 1110 (conditions of applicablity of Sec. 16,) [Sec. 12 (4), new] indicated).
6. *Ibid.* at p 46.
7. William Graham *v.* Krishna Chandra Dey, A. I. R. 1925 P. C. 45 at p. 46 : I.L.R. 52 Cal. 335 (P. C.) : 52 I. A. 90 : 80 I.C. 232 : 48 M.L. J. 172 : 29 C.W.N. 19 : 3 Pat. L R. 93 : 1925 M.W.N. 138 : 27 Bom. L. R. 704 : 21 L W. 390 : 23 A. L. J. 709.

along with it form a group. As the Judicial Committee point out in *William Graham* v. *Krishna Chandra Dey*[1] :

> "Sections 14 to 17 (now included in new Sec. 12) inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete Code within the terms of which relief of the character in question must be brought, if it is to be granted at all."

Had defendant 1 come to Court instead of the plaintiff, he would have been likewise granted specific performance, that is to say, it would have been open to him, although he was the party in default, to compel the plaintiff, a person not to blame to buy a third of the land - the result being that the Court would be substituting a new bargain and forcing upon the parties a new contract, a thing which the Privy Council has shown ought not to be done.[2]

The Court when called upon to specifically perform part of an agreement the whole of which cannot be specifically performed, is bound to see that the part which cannot be specifically performed is independent of that which it is called upon to perform.[3] In the above-noted case the defendant Fossick entered into an agreement with Ogden by which the defendant agreed to grant a lease of his coal wharf to plaintiff Ogden at a certain rent ; plaintiff in his turn agreed to employ the defendant throughout the tenancy at a salary of £200 a year with commission on the coal sold at the wharf. Ogden filed a suit for specific performance of the agreement to grant the lease which was refused as the Court was unable to execute the whole contract, i.e. the part relating to the employment of the defendant Fossick. The agreement was held to be inseparable and the suit was dismissed.[4]

The law bearing on the grant of specific relief in regard to a part of the contract is enacted in Secs. 14 to 17 (old), Specific Relief Act, which constitute a complete Code in that regard, and relief in that behalf could be granted only within the term of these sections.

If the purchaser wants to exercise his option under Sec. 15 (old) he must be prepared to pay the whole purchase price for getting the conveyance in respect of the remaining land.[5]

A contract for the sale of property in one lot will generally be considered indivisible and the Court will not, as a general rule, compel specific performance of the contract unless it can execute the whole contract.[6]

The sale-deed is a sufficient consideration for the contract for reconveyance and these facts justify the finding that these two deeds formed really part of one and the same transaction. In the Madras Full Bench decision,

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1. 86 I.C. 232 : I.L.R. 52 Cal. 335 (P. C.) : 52 I. A. 90 : A I.R. 1925 P. C. 45.
2. Abdul Aziz Sahib *v.* M. Abdul Sammad Sahib, A. I. R. 1937 Mad. 596 at p. 597 : 45 L. W. 693.
3. Ogden *v.* Fossick, 32 L. J. Ch. 73 : 135 R. R. 228 : 4 De. G. F. & J. 426 ; Kochuvareed *v.* Mariappa, A.I.R. 1954 T. C. 10 at p. 21.
4. *Ibid.*
5. K. Lakshmikantayya *v.* M. Nagayya. A. I. R. 1955 A. P. 188 at pp. 189-90 : 1956 Andh. W. R. 1001.
6. Abdul Rahim *v.* Tufan Gazi, A. I. R. 1928 Cal. 584 at p. 586 : I. L. R. 55 Cal. 1181 : 109 I. C. 284 : 32 C. W. N. 1163; Abdul Haq *v.* Yehia Khan, A. I. R. 1924 Pat. 81 ; Kochuvareed *v.* Mariappa, *supra*.

N. B. Sitaramanrao v. *Venkatarama Reddiar*,[1] Govinda Menon, J., observed at page 268 as follows :

> "A similar case in point is the judgment of the Chief Justice and Rajagopala Ayyangar, J., in *Srinivasalu Naidu* v. *Raju Naicker*,[2] confirming the decision of Viswanatha Sastri, J., in App. No. 287 of 1947 where it was held that a sale followed by an agreement of reconveyance should be treated as one transaction and that consideration for the reconveyance should be the sale-deed itself."

The doctrine of mutuality means that the contract must be mutually enforceable by each party against the other. It does not, however, mean that right for right there must be a corresponding clause. A contract may contain series of clauses and covenants which form the total bargain between the parties and each of them is the consideration for the other. Mutuality in this context does not mean equality and exact arithmetical correspondence. It means each party to the contract must have the freedom to enforce his rights under the contract against the other. On this particular clause the right of the appellant is to get the money when he reconveys. It cannot be said that this provision lacks mutuality because the appellant cannot call for the money. His right under the contract is that if he is asked to reconvey he can insist on his right to the money.

The contract may be of such a nature as to give to the one party a right to the performance which it does not give to the other—as for instance, where a lessor covenants to renew upon the request of his lessee,[3] or where the contract is in the nature of an undertaking.[4] But these are merely cases of conditional contracts ; and when the condition has been performed, as for instance in the case above stated, by a request to renew, the contract becomes absolute and mutual and capable of enforcement alike by either party,[5] and in support of this proposition the authority of the case of *Weeding* v. *Weeding*[6] is quoted where a conditional contract had become absolute by the exercise of an option of purchase.

In *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[7] the proposition is that neither the guardian of a minor nor his manager is competent to bind the minor or his estate by a contract for the purchase of immoveable property. One of the questions before the Privy Council was whether the first plaintiff in that case had the right to enforce specific performance of the contract. The agreement there was made by Mir Sarwarjan and Basanta Kumar Guha, who acted as manager for one Mr. Garth who was himself the manager of the plaintiff's estate. The well-known observation of Lord Macnaghten is as follows :

> "Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was

1. A. I. R. 1956 Mad. 261.
2. A. I. R. 1955 Mad. 635.
3. Chesterman *v.* Mann, (1851) 9 Hare 205.
4. Palmer *v.* Scott, (1830) 1 Russ. & M. 391.
5. *Cf.* Weeding *v.* Weeding, (1861) 1 John. & H. 424.
6. (1861) 1 John. & H. 424.
7. 39 I. A. 1.

not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract. *Dasarath Gayen* v. *Satyanarayan Ghosh*[1] was the case of a major plaintiff suing a major defendant for specific performance. No claim for specific performance for or against a minor is made in this suit. The minor defendants are only *pro forma* defendants in this suit. The contract for reconveyance is between the appellant and the nine other parties of whom some are minors. This particular contract for reconveyance by its very clause expressly says that this right to reconveyance is to be had by either of the parties or anyone of them on paying Rs. 8,000 and other incidental and indispensable costs. If so, the contract for reconveyance is a joint and several contract by each one of the parties. Therefore, as between the appellant who is a major and the first defendant, the suit for specific performance is brought by the major vendor-plaintiff against the first defendant-vendee who is the appellant. To this suit are joined *pro forma* defendants to which some were minors. These *pro forma* defendants were, it seems, parties to the transaction of sale and reconveyance. It is binding contract without any question of minority of anyone. Simply because other minors have certain rights under the contract independently of the first defendant that does not vitiate the contract between the appellant and the first defendant or the major first defendant's claim of a specific performance of the contract against the major appellant."

Section 43 of the Indian Contract Act provides that when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any or more of such joint promisors to perform the whole of the promise. As between the appellant and the first defendant, therefore, the argument based on the minority of others cannot prejudice this claim for specific performance. Even under Sec. 16 (old) of the Specific Relief Act when a part of a contract which, taken by itself, can and ought to be specifically performed stands on a separate and independent footing from another part of the same contract which cannot be specifically performed, the Court may direct specific performance of the former part. Therefore, when the contract is several and not merely joint and when the fact that the other part of the contract which is severable is between persons who are minors, the minority of others cannot be a bar to the claim for specific performance between the major parties.[2]

How far specific performance of the suit agreement could be decreed when it is found that the promisor had no title in regard to a certain agreed item. Section 14 (old) of the Specific Relief Act is based upon the English law on the subject, which has been summed up by the Privy Council in *Rutherford* v. *Acton Adams*[3] :

"If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not by misrepresentation or otherwise, disentitled himself to his remedy."

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1. A.I.R. 1963 Cal. 325.
2. Dasarath Gayen *v.* Satyanarayan Ghosh, A.I.R. 1963 Cal. 325 at pp. 327-28.
3. (1915) A. C. 866 ; A. I. R, 1915 P. C. 113.

But in the present case, one cannot consider the item as amounting to a small and immaterial deficiency in the contract, which will entitle the plaintiff to get a decree for specific performance subject to the payment of compensation to the vendee by equating the amount of compensation to the price of item 2. Section 6 (old) of the Specific Relief Act refers to a part of a contract which, taken by itself, can and ought to be specifically performed and stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed. Specific relief by performance of the agreement could be granted to the plaintiff by conveyance of item 1 provided he pays the full amount of consideration and waives all right to compensation for the deficiency or the loss or damages sustained by him through default of the first defendant.

It has been pointed out in several decisions of courts that the giving of the relief of compensation could be made by the promisor at any stage in the action. In *Kalyanpur Lime Works Ltd.* v. *State of Bihar*,[1] the Supreme Court had observed that relinquishment of the claim to further performance can be made at any stage of the litigation and the plaintiff can claim relief under Sec. 15 (old) of the Specific Relief Act. This has been followed by the Calcutta High Court in *Dwijendra Kumar* v. *Manmohan De*,[2] where it observed that the relinquishment can be made even in second appeal. In *Promothonath Mitra* v. *Gostha Bihari Sen*,[3] it was held by the Privy Council that the specific performance of a part could not be granted where the plaintiff had not relinquished all other claims as required by Sec 15 (old) of the Specific Relief Act. But the Privy Council did not consider the question about the stage at which the promisee could relinquish his claim. The law permits the plaintiff to relinquish his claim to compensation at any stage of the action, even at the stage of the second appeal. Any possible appreciation of the price in the interval, that has elapsed between the date of the plaint and the date of the application, will not be an adequate ground for refusing specific performance after permitting the plaintiff to relinquish a portion of the property on which the promisor had no title to sell.[4]

43. Contract for sale of property in one lot is indivisible.—Where the vendor sells two or more estates or lots at one time and for one sum, the contract is entire, unless there should be some express clause making it separable and the failure of the title to one of the estates is complete bar to the vendors enforcing a performance upon the purchaser as to others to which the title is good. The reason for this rule is that the Court will not and indeed cannot make an apportionment of the whole price among the lot and determine what amounts shall be charged to those whose title is good and what to those of which the title has failed so as to bind an unwilling purchaser.[5] Now in a suit for specific performance of a contract the principle on which the Court will proceed is that a contract for the sale of property in one lot will generally be considered indivisible, and the Court will not, as a general

Contract for the sale of property.

1. (1954) 1 M. L. J. 305 : A. I. R. 1954 S. C. 165.
2. A.I.R. 1957 Cal. 209.
3. I. L. R. 59 Cal. 1025 : A. I. R. 1932 P. C. 43.
4. A.L. Parthasarthi Mudaliar *v* Venkata Kondiah Chettiar, A. I. R. 1963 Mad. 105 at pp. 108-9.
5. William Graham *v.* Krisbna Chandra Dev, I.L.R. 52 Cal. 335 (P. C.) : 52 I.A. 90 : 86 I. C. 232 : 48 M. L. J. 172 : 29 C. W. N. 919 : 3 Pat. L. R. 93 : 1925 M.W. N. 138 : 27 Bom. L. R. 704 : 21 L. W 390 : 23 A. L. J. 709.

rule, compel specific performance of the contract, unless it can execute the whole contract. Or as Lord Romilly, M. R., expressed it :

> "This Co rt cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all "[1]

It is true tha· there are exceptions to this rule which may be justly made in view of the circumstances of any particular case. Even in cases where the contract is plain and certain in its terms and obligatory on both parties, the right to specific execution is not absolute and its enforcement must rest on the sound discretion of the Court, a judicial discretion, to be exercised according to the established principle of equity.[2] The first defendant agreed to sell to the plaintiff a plot of land which had originally belonged to his wife and which on her death devolved upon himself and his children, his share being one-third. Out of the agreed consideration of Rs. 825, the plaintiff paid the first defendant Rs. 250 as advance. The first defendant afterwards repudiated the contract, and it also appeared that two of his sons who had become major were unwilling to perform it. The first defendant sold the entire land to the second defendant. The plaintiff sued for specific performance. The Lower Appellate Court granted him a decree for specific performance in respect of the first defendant's one-third share alone, as he could not be compelled to specifically perform the contract as regards two-thirds of the property which was his children's share. It was held that the contract was not divisible into parts, and in the language of the present section, the Court could n·t import a contract affecting a third share standing on a separate and independent footing from another supposed contract relating to the remaining two-thirds and the plaintiff was consequently not entitled to a decree for a third share on payment of a third of the agreed price but was entitled to a decree for return of the sum of Rs. 250 paid as advance with interest at 12 per cent. thereon.[3] On the other hand, if several distinct estates are sold for separate and distinct prices, a separate price to each lot, although sold at the same time, and much more, if sold at different times, the contract is a clear intention from its language, that it is to be entire ; and the failure of the vendor's title to one or more of the lots or estates does not prevent him from compelling a specific performance in respect of the others to which his title is good. The difficulty in the former case does not exist in this for the parties have themselves made an apportionment of the price. Thus where lots are sold either one after another, or at the same time for separate and distinct sums, the contract in respect of its spe·ific performance *prima facie* divisible as to each lot, that is, the sale of each lot constitutes a separate contract and a failure of title to one or more will not be an obstacle to an enforcement at the suit of the vendor as to the remainder.[4] Where the defendant agreed to convey six of the well sites received for 1902 and three of the well sites to be received for 1903 and in pursuance of that agreement the defendant conveyed to plaintiff six specified well sites of those issued in 1902 but failed to convey three of those received for the year 1903, it was held that agreement could be specifically enforced to the extent of the number of sites the defendant could convey up to the agreed number.[5] Where one item of land which

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1. Merchants Trading Co. *v.* Banner, (1871) 12 Eq. 18 : 40 L. J. Ch. 515 : 19 W. R. 707 : 24 L. T. 861.
2. Abdul Rahim *v.* Tufan Gazi, A. I. R. 928 Cal. 584 at p. 586 : I.L.R. 55 Cal. 1181.
3. Abdul Aziz *v.* Abdul Sammad, A I. R. 1937 Mad. 596 at p. 596 : 171 I. C. 30 : 45 M L.W. 693.
4. Pomeroy, *Sp. Com.*, Sec. 351 ; *see* also Stoddart *v.* Smith, 5 Binny 355 (American case).
5. Maung Mo Haung *v.* Ma Shwe, A.I R. 1921 U. Bur. 16.

bears separate *khata* and assessment is agreed to be sold along with certain other items by the owner and it appears that although its price had not been fixed there are materials for doing so, the contract is divisible and may be enforced in part.[1]

In this connexion, *see* the undermentioned case.[2]

44. art of contract which is not illegal may be enforced, if legal and illegal parts are separable.—If any part of a contract is invalid, being forbidden by law, but the other part is valid not being prohibited by any provision of law, the entire contract is not void and may be enforced *pro tanto*.[3] But if a particular proceeding though not itself illegal is inseparably connected with another which is so, in such a manner that both form parcels of one transaction, e.g. of the trading adventure, such transaction is illegal in its entirety and cannot be partially enforced.[4]

45. Abatement of price.—Under Sec. 14 (old), performance of a contract may be enforced by either promisor or promisee provided—

(1) the part which cannot be performed—

(*a*) bears only a small proportion to the whole in value, and

(*b*) admits of compensation in money ; and

(2) that such compensation is made.

Under Sec. 15 [now Sec. 12 (3)], the party in default cannot claim specific performance with or without compensation, where the part left unperformed is considerable portion of the whole or does not admit of compensation in money. But the party not in default, however, may have specific performance of part of the contract which can be performed provided that he relinquishes all claim to further performance and all rights to compensation. Under Sec. 16 [now Sec. 12 (4)] where a contract consists of several parts, which are separate and independent of one another, and some of which cannot or ought not to be specifically performed, such part or parts as can and ought to be performed, may alone be specifically enforced. This section does not speak of any compensation but as held in *Krishna Chandra Dey* v. *Graham*,[5] the scope of the section cannot be restricted so as to exclude abatement of price. Therefore, where a part of a contract stands on a separate and independent footing from another part of the same contract, which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part subject to the payment of an abatement of price after giving due allowance for the price of the portion left unperformed.

46. Illustrative cases.—(1) This appeal has arisen in connexion with a suit for specific performance of a contract. Defendant 1, who is the appellant, executed Ex. 2 in favour of the plaintiff by which he contracted to sell a certain plot of land. Rupees 49 was paid by the plaintiff as earnest money, the price being fixed at Rs. 900. This was on the 27th *Agrahayan* 1341; two days later, the appellant sold part of the plot to defendant 2 for Rs. 600.

1. Shanbhogue *v.* Rameingar, 5 Mys. L. J. 221.
2. Smith *v.* MacGowen, (1938) W. N. 265 : 159 L.T. 278 : (1938) 2 All E. R. 447 (claim for specific performance of one indivisible agreement agreed to be purchased at one indivisible price of separate lots purchased in auction for separate prices, *see* Sec. 40, Law of Property Act).
3. Stewart *v.* Gibson, 7 Cl. & Fur. 729.
4. *Ibid.*
5. I. L. R. 50 Cal. 700 at p. 716.

Both the courts below found that defendant 2 was a *bona fide* purchaser for value without notice of the contract between defendant 1 and the plaintiff. The Munsif gave the plaintiff a decree for a refund of the earnest money which he had paid. On appeal by the plaintiff, the Subordinate Judge passed a decree directing defendant 1 to convey the remainder of the property to the plaintiff for Rs. 450 *minus* Rs. 49 which had already been paid as earnest money. Defendant 1 has now appealed to this Court on the ground that Sec. 16 (old), Specific Relief Act, has no application to the facts of the case.

There is nothing in the contract Ex 2 to suggest that part of it stands on a separate and independent footing from another part. It is merely an agreement to sell a plot of land for a certain sum of money. There is no more reason for regarding that contract as two separate contracts to sell two portions of the plot than there is for regarding it as a hundred separate contracts each for selling a hundredth part of the plot. That being the case, it is very difficult to see how Sec. 16 (old), Specific Relief Act, can have any application It was however argued on behalf of the respondent that the effect of the sale of a part of the plot to defendant 2 is to make the original contract into two separate divisible contracts. But supposing this contention were accepted, the very difficulty that was pointed out by their Lordships of the Judicial Committee in *Graham* v. *Krishna Chandra Dey*,[1] would arise. The agreement made by the appellant was that the whole plot of land would be sold for Rs. 900. There is absolutely no evidence to support a finding that the portion sold to defendant 2 and balance are of equal value. Indeed the reluctance of the appellant to accept the decree made in the Lower Court strongly suggests that they are not. In that view of the case it is quite impossible to support the decree for specific performance of a part only of the contract.[2]

(2) *All the assignees must jointly sue for specific performance.*—The assignee of only a portion of land originally demised cannot sue without the other assignees joining him for specific performance.[3]

Where there is a single contract for the sale of immoveable property by the owner thereof to several persons, specific performance cannot be decreed against the vendor at the suit only of some of those persons, if the other refuse to join them in claiming performance. The present section does not apply to such a case.[4]

(3) *Legal parts of a registered contract with wife for maintenance, etc. may be enforced.*—A Mohammedan entered into an agreement with his wife, stipulating among other things to maintain her, treat her kindly, not to remarry and to hand over the earnings to her. It was held that though some of the points were opposed to public policy and therefore void, the agreement being registered was not bad for want of consideration and that the legal parts could be enforced.[5]

(4) *Contract for sale of property in one lot.*—A contract for sale of property in one lot will generally be considered indivisible for the reason that there is

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1. 86 I. C. 232 : 52 I.A. 90 : I. L R. 52 Cal. 335 (P. C.).
2. Kuraun Hajra *v.* Gokul Chand Brajbashi, A.I.R. 1938 Cal. 234 at pp. 234-35 : 66 C.L.J. 1.
3. Secretary of State *v.* Volkart Bros., I.L R. 51 Mad. 885 (P.C.): 111 I.C. 404: 55 I.A. 423 : 33 C W.N. 33 : 55 M. L. J. 646 : 1928 M.W.N. 754 : 28 L.W. 803 : 26 A. L. J. 1929 : 48 C L. J. 431 : 30 Bom. L. R. 1578.
4. Safiur Rahman *v.* Mahramunnissa Bibi, I.L.R. 24 Cal. 832.
5. Ponoo *v.* Fyez, 15 B.L.R. (App.) 5.

obvious injustice in compelling the purchaser of the entirety to take undivided parts or shares of the estate.[1]

(5) *Sale of house by one joint owner.*—The plaintiff sued for specific performance of a contract by defendant No. 1 to sell a house to him for Rs. 1,300. It was found that the house was jointly owned by defendant No. 1 and his wife defendant No. 2 and that the defendant No. 1 had no authority to sell on behalf of his wife. The plaintiff refused to take advantage of his privilege under Sec. 15 [now Sec. 12 (3)] and the question for determination was whether plaintiff could avail himself of Sec. 16 [now Sec. 12 (4)]. The answer was returned in the negative and the suit was dismissed.[2]

(6) *Parties stipulating piecemeal performance of a part may be allowed.*—Where the parties themselves stipulate piecemeal performance, specific performance of part will be allowed Thus in a building contract where the landowner agreed to grant separate leases of separate plots to the lessee on his building to the satisfaction of the owner certain houses on each plot, it was held that the lessee or his assignee was competent to claim leases of the plots on which the house had been built, though the builder had not built the houses on other plots.[3]

(7) *Property consisting of parts of several descriptions.*—Where the property, the subject-matter of sale, consists of parts of several descriptions, e. g. a ship and its freight, the case is within the ambit of the section.[4]

(8) Where goods are sold in separate lots, Sec. 16 [now Sec. 12 (4) will apply.[5]

(9) *Right to lease and right to purchase are divisible parts of a contract.*—A vendor agreed to grant lease of a plot of land to the plaintiff on his building a house to be insured in their joint names. Another stipulation was that the plaintiff was to have a right to purchase the property within two years. The plaintiff insured the house in the wrong office. It was held that by his conduct the plaintiff was deprived of his right to the specific performance as regards lease but he could purchase the property.[6]

(10) Where *A* and *B* enter into a mutual contract for sale and purchase of their estates and there is mixed case of enjoyment of estates, e.g. where one of the parties has an easement over the property of the other, the contract is indivisible.[7]

(11) *Where pronotes are executed for whole debt, plaintiff can recover only in respect of legal debts.*—The defendant owed to the plaintiff various debts, some legal, others illegal. The defendant gave a house as security. On plaintiff's going to put it to auction, the defendant entreated him to desist and in consideration for this the defendant executed pronotes of the whole debt. It was held that the pronotes were illegal, so far as they covered illegal claims and legal so far as they covered the others and the plaintiff could legally recover those that were legal.[8]

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1. Abdul Haq *v.* Yahia Khan, A I.R. 1924 Pat. 81 at p. 82.
2. K. Seshaya *v.* V. Hammayamma, A.I.R. 1927 Mad. 1103 at p. 1110 : 104 I. C. 192.
3. Wilkinson *v.* Clements, (1872) L. R. 8 Ch. 96 : 2 L. J. Ch. 38.
4. Mestaer *v.* Gallaspre, 11 Ves. 621.
5. James *v.* Shore, 1 Stark 426
6. Green *v.* Low, (1856) 22 Beav. 625.
7. Croone *v.* Lediard, 12 My. & K. 251 : 39 R. R. 195.
8. Joseph *v.* Solano, 9 B. L. R (O. C.) 441.

(12) *Property jointly owned by Hindu co-sharers does not consist of separate parts.*—A contract, which purports to be a contract for the sale of joint Hindu property, it is not possible to say that the shares of the various co-sharers in that property can probably be said to form separate parts of the property in the sense contemplated in Sec. 16 [now Sec. 12 (4)], Specific Relief Act.[1]

Where one member of a joint Hindu family purports to sell not only his own share but those of his coparceners and the vendor is not able to give a good title to anything more than his own individual share in the property ; if the purchaser desires to have a remedy by way of specific performance he cannot claim more than the share of the actual contraction member of the joint family and he can only obtain even that share by being prepared to pay not merely a proportionate part of the purchase price but whole of the sum originally agreed upon as the consideration for the sale of the entire property in question. In that view of the matter Sec. 15 [now Sec. 12 (3)], Specific Relief Act, applies.[2]

The law in India with regard to specific performance of contracts is in many respects quite different from the law in England. The law in this country is contained within the four corners of certain sections of the Specific Relief Act, 1877, namely Secs. 14 to 17 inclusive. Sections 14 to 17 inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete Code within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the section must ultimately prevail.

Section 17 (old) prescribes that there shall be no grant of specific performance except in cases coming within one or other of the three previous sections. It was not proved that the part of the contract which was left unperformed bore only a small proportion in value to the whole within Sec. 14 (old) and the purchaser had declined to accept relief on the terms of Sec. 15 (old). Accordingly Sec. 16 (old) (which appears to be novel in the width of the power which it confers) afforded the only ground on which the Court could help him. To make this section applicable it had to be shown that there was a part of the contract, to wit, that relating to plot *A* which (*a*) taken by itself could and ought to be specifically performed and (*b*) stood on a separate and independent footing from the other part of the contract, which admittedly could not be performed.

It is quite clear that Secs. 14, 15 and 16 (old) deal with three sets of circumstances. Section 14 (old) deals with the case where a party to a contract is unable to perform the whole of this part of it, but the part which must be left unperformed bears only a small proportion to the whole in value; Sec. 15 (old) deals with a case where the part which must be left unperformed forms a considerable portion of the whole and Sec. 16 (old) deals with a case where part of the contract can clearly be severed from the rest of the contract. In the present case the circumstances are such that beyond all question the matter does not fall within the purview of Sec. 14 (old). The matter also does not fall within the purview of Sec. 16 (old). Therefore it is a matter beyond all argument that this is one of the class of cases which fall

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1. Panchananda Kundu *v.* Rajani Kanta Pal, A. I. R. 1931 Mad. 463 at p. 465 : 5 C. W. N. 40.
2. *Ibid.* at p. 467.

within the intermediate section, that is to say, within Sec. 15 (old). One has only to consider the salient features of the contract to see that the matter was so. Defendant 1 has only one-third share in the property and he is in a position to sell that one-third share and no more. Therefore that part which must be left unperformed forms a considerable portion of the whole. Where that is so the Indian Legislature in enacting Sec. 15 (old), Specific Relief Act, unlike the English law, has not recognized the right to a proportionate abatement of the purchase-money.

This section agrees with English law in allowing a purchaser to enforce specific performance at his option under the named conditions, although the vendor cannot claim it. But the Indian enactment clearly excludes, in such cases, any claim of the purchaser to compensation, thus making a considerable and (it must be presumed) deliberate departure from English authority.

In the case of *Baluswami Aiyar* v. *Lakshmana Aiyar*,[1] Kumaraswami Sastri, J., put the matter thus :

> "The English decisions on the subject of specific performance where a party is only entitled to a share are not uniform and the latter part of Sec. 15, Specific Relief Act, is a clear departure from English rule as to abatement or compensation when specific performance of part of a contract is decreed."[2]

(13) A ship-builder contracted to alter a ship and it was agreed that in default of performance by him the owner might enter and make the alterations. The inability to compel the ship-builder to alter the ship was held to be a sufficient reason for refusing to order specific performance of the covenant that the owners might, in default by the ship-builder, re-enter and make the alterations themselves.[3]

(14) *Plaintiff must be willing and ready to perform his part of the contract but if the Court cannot enforce it the plaintiff has no remedy.*—"The Court does not give relief to a plaintiff, although he be otherwise entitled to it, unless he will, on his part, do all that the defendant may be entitled to ask from him, and if that which the defendant is entitled to, be something which the Court cannot give him, it certainly has been the generally understood rule that that is a case in which the Court will not interfere."[4]

(15) Specific performance has been refused of an agreement to grant a lease, where the terms included the maintenance of a railway by the lessee on the land demised,[5] and of a covenant in a lease to appoint a servant to perform specified duties for the benefit of the occupiers,[6] these being such undertakings as the Court could not superintend.

(16) *Specific performance of contract to sell several plots of land.*—If at an auction a person buys several plots of land, the inability of the vendor to make out good title to one plot will not prevent him from enforcing specific performance of the other plots. The contract in such a case will be treated

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1. A. I. R. 1921 Mad. 172 : 63 I. C. 374 : I.L.R. 44 Mad. 605.
2. Panchananda Kundu *v.* Rajani Kanta Pal, A. I. R. 1931 Cal. 463 at p. 457 : 5 C. W N. 40.
3. Merchants Trading Co. *v.* Banner, (1871) L. R. 12 Eq. 18.
4. Warring *v.* Manchester, Sheffield and Lincolnshire Ry. Co , 7 Hare 492.
5. Blackett *v.* Bates, (1865) L. R. 1 Ch. 117.
6. Ryan *v.* Westminster Chambers Association, (1893) 1 Ch. 116.

as divisible and the inability to order performance of one or more plots will not prevent the Court from enforcing the rest.[1] But if all the plots were purchased for single price or if the parties themselves treated the contract one and entire, specific performance of one part alone will not be enforced.[2] Again, there may be facts within the knowledge of both parties establishing such a connexion in use and enjoyment between the two separate lots as to show that the purchaser bought them for a single purpose and would not have taken the one, had he not reckoned upon also having the other. In such a case the failure of the seller to convey one lot will be a ground for the buyer to claim to be released from his contract as to the other.[3] But the mere fact that one lot is contiguous to another or that a particular purchaser in his own mind resolves to purchase two because he thinks he can conveniently occupy them together is not sufficient to complicate them in the matter of use as stated above.[4] If, however, the Court is satisfied that apart from the misrepresentation the particular purchaser could not have bought either lot, it will refuse the vendor specific performance as to the first lot.[5]

Where the vendor sells two or more estates or lots at one time and for one sum, the contract is entire, unless there should be some express clause making it separable, and the failure of title to one of the estates or lots is a complete bar to the vendor's enforcing a performance upon the purchaser as to others to which the title is good. The reason is that the Court will not and indeed cannot make an apportionment of the whole price among the lots and determine what amounts shall be charged to those whose title is good and what to those of which the title has failed so as to bind an unwilling purchaser.[6]

(17) *Where one of considerations is illegal entire contract is void.*—If a contract has several considerations and one of them is illegal, the entire agreement is void.[7] But where the consideration is not illegal but some of the objects are illegal, then illegality does not taint the others, if these parts cannot be treated inseparable.[8]

(18) *Impracticable part already performed the other may be enforced.*—Where a contract is made up of two parts, and the impracticable part has already been performed, the specific performance of the other will be allowed.[9]

(19) Where a person entering a stall purchased various things at different prices the contract was held as indivisible.[10] The mere fact that different prices have been fixed for different parts of the subject-matter of the contract will not necessarily make it divisible.[11]

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1. Lewin *v.* Guest, (1826) 1 Russ. 325.
2. Dalbey *v.* Pullen, 3 Sim. 29 ; Dykes *v.* Blake, 4 Bing. N. C. 463.
3. Gasamajir *v.* Strode, (1834) 2 My. & K. 706 : 39 R. R. R 339 ; Holliday *v.* Lockwood, L. R. (1917) 2 Ch. 47.
4. *See* Holliday *v.* Lockwood, *supra*.
5. *Ibid.*
6. William Graham *v.* Krishna Chandra Dey, I.L.R. 52 Cal. 350 (P. C) : 52 I. A. 90 : 86 I. C. 232 : A. I. R. 1925 P. C. 45 : 48 M. L. J. 172 : 29 C. W. N. 919: 3 Pat. L. R. 93 : 1925 M. W. N. 138 : 27 Bom. L. R. 704 : 21 L. W. 390 : 23 A. L. J. 709.
7. Waite *v.* Jones, 1 Scott 730 ; Sheckell *v.* Rozier, 3 Scott 59.
8. Sheckell *v.* Rozier, *supra*; *see* also Ponno *v.* Fyez, 15 B. L. R. App. 5, where legal parts of a registered contract by a Mohammedan with his wife, stipulating among other things to maintain her, treat her kindly, not to marry and to hand over the earnings to her, were enforced although some of the points were opposed to public policy and therefore void.
9. Hope *v.* Hope, 22 Beav. 351.
10. Baldey *v.* Parker, 2 B. & C, 37.
11. *Ibid.*

(20) Where different prices were fixed for land and timber and the vendor could not make out the title to all the timber on account of the copy-hold tenure of a part of the land, it was held that the contract was one as the vendor had agreed to copy-hold tenure of the land.[1]

(21) Where the contract contains positive terms which are not proper subjects of specific performance and contains either expressly or by implication stipulations a breach of which can be properly prevented by injunction, the case falls under the present section.[2]

(22) *Court will not enforce a contract containing a clause about exchange of land to be determined by arbitrators.*—The plaintiff and the defendant being two neighbouring landholders whose lands were from time to time damaged by the overflow of the stream separating the two estates, entered into a contract to change the course of that stream in a way beneficial to both parties. One of the conditions of the agreement was that if there would be any damage to the estate of the defendant by reason of the erection of the dam, which was agreed to be erected, the plaintiff would give an equivalent in land to the defendant by way of compensation, the quantity of land to be determined by the arbitrators. On the defendant's failure to fulfil his part of the agreement, plaintiff sued for specific performance. The Court refused specific performance as it could not execute the whole contract, holding that the clause about the exchange of land as determined by the arbitrators was something which the Court could not carry out *in praesenti*.[3]

(23) A contract for sale of shares with cultivating rights in *sir* land cannot be specifically enforced in the Central Provinces (now Madhya Pradesh).[4]

(24) Section 29, Bengal Tenancy Act (VIII of 1885), makes an agreement for an enhancement of rent of an occupancy tenant by more than two annas (twelve paise) per rupee wholly void. Therefore no part of such an agreement can be rejected in order to validate the agreement and decree so much of enhancement as is lawful.[5]

(25) *Whether contract for sale of some portion of property can be enforced.*—When some persons combine to sell property which some of them own in part with other persons individually, the vendee can claim enforcement of the contract as against some portions of the property only, if the portions claimed can reasonably be enjoyed independently of the remainder.[6]

(26) *Where minor defendant not properly represented, the suit is liable to dimissal as against the other defendants also.*—Where in a suit to enforce a right of pre-emption on the basis of a contract it is found that one of the defendants who is a minor is not properly represented in the suit, it must be held that the plaintiffs have by their conduct made it impossible for the Court to give effect to the contract in its entirety and the suit is liable to dismissal as against other defendants also.[7]

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1. Crosse *v.* Lawrence, 9 Hare 262.
2. Lumley *v.* Wagner, 1 De G. M. G. 604 and Sec. 75.
3. Grovais *v.* Edwards, (1842) 2 Dr. & War. 80.
4. Ram Singh *v.* Rampiare, 8 I. C. 1184 : 6 N. R. 185.
5. Kristodhone *v.* Brojo, I. L. R. 24 Cal. 895.
6. Subramania Aiyar *v.* Kalyanasundram Aivar, 53 I. C. 283.
7. Abdul Rahim *v.* Tufan Gazi, I. L. R. 55 Cal. 1181 : 109 I. C. 284 : 32 C. W. N. 1163.

(27) See *Abdul Aziz* v. *Abdul Sammad*[1] under the heading "Scope and application".

47. "Can and ought."—The word "can" implies that it should be possible for the contract to be enforced physically as well as legally. In order to attract the application of sub-section (4) (now Sec. 16), the part which is sought to be enforced must be capable of performance physically and must not be illegal. But that is not enough ; it must also be such as the Court should enforce in the exercise of its discretion.

48. Distinction between sub-section (4) and sub-sections (2) and (3).—The only consideration under sub sections (2) and (3) of this section (old Secs. 14 and 15), is whether or not a contract is capable of perform. ance physically. Under sub section (4) (old Sec. 16) it is not only the ques. tion of physical possibility that is germane to the enquiry but of legality also. Not only that as stated above, the Court has to consider the question whether or not it would be advisable to allow specific performance in the exercise of its discretion.

49. Explanation.—It lays down that a contract as a whole is not capable of performance because a portion of its subject-matter existing at its date has ceased to exist at the time of its performance.

New	Old
13. Rights of purchaser or lessee against person with no title or imperfect title.—(1) Where a person contracts to sell or let certain immoveable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely :	**18. Purchaser's rights against vendor with imperfect title.**—Where a person contracts to sell or let certain property having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights :
(*a*) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest ;	(*a*) if the vendor or lessor has subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

1. 171 I. C. 30 : 45 L. W. 693 : I. L. R. 10 Mad. 299.

New

(*b*) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance ;

(*c*) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee ;

(*d*) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

Old

(*b*) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence ;

(*c*) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money, and the vendor has, in fact, only a right to redeem it, the purchaser may compel him to redeem the mortgage, and to obtain a conveyance from the mortgagee ;

(*d*) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

New

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of moveable property.

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1. Legislative changes.—The section corresponds to the old Sec. 18 of the repealed Specific Relief Act, 1877. The sectional heading of the old section has been substituted. The words "Rights of purchaser or lessee against person with no title or imperfect title" have replaced the words "Purchaser's rights against vendors with imperfect title" occurring in the sectional heading of the repealed Sec. 18. In the enacted provisions of the new Sec. 13 (1) the word "immoveable" has been inserted after the word "property", the words "no title or" have been inserted after the words "imperfect title". The words "except as otherwise provided by this Chapter" have been replaced by the words "subject to the other provisions of this Chapter namely". In sub-clause (*a*) of sub-section (1) of this section the words "the contract" have been substituted for the words "the sale or lease". In sub-clause (*b*) of this section the words "for validating" have replaced the words "to validate". The words "and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title" have been added after the words "the title" before the words "and they are bound to convey". For the words "at vendor's or lessor's request" the words "at the request of the vendor or lessor" have been substituted and the word "conveyance" has replaced the word "concurrence". In sub-clause (*c*) of the new section the words "and to obtain a valid discharge and where necessary, also a conveyance from the mortgagee" have replaced the words "and to obtain a conveyance from the mortgagee" occurring in the sub-section (*c*) of the old Sec. 18 of the repealed Act. In sub clause (*d*) of the sub-section (1) of the new Sec. 13, the words "want of title or" have been added before the words "imperfect title" and for the words "agreed to be sold or let", the words "which is the subject-matter of the contract" have been substituted.

Sub-section (2) of the new Sec. 13 has been newly inserted. It provides that the provisions of sub-section (1) of this section shall govern the cases of moveable property, which forms the subject of contract for its sale or hire.

2. Reasons for the amendment.—The present Sec. 13 has been recast and enacted on the basis of the recommendations and suggestions made by the Law Commission of India in their report on the provisions of the repealed Specific Relief Act, 1877. In their new report on the Specific Relief Act, 1877, they say at pages 11 to 16 of the Law Commission Report :

> "There is some uncertainty as to whether Sec. 18 (old) covers the case of an absence of title as distinguished from that of an imperfect title. The section mentions only 'imperfect title.' But according to a Nagpur decision,[1] the wording of Cl. (*a*) of Sec. 18 (old) whereby the vendee can compel the vendor to make good the contract out of 'any interest in the property subsequently acquired by the vendor, indicates that an imperfect title would include even complete absence of title'.
>
> "The English law, as stated in *Holroyd* v. *Marshall*,[2] is that—
>
> '.....if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.'
>
> "A defendant cannot he permitted to say that he did not mean to acquire that interest.[3] Accordingly, it would be advisable to make the position clear by including in Sec. 18 (new Sec. 13) the case of a total absence of title.
>
> "The applicability of Secs. 14 to 16 [now Sec. 12 (2), (3) and (4)] in a case falling under Sec. 18(*a*) [now Sec. 13 (1)] came up for the consideration of the Supreme Court in *Kalyanpur Lime Works Ltd.* v. *State of Bihar*.[4] In that case the facts,[5] in short, were that *A* agreed to grant a lease to *B* for a period of 20 years commencing from specified date. At that time *A* had no title to grant the lease, but subsequently, *A* acquired title at a time when only six years were left out of the 20-year period of the lease agreed to be given to *B*. *B* brought a suit for specific performance claiming a lease for a period of 20 years from the date when *A* acquired title to grant the lease. It was contended[6] on behalf of *B* (plaintiff) that he was entitled to specific performance of the original contract and that the Court was competent to reconstruct the contract in the context of the changed circumstances in order to give him the relief to which he was entitled under the original contract. The Patna High Court[7] held that Sec. 18 (*a*) [now Sec. 13 (*a*)] gave no power to Court to reconstruct the contract, but that the Court could enforce the contract only to the extent that it was possible in the changed circumstances, if the plaintiff so desired, and that the plaintiff might get a decree for the remaining six years of his term under the original contract, provided he complied with the provisions of Sec. 15 [now Sec. 12 (3)]. These two propositions of law were accepted by the Supreme Court.[8] It is, therefore, advisable to make it clear that Secs. 14 [now Sec. 12 (2)] to 16 [now Sec. 12 (4)] apply also to cases covered by Sec. 18 (old).

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1. Pundlik v. Jainarayan, A. I. R. 1949 Nag. 83.
2. 10 H. L. C. 191 at p, 211.
3. Fry, *Specific Performance*, 6th Ed., p. 464.
4. (1954) S. C. R. 958.
5. *See* Dalmia Jain & Co. Ltd. v. K. L. Works, A I. R. 1952 Pat. 393.
6. *Ibid.*, pp. 400, 401.
7. *Ibid.*
8. Kalyanpur Lime Works Ltd. v. State of Bihar, (1954) S. C. R. 958.

"In *Dalmia Jain & Co.* v. *K. L. Works*,[1] there was a controversy whether Sec. 18 (*a*) [now Sec. 13 (*a*)] of the Specific Relief Act applied to executory contracts at all. Das, J., accepted the contention of the appellants that both Sec. 18(*a*) [now Sec. 13(*a*)] of the Specific Relief Act and Sec. 43 of the Transfer of Property Act related to the same subject-matter, viz., executed contracts and observed :

> 'I am of the view that the words used in Cl. (*a*) of Sec. 18 [now Sec. 13 (*a*)] such as "sale or lease" are only "apt and appropriate to executed contracts".'

"It is, however, to be noted that the opening words of Sec. 18 [now Sec. 13] refer to 'contracts to sell or let' and the word 'contract' is also mentioned in the latter portion of Cl. (*a*) itself. It is obvious that Sec. 18 (*a*) [now Sec. 13 (*a*)] refers to contracts to sell or lease, i.e. executory contracts, whlie Sec. 43 of the Transfer of Property Act applies to executed contracts. Otherwise, it is difficult to distinguish between the two provisions. The distinction is thus brought out by Mulla[2] :

> 'Section 43 follows the equitable rule in that until the option is exercised, it treats the transferee as the beneficiary of a trust..... But it departs from the equitable rule in that it does not require the transfer to be effected by a further conveyance.....If the transferee were enforcing the contract under Sec. 18 (*a*) [now Sec. 13 (*a*)] of the Specific Relief Act, the transferor would be required to execute a further conveyance. But under Sec. 43 the exercise of the option or the mere requisition of the transferee is sufficient to bring the subsequent interest within the scope of the original transfer.'

"The words 'sale or lease', as observed by Das, J.,[3] do appear to be apt or appropriate to executed contracts only. We recommend that these words be substituted by the word 'contract', which refer to the 'contract to sell or let' mentioned in the opening sentence of Sec. 18.

"Clause (*b*) of Sec. 18 [now Sec. 13] refers to cases like contracts for the assignmens of leasehold interest where the lessor's consent is necessary for the same. As was observed in *Bain* v. *Fothergil*[4] :

> 'Whenever it is a matter of conveyancing and not a matter of title it is the duty of the vendor to do everything that he is able to do by force of his own interest and also by force of the interest of others whom he can compel to concur in the conveyance.'

"But equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to require.[5] The requirement of concurrence seems to be the essence of the clause but there are cases where concurrence alone may not be enough and if a conveyance by another person, who is bound to convey at the vendor's request, is required, there is no reason why the vendor should not be compelled to get the conveyance from that person by a resort to legal proceedings, if it cannot be had amicably. Suitable changes have been suggested in Cl. (*b*) [now Sec. 13 (1) (*b*)] to make this clear.

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1. A.I.R. 1952 Pat. 392 at p. 409 ; *see* also Reuben, J., at pp. 404-5, who observes that "the words 'sale or lease' appear to be used in contrast to the word 'contract'."
2. *Transfer of Property Act*, 4th Ed., p. 196.
3. Dalmia Jain & Co. v. K. L. Works, A. I. R. 1952 Pat. 393.
4. (1874) 7 H. L. 158, at p. 209.
5. Dart, *Vendors and Purchasers*, 8th Ed., Vol. II, p. 924.

"Clause (*c*) [now Sec. 13 (1) (*c*)] imposes an obligation upon the vendor to obtain a conveyance from the mortgagee in case of sales of mortgaged properties. A conveyance from the mortgagee is, however, not necessary except in the case of an English mortgage or a mortgage by conditional sale. The words 'where necessary' should, therefore, be inserted in Cl. (*c*) [now Sec. 13 (1) (*c*)].

"Where a claim for specific performance is refused, the plaintiff may, in certain cases, be entitled to get a refund of earnest money or purchase money[1] or other sum deposited by him as a pre-payment. Section 18 (*d*) [now Sec. 13 (*d*)] of the Act deals only with the right of the defendant to a refund in a case of refusal of specific performance on the ground of imperfect title of the vendor or lessor. But there are cases where the plaintiff who is a purchaser or lessee and whose claim for specific performance is refused is entitled to a refund[2] In England. it was held in earlier cases,[3] that where the remedy of specific performance was refused on merely equitable grounds, the purchaser could recover damages for breach of contract but could not recover his deposit. But Sec. 49 (2) of the Law of Property Act, 1925, now provides that the Court may 'order the repayment of any deposit' either in an independent action for its return or in a suit for specific performance 'where the Court refuses to grant specific performance'. Hence, either party may, in a suit for specific performance, claim repayment of any deposit when the claim for specific performance is refused. In India, in some cases, a claim for refund of the earnest money has been made in the alternative in a suit for specific performance,[4] and it has been held that even in the absence of a specific prayer[5] for return of earnest money, the Court may, in a suit for specific performance, direct a refund while refusing specific performance, if the facts disclose a case for such refund. Ont he other hand, there has been some uncertainty as to the right of the plaintiff to ask for an amendment claiming such a relief at a late stage of the proceeding. While in some cases it has been held that such an amendment should be allowed at any stage of the litigation[6] there is a contrary view,[7] that the Appellate Court should not give this relief where the plaintiff has not initially claimed it as an alternative relief in his suit for specific performance.

"We are of the view that, as in the matter of compensation, the law should not allow a decree to be made without a proper pleading, but that the Court should try to prevent multiplicity of proceedings by allowing amendment seeking to introduce a claim for a refund of a similar relief, even at a late stage. A specific provision, on the above lines has been inserted in the Act, enabling a person to obtain a refund or similar relief in a suit for specific performance.

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1. Munni v. Kamta, A.I.R. 1923 All. 321 ; Govind v. Miraji, A.I.R. 1944 Nag. 718.
2. Amma v. Udit, I.L.R. 31 All. 68 (P.C) ; Abdul Rahman v. Rahim Bakshi, A. I. R. 1929 Lah. 332 ; Raghunath v. Chandra, 17 C. W. N. 100 ; Fibrosa v. Fairbairn, (1942) 2 All E. R. 122 (H. L.) ; Munshi v. Vishnu, A. I. R. 1954 All. 450.
3. *Cf. Re* National Provincial Bank, (1895) 1 Ch. 130.
4. Amma v. Udit, *supra* ; Karasandas v. Chhotalal, A.I. R. 1924 Bom. 19 ; Natesa Aiyar v. Appavu Padayachi, I. L. R. 38 Mad. 178.
5. A. J. Majith v. Krishnaswami, A.I. R. 1955 Mad. 591 at p. 593; Raghunath v. Chandra, 17 C.W.N. 100.
6. Irbrahimbhai v. Fletcher, I. L. R. 21 Bom. 827.
7. Somasundram Chettiar v. Chidambaram Chettiar, A. I. R. 1951 Mad. 282.

"We have next to consider whether it should be made obligatory on the plaintiff to make the claim for a refund in the suit for specific performance itself.

"Pollock and Mulla have suggested that it is—

'.....desirable that the right to return of the deposit should be determined in the suit for specific performance.....'

"It has however been generally held that a separate suit lies for a refund of the earnest money, even though the suit for specific performance has been dismissed.[1] Having regard to the fact the number of such suits cannot be considerable, we do not think it right to recommend a provision barring such suits."

In the Notes on Clauses in Cl. 12 which dealt with old Sec. 18 and the new provision of Sec. 13 it was stated as follows :

"This is Sec. 18 (old) of the existing Act (1877) with the following amendments :

(*a*) It is made clear that this clause applies also to absence of title ;

(*b*) by inserting the words 'subject to the other provisions of this Chapter' it is made clear that other provisions of this Chapter, like Cl. 11, apply to cases under sub-clause (*a*) ;

(*c*) in sub-clause (*a*) of the old section, for the words 'sale or lease' the word 'contract' has been substituted so that it is made clear that the sub-clause applies only to contracts to sell, lease or hire ;

(*d*) sub-clause (*b*) of the old section is modified so that a plaintiff would also be enabled to require a vendor to get a conveyance from a person who is bound to convey at the request of the vendor ;

(*e*) in sub-clause (*c*) of the old section, the addition of the words 'wherever necessary' makes it clear that a re-conveyance need be obtained only when it is required under law.

With respect to sub-clause (2), *see* notes under Cl. 16,"

Speaking about sub-section (2) the Notes on Cl. (2) which dealt with Sec. 25 (old) of the repealed Act says : "Although Sec. 25 (old) refers to both moveable and immoveable property, it is not clear how far Secs. 18 and 25 (old) apply to contracts for the letting of moveable property. Sub-clause (*a*) of the old sections is therefore confined to immoveable property, but sub clause (*d*) provides [as in the case of Cl. 12(2)] that the provisions of sub-clause (1) will also apply to moveable property in so far as such application is possible."

3. Principle of the section.—This section is based on the extended principle what is known in English law as the doctrine of feeding the grant by estoppel. This doctrine found acceptance in India, in the form of Sec. 43 of the Transfer of Property Act, 1882. It has been extended in the old provisions of Sec. 18 of the repealed Specific Relief Act, and in the present Sec. 13 of this new Specific Relief Act, 1963. The doctrine of feeding the grant by estoppel is itself an extenison of the well-recognized rule of estoppel. There

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1. Munni Bibi v. Kamta Singh, I. L. R. 45 All. 378. (This is also the law in England under the Law of Property Act, 1925). Of course in the case of default by the vendor, the purchaser may, instead of suing for specific performance, sue only for refund of the deposit with or without damages ; Naturam v. Uluk Chand, A. I. R. 1926 Cal. 1041 at p. 1042.

is, however, a marked distinction between the provisions of Sec. 43 of the Transfer of Property Act, 1882, and Sec. 13 of Specific Relief Act, 1963. It would be useful to note the distinction between the two. The main points of difference between the two provisions are as follows :

(1) Section 13 of the Specific Relief Act, 1963, applies to contracts for sale or lease of immoveable property, and contracts for sale or hire of moveable property which is in existence. It does not apply to those properties which are not in existence, on the other hand, Sec. 43 of the Transfer of Property Act, 1882, applies to transfer of immoveable property while it has no application to moveable properties.

(2) Section 13, Specific Relief Act, 1963, applies to contracts to sale, let or hire properties, moveable or immoveable, while Sec. 43, Transfer of Property Act, applies to transfers which includes within their ambit not only sales and leases but mortgages, charges or other transfers for valuable considerations.

(3) Section 13 (new), Specific Relief Act, covers cases of contracts of sale, lease or hire by persons having either no title or imperfect title to properties moveable or immoveable sold, let or hired ; Sec. 43, Transfer of Property Act, applies to cases of transfers by a person fraudulently or erroneously representing that he is authorized to transfer immoveable properties and professes to transfer the same for consideration.

4. Scope.—This section extends to India the well-known principle of English law which is sometimes referred to as feeding the grant by estoppel. The principle is an extension of the rule of estoppel.[1] The principle underlying the section is that where a party enters into a contract without at the time having the power of performing it and afterwards acquires that power, he is bound to perform the contract he entered into.[2] In the words of Lord Buckmaster "if a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant the estate instanly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first."[3] This section [with the exception of Cl. *(d)*] is limited to cases in which the buyer or lessee sues the seller or the lessor and the latter is at the time of the suit able to make a perfect title though at the time of the contract he had only an imperfect title or even none at all. But that does not mean that the buyer or lessee cannot sue for specific performance. Thus it has been held that if a vendor sues and can convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation, for any small or immaterial deficiency if the vendor has not by misrepresentation or otherwise disentitled himself to his remedy.[4] Clause *(d)* of this section contemplates the vendor or lessor with an imperfect title being the plaintiff, and the dismissal of the suit on the ground of his imperfect title ; but instead of the suit being dismissed with costs the defendant is entitled to the specific relief of a decree for return of his deposit (if any) with interest and his costs together with a lien for the

1. Mokhoda v. Umeshchander, 7 C. L. J. 381; Dalichand v. Bribhikanal, 3 W.R. 734 (P.C.).
2. Halroyd v. Marshall, (1862) 10 H.L C. 191 ; Carne v. Mitchel, 15 L. J. Ch. 287.
3. Tilakdhari v. Khedan Lal, 32 C. L.J. 479 : 25 C. W. N. 49.
4. Rutherford v. Acton Adams, 32 I.C. 47 (P. C.) ; *see* also Morlock v. Buller, (1804) 10 Ves. at p. 315 : 7 R. R, 429.

same on the property comprised in the contract.[1] There can be no question of any equities in the case of a court sale.[2] The section only lays down certain rights which the purchaser or lessee of a property has against the vendor or lessor who having an imperfect title thereto contracts to sell or let. It does not make the contract invalid. Where therefore a lessee who has no right to sub-lease without the consent of the lessors, enters into a contract to sub-lease without such consent, there is no reason why the contract cannot be specifically enforced if the lessee obtains the concurrence of his lessor when called upon to do so by the sub-lessee by the Court.

It cannot be disputed that under the provision of Sec. 19 (now Sec. 21), Specific Relief Act, the Court has power to award compensation to the plaintiff for breach of a contract of the plaintiff has not debarred himself from claiming specific performance of the contract.[3] The case of the defendant is that the contract for breach of which compensation has been awarded by the courts below is not specifically enforceable.

Where specific performance is claimed by the lessor, the lessor must show : (*a*) that the contract to lease is in writing ; (*b*) that it is signed by both the parties ; (*c*) that it is required to be registered under the law but has not been registered ; (*d*) that there has been delivery of possession of the property by the lessor to the lessee in part-performance of the contract.[4]

The object of old Sec. 27-A, was not to take away the right to claim specific performance in cases where such right existed before the introduction of that section in the Specific Relief Act. If there is a valid oral agreement to lease, and it has not been followed by a formal or effective transfer, it can still be specifically enforced. But if the agreement to lease is not oral but is as indicated in Sec. 27-A in order to enable the lessor to claim specific performance, he must show that the contract on which he relies fulfils all the requirements of Sec. 27-A. Section 27-A does not abrogate the right to the specific performance of an oral agreement which is given by Sec. 12, Specific Relief Act. Thus Sec. 27-A does not operate as a bar to the plaintiff's claim for specific performance of the oral agreement.[5]

Section 18 (now Sec. 13) lays down certain rights which the purchaser or the lessee of a property has against the vendor or lessor who having an imperfect title thereto contracts to sell or let. It does not make the contract invalid. The absence of concurrence of persons whose consent is necessary to validate the transfer is no doubt a serious defect in the title of the lessee. Under the provisions of Sec. 25 (*b*), Specific Relief Act, the Court cannot enforce a contract specifically if the lessor enters into a contract believing that he has a right to sublet but within the time fixed by the parties or by the Court he cannot procure the consent of his landlord to the sub-lease. But if he is called upon by the lessee or by the Court to obtain the concurrence of his lessor and he succeeds in obtaining such consent, there is no reason why the contract cannot be specifically enforced. If a person agrees to let, there is an implied covenant on his part to do all things necessary to make

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1. Nelson.
2. Nanak Chand v. Gandu Ram, A. I. R. 1938 Lah. 360 at p. 361:40 P.L.R. 202.
3. Ardeshir H. Mama v. Flora Sassoon, 55 I. A. 360 : A. I. R. 1928 P. C. 208 ; 111 I. C. 413.
4. Kumar Gokul Chandra Law v. Haji Mohammad Din, A.I.R. 1938 Cal. 136 at p. 138 : I. L. R. 1 Cal. 563,
5. *Ibid*, at pp. 139-40.

the transfer effective. If the lessor is in a position to do all things that are necessary for completing the title of the lessee, there is no reason why the contract to lease could not be specifically enforced.[1] The objection that the plaintiff is not entitled to claim specific performance of the contract to lease, as he did not take the permission of the Collector for granting a sub-lease, was not taken in the written statement nor was it put into issue. The defendant cannot be allowed to contend that the plaintiff is not entitled to claim specific performance of the contract as he did not obtain the sanction of the Collector to grant a sub-lease before the contract or before the institution of the suit.[2] Similarly, where during the subsistence of a lease period in favour of a person the lessor (believing he had a right to forfeit) granted another lease to another, the transaction is not invalid. The second lease would take effect from the expiry of the period of the prior lease provided the lessee agreed to take it satisfying the provisions of Sec. 15 [now Sec. 12 (3)].[3] The section applies not only to express agreements but to implied ones as well.[4]

5. Suit for mere declaration of title.—In *Veerappa Mudaliar* v. *Venugopala Mudaliar*.[5] Srinivasan, J., has held that a suit for a mere declaration of title without a prayer for possession will be maintainable when the declaration of title is sought in respect of properties in the possession of the cultivating tenants governed by the Madras Cultivating Tenants Protection Act, which prevents actual possession being taken, the tenants being entitled to continue in possession. When the tenant comes under the purview of the Madras Buildings (Lease and Rent Control) Act, a suit for mere declaration is maintainable.[6]

6. Sub-clause (a).—This clause is based on an English rule of law which has been stated thus : "If a man sells an estate to which he has no title and after the conveyance acquire the title, he will be compelled to convey it to the purchaser."[7] This clause envisages a means to obtain power of perfecting an imperfect title and the means is the subsequent acquisition of any interest in the property.[8] A good illustration of the application of this rule can be found in a case falling under the Mitakshara School of Hindu Law. One out of three undivided members of a Mitakshara Hindu family sold coparcenary property to the plaintiff without family necessity. During the pendency of the suit for possession another member of the family died. It was held by the Madras High Court that the plaintiff was entitled to a moiety of the land sold to him and the deficiency could be made good out of the share of the deceased member devolving on the vendor.[9]

7. Scope of Cl. (a).—The provisions of Sec. 13 (*a*) of the Specific Relief Act, 1963, are analogous or similar to those of Sec. 43 of the Transfer of Property Act. There is to a certain extent overlapping between Sec. 43 of the Transfer of Property Act and Sec. 13(*a*) of the Specific Relief Act, 1963. They deal with one and the same subject. But there is essential difference between the scope of the provisions of the two sections. Section 43 of the Transfer of Property Act applies where there is fraudulent or erroneous

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1. *See* Motilal v. Nanhelal, 573 I. A. 353 : A. I. R. 19 0 P. C. 287 : 128 I. C. 652.
2. Kumar Gokul Chandra Law v. Haji Mohammad Din, A. I. R. 1938 Cal. 136 at p. 140 : I. L. R. (1938) 1 Cal. 563.
3. Kalyanpur Lime Works v. State of Bihar, A. I. R. 1954 S. C. 165 at pp. 169-70 (reversing Dalmia Jain Co. v. Kalyanpur Lime Works, A. I. R. 1952 Pat. 393).
4. Motilal v. Nanhelal, *supra*.
5. (1967) 1 M. L. J. 96 : A. I. R. 1967 Mad. 404.
6. Balammal v. M. Lakshmana Naicker, A. I. R. 1972 Mad. 333 at p. 336.
7. Sugdon, *Vendors and Purchasers*, 355 (note).
8. Magni Ram v. Baku Bai, I. L. R. 36 Bom. 510.
9. Virayya v. Hanumanta, I. L. R. 14 Mad. 459.

representation by a person to the effect that he was authorized to transfer certain immoveable property and also professed to make the transfer of the property for consideration, such transfer shall at the option of the transferee operate to bind any interest, which the tranferor might subsequently acquire in such property at any time during the subsistence of the contract of transfer. The scope of Sec. 13 (*a*) of the Specific Relief Act, 1963, is different. It is restricted or limited to the two classes of transactions only, namely by sale or lease. Other cases of transfer are not covered by the section. The element of fraudulent or erroneous representation is not at all necessary. Section 13 (*a*) of the Specific Relief Act, 1963, applies to the case where a person, who has no title or an imperfect title to a property, contracts to sell or let it out, the purchaser or the lessee, as the case may be, has the option to compel the vendor or lessee to make good the contract out of the interest he acquires subsequently on the property. Section 13 (*a*) of the Specific Relief Act, 1963, applies to completed sales or leases. It does not apply to incomplete transactions merely because there is some seeming overlapping between the two sections, it will not be proper to ignore the essential and basic distinction between the two sections and give artificial and far-fetched construction to the language of Sec. 13 (*a*) of the present Specific Relief Act. The words "subsequently to the contract" occurring in Sec. 13 (*a*) (new) of the Act clearly points to the completed transactions and before the provisions of Sec. 13 (new) are attracted, it is necessary to prove that the transaction in question was either a completed sale or a completed lease failing which this section will have no application.[1]

8. **Applicability.**—This section applies to contracts of sale, of lease or hire of immoveable or moveable property by person who has either no title or imperfect title and who prescribes the rights of the purchaser or lessor. Sub-section (*a*) to this section says that where subsequent to the contract by a person who has either no title or imperfect title on the date of the lease or sale of immoveable property the purchaser or the lessee shall have a right to compel the vendor or seller to make good the contract out of the interest which he subsequently acquires in the property, which formed the subject-matter of sale or lease.

Sub-section (*b*) to this section postulates that where the concurrence of other persons is necessary to perfect or validate the title of the vendor or lessor and where such person or persons are found to give concurrence at the request of the vendor or lessor, the purchaser or the lessee may have to procure such concurrence of those persons and where such conveyance is necessary of such other persons at the request of the lessor or vendor he may be compelled to procure such conveyance.

Sub-clause (*c*) to the present section says that where the vendor professes to sell property as unencumbered but if it turns out that the property is encumbered to an amount not in excess of the purchase money such a vendor may be compelled by the purchaser to redeem the mortgage to obtain a valid discharge of the debts and, if necessary, to obtain conveyance from the mortgagee.

Sub clause (*d*) to the present section provides for the return of the deposit in case the suit of the vendor or lessor for specific performance of the contract is dismissed on the ground of his imperfect title or no title, to the defendant along with interest and costs and also for the lien in lieu thereof.

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1. Silla Chandra Sakha Ram v. Smt. Lalita, A. I. R. 1959 Orissa 169 at p. 171 : I. L. R. (1959) Cut. 81.

This section applies not only to express agreements, but to implied ones as well. In *Motilal* v. *Nanhelal*,[1] Sir L. Sanderson said : "In view of the above-mentioned construction of the agreements of 4th September, 1914, viz. that Sobhogmal agreed to transfer the cultural rights in the *sir* land there was in their Lordships' opinion an implied covenant on his part to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer."

Where *A* agrees to lease specific immoveable property for a fixed term on a specified day to *B*, before the day fixed he leases that property to *C*, who had no knowledge of the earlier agreement to lease. *B* sued for specific performance of the contract. Dealing with this aspect of the case the Court in *Sarju Prasad* v. *Wazir Ali*[2] said : "It seems to us that the case is one within the meaning, if not within the words, of Sec. 18 of Act No. 1 of 1877, and it is also consistent with the rulings of the English courts that when a party enters into a contract without power to perform that contract, and subsequently acquires power to perform the contract, he is bound to do so. In this case the defendant No. 1 by his own action rendered himself temporarily unable to perform the contract. Certainly his position, in our opinion, can be in no sense better than that of a person who laboured under the same disability before he entered into the contract."

It is settled law that if a person executes an agreement to sell property, the vendor is not entitled to put forward, in a suit for specific performance by the purchaser the defence that the vendor had no title. It is open to the purchaser to set up a defence that the vendor had no title or has defective title in a suit for specific performance by the vendor. But the vendor cannot set up as a defence in a suit for specific performance by the purchaser. In *Kalyanpur Lime Works Ltd.* v. *State of Bihar*,[3] the Supreme Court had to consider a case where when the Government entered into an agreement to grant a lease to *A*, it had an imperfect title, inasmuch as it could not grant a fresh lease to any one during the existence of the previous lease in favour of *B*. Subsequently the lease in favour of *B* expired and the impediment to grant leases stood removed. It was held that Sec. 18 (*a*) was attracted and specific performance could be enforced.[4]

9. Title.—Title cannot be understood as something equivalent to a process involving making of title. In order to convey property the vendor should have a present right or interest in immoveable property which he contracts to convey. A bare expectancy of getting such a right in course of time which has not reached its end is not the same thing as to assert that he is a person having an interest in immoveable property. A title which has not been perfected and which cannot rationally be said to be free from doubt is no title at all. It is established that the question of title, if raised in a suit for specific performance, has to be decided between the parties so that they may not be exposed to the danger and extent of a legal contest at a future date. In such circumstances, courts in equity are bound to pronounce upon the efficacy or otherwise of the title in question except perhaps in rare and exceptional cases. In *Rajendra Kumar Bhandari* v. *Poosammal*,[5] the first defendant was a lessee of a piece and parcel of land. Defendants 2 to 5 were the owners of this property. The first defendant put up

Imperfect title.

1. A. I. R. 1930 P. C. 287 at p. 290.
2. I.L.R. 23 All. 119.
3. A. I. R. 1954 S. C. 165.
4. Mir Abdul Hakeem Khan v. Abdul Mannan Khadri, A. I. R. 1972 A. P. 178 at pp. 181, 182.
5. A. I. R. 1975 Mad. 373.

a structure on the land so leased out to her by defendants 2 to 5 and gained an entitlement under the provisions of the City Tenants Protection Act to purchase the land over which the superstructure was put up by her as and when she was sought to be evicted by the owners. It was common ground that defendants 2 to 5 filed an ejectment suit for eviction of the first defendant. The first defendant thereafter, pursuant to her statutory rights under the City Tenants Protection Act, filed the usual application under Sec. 9 thereof and obtained the necessary order entitling her to purchase suit land from defendants 2 to 5. Under the judgment of the Court and the ancillary orders under Sec. 9 she was enabled to purchase the land for a sum of Rs. 1,950 and she was also given the concession of paying the same in instalments. The first defendant defaulted at one time in the payment of instalments, but such a delay in the payment of instalments towards the purchase price was condoned by an order of the Court of Small Causes. Whilst things remained so nebulous and uncertain, in so far as the title of the first defendant to the land in question was concerned, she entered into an agreement in and by which she agreed to sell the above piece of land to the plaintiff for a consideration of Rs. 6,000. Later the defendant committed a second default and entered into a compromise with the owners, defendants 2 to 5 pursuant to which the first defendant delivered vacant possession of the land to the owner. Thereafter plaintiff filed a suit for specific performance of the agreement. It was held that at no point of time did the first defendant have any marketable title or any title which was free from doubt. If, therefore, the first defendant had no title or, in any event, had no marketable title or a title free from reasonable doubt, it follows that the plaintiff was not entitled to specific performance, as a matter of right.[1]

Title is imperfect within the meaning of this section when it is defective in law or is not complete as to vest full legal title in the possessor of it. Where the sale of a property is in contravention of the provisions of the law it would not confer full legal and complete title on the purchaser of the property, and the purchaser would not be legally competent to sell it. Such a sale would be invalid and would have no legal effect.

The vendor cannot be permitted to set up a defence in a suit for specific performance brought by the purchaser that he had no title or had defective title to the property which he had agreed to sell.[2]

It was observed by the Full Bench of the Madras High Court in *Baluswami Aiyar* v. *Lakshmana Aiyar*[3] :

> "Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has. But where a party seeking specific performance seeks to bind the

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1. Rajendra Kumar Bhandari v. Poosammal, A. I. R. 1975 Mad. 379 at pp. 81 83 : (1975) 2 M. L. J. 59.
2. Deenanath v. Chunnilal, A. I. R. 1975 Raj. 69 at p. 71 : 1974 R. L. W. 383 ; Mir Abdul Hakeem Khan v. Abdul Mannan Khadri, A.I.R. 1972 A.P. 178; Baluswami Aiyar v. Lakshmana Aiyar, A.I.R. 1921 Mad. 172 (F.B.) and Muni Samappa v. Gurunaniappa, A. I. R. 1950 Mad. 90.
3. A. I. R. 1921 Mad. 172 (F. B.).

interests of persons not parties to the contract alleging grounds which under Hindu law would bind their interests and enable the vendor to give a good title as against them and make them parties, it is difficult to see how the question as to the right of contracting parties to convey any interest except his own can be avoided and a decree passed the effect of which will merely be to create a multiplicity of suits."[1]

In *Magni Ram Vethuram* v. *Baku Bai*,[2] it was stated : "We think that the defendants, after the incompetence has been removed could be compelled to make good to the plaintiff the interest which they purported to convey under the sale-deed." A mere inadequacy of price is no ground for refusing specific performance although it is a circumstance which will arouse the "sixth sense of equity". Where (1) the price is so inadequate as shocks the Court's conscience and (2) either by itself or in conjunction with any other circumstance such as illiteracy, oppression, etc., it evidences fraud or that undue advantage was taken by the other side, the Court will refuse specific performance of a contract of sale, the agreed price was so grossly inadequate and the vendors were illiterate agriculturists who were heavily in debt to the plaintiff, it is a case where the provisions of Sec. 28 (*a*) of the Specific Relief Act are attracted. In order to apply the equitable principles laid down in Sec. 22 (new) of the Specific Relief Act, it is not necessary to prove the case of fraud or misrepresentation made out by the plaintiff. It is enough if the transaction is grossly unfair due to any cause. If there are surrounding circumstances such as duress or intimidation or where the piaintiff obtained the agreement by practising unscrupulous acts, or by the non-disclosure of important facts or by trickery or by taking undue advantage of his position and the like, the Court has to look to such an agreement with caution and circumspection.[3] The principle of feeding the grant by estoppel has no application where the contract refers to property which has been expressly rendered inalienable by the Legislature.[4] Thus by virtue of Sec. 6, Transfer of Property Act, the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred. Therefore, it has been repeatedly held that contract in respect of a *spes successionis* cannot specifically be enforced.[5] No suit for specific performance of contract for a sale by the reversioner of his right of expectancy or *spes successionis* is legally maintainable as both under the Hindu law and Transfer of Property Act it cannot form the subject-matter of transfer and such a contract would be legally unenforceable.[6] The chance of a Mohammedan co-heir-apparent to succeed to an estate is in the nature of a *spes successionis* and as such is incapable of being transferred or relinquished.[7] Specific performance in respect of such interest cannot be

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1. Deenanath v. Chunnilal, A. I. R. 1975 Raj. 69 at p. 71 : 1974 R. L. W. 383.
2. I.L.R. 36 Bom. 510 at p. 514.
3. *See* Manakchand v. Puran, A.I.R. 1953 M.P. 235.
4. Tilakdhari v. Khedanlal, I. L. R 48 Cal. 1 (P.C.) : 32 C L J. 479 : 25 C. W. N. 49 ; Venkatanarayana v. Subbammal, I.L.R. 38 Mad. 406 at p. 410 (contingent reversionary heir).
5. Samsud in Ghulam Hossain v. Abdul Hossain Kalimoodin, I.L.R. 31 Bom. 165 ; Rama v. Ramasami, I.L.R. 30 Mad. 554 : 29 I.C. 241 : 28 M.L.J. 6'0: 17 M.L.T. 419 : 1915 M. W. N. 626 ; Sham Sundar v. Achhan Kunwer, I.L.R. 21 All. 71 (P.C.) : 25 I.A. 183 : 2 C. W. N. 729 ; Nanda Kishore v. Kanceram, I. L. R. 29 Cal. 355 : 6 C. W. N. 395 ; Ghulam Mohammad v. Pir Baksh, 108 I.C. 390.
6. Ramgopal Dula Singh v. Gurbax Singh Jiwan Singh, A.I.R. 1955 Punj. 215 at pp. 217, 220.
7. Ghulam Mohammad v. Pir Baksh, 108 I.C. 390, following Samsuddin Ghulam Hossain v. Abdul Hossain Kalimoodin, I.L.R. 31 Bom. 165 : 8 Bom. L.R. 781 ; Aisha Bibi v. Kurupan Chetty, 45 I. C. 35 : I. L. R. 41 Mad. 365 : 7 L.W. 215 : 34 M.L.J. 460.

enforeed even when the estate falls into possession.[1] But where the Transfer of Property Act is not in force, as in the Punjab, the position is different, consequently it has been held that as the said Act is not in force in the Punjab, a sale of reversionary right of succession, though at the time of the sale it does not affect a transfer of property, gives rise to a right which the Court will enforce when the inheritance falls into possession.[2]

It is the nature of the estate conveyed that has to be looked at. If it is a professedly contingent interest sold for a price fixed with a view to the contingency no equity arises out of the contract to fasten it upon the new title.[3] Where, therefore, a mother contracted to sell certain property as that of her minor son and not her own and she subsequently succeeded to the property on the death of that son, the section was held not to be applicable to the agreement.[4] Of course, if the guardian of a minor enters into a contract on his behalf, for legitimate purposes, there being no defect of title in the minor and the contract not being voidable at his instance, the purchaser or the lessee may have specific performance against the minor's legal representative. When there is legally conveyable title in the vendor, even if the title may be defeated upon claim by a third party, the purchaser may have specific performance.[5]

In the Act of 1963 in Sec. 13 which replaced Sec. 18 of the old Act, before the words "having only an imperfect title thereto" the words "no title or" were added. This change was probably made to clarify the law, as the old Sec. 18 and the new Sec. 13 are based on the well-known rule of estoppel sometimes referred to as feeding the grant by estoppel.

The Calcutta High Court in the case of *Prem Sukh Gulgulia* v. *Habib Ullah*,[6] held that transfers of non-existent or as it is conveniently called, after-acquired property, provided they are not of the nature contemplated in Sec. 6 (*a*) are perfectly valid. The transfer would be regarded in a court of justice as contract to transfer after the vendor had acquired title and would fasten upon the property as soon as the vendor acquired it. A contract of sale of property which is not of the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, is not bad in law.[7]

In the above-noted case, defendant No. 1 entered into an agreement dated 12th April, 1958, with the plaintiff thereby agreeing to sell to the plaintiff the property in the suit which was his house property. The property had been declared to be evacuee property and it was duly auctioned as such. The auction was completed on the 14th of April, 1958. Subsequently the sale certificate was issued on the 19th of March, 1959, declaring that defendant No. 1 who was the highest bidder had become its owner with effect from the 1st of February, 1959. It was held that though at the time of agreement defendant No. 1 had no title to the property in the suit he nevertheless had an imperfect title within the meaning of Sec. 18 of the Specific Relief Act,

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1. Jagnanda Raju v. Rajab Prasad, I.L.R. 39 Mad. 554 : 29 I.C. 241 : 28 M.L.J. 650 : 17 M.L.T. 419 : 1915 M.W.N. 329.
2. Allah Baksh v. Ghulam, 13 P.R. 1899; Naraujan Singh v. Dharam Singh, A. I. R. 1930 Lah. 928 at p. 929 : 29 I. C. 29 : 31 P.L.R. 909; Padmun v. Achhar, 89 I.C. 792 : A.I.R. 1926 Lah. 39; *cf.* 66 P.R. 1897.
3. 2 Dart, *Vendors and Purchasers*, Sec. 19; Dr. Banerji', *Tagore Law Lectures*, App. C, p. 54.
4. Rashmoni v. Surja, I.L.R. 32 Cal. 832.
5. Gurusami v. Ganapathia, I. L. R. 3 Mad. 337; Ponaka v. Vadamadi, I.L R. 38 Mad. 359; Srinivasa v. Sivarama, I.L.R. 37 Mad. 320; Bykuntha v. Shib Das, 2 C.L.J. 321.
6. A.I.R. 1945 Cal. 355.
7. Eshanul Haq v. Mohd. Umar, A. I. R. 1973 All. 425 at pp. 425, 426 : 1973 A.L.J. 310,

1897 (corresponding to Sec. 13 of the present Act). An agreement to sell of the nature entered into between the parties, was a valid agreement and was, therefore, enforceable in law unless it was shown that the agreement was hit by the provisions of Sec. 6 (*a*) of the Transfer of Property Act or by any other law. There is no provision of law which would make such an agreement as was entered into in instant case invalid.

Section 18 of the old Specific Relief Act has been applied also to cases where a person, at the time of agreement of sale, had no title in the property agreed to be sold. Clause (*a*) of Sec. 18 gives right to the purchaser to compel the vendor to make good the contract out of any interest the vendor has acquired in the property after the contract of sale. The expression "any interest" is very wide in its amplitude and also denotes a case in which a vendor who has no title to the property acquires title after the contract of sale. There is nothing in Cl. (*a*) to limit the expression "any interest" only to cases where a person has title to the property and later he acquires an interest which enables him to give a valid title to the purchaser. This view was taken by a single Judge of the Nagpur High Court in *Pundilik Daryaji* v. *Jainarayan Maliram Shop*.[1] The defendant therein purchased certain properties at an auction sale for arrears of land revenue. Before the sale was confirmed in his favour, he entered into an agreement to execute a sale-deed in favour of the plaintiff. On confirmation of the sale in favour of the defendant, he refused to execute a sale-deed and the plaintiff brought a suit for specific performance. It was argued before the learned Judge that the expression "imperfect title" in Sec. 18 did not include absence of title. On the date of the agreement of sale, the defendant therein had no title to the property as the sale had not been confirmed. The learned Judge repelled this argument observing that by virtue of Cl. (*a*) of Sec. 18, the vendee can compel the vendor to make good the contract out of any interest in the property subsequently acquired by the vendor. This, according to the learned Judge, indicated that the words "imperfect title" would include even complete absence of title. The learned Judge then referred to the rule of English law that if a man sells an estate to which he has no title and, after the conveyance acquires the title, he will be compelled to convey it to the purchaser and relied upon.[2] This case has been distinguished by a learned Judge of the Bombay High Court in *Bhiku Keru* v. *Dashrath*.[3] While distinguishing, the learned Judge has held that in the circumstances of the case, the Nagpur High Court came to the conclusion that it was a case of imperfect title and not a case of absence of title. While making this remark, the learned Judge of the Bombay High Court has not taken into consideration the interpretation of Cl. (*a*) of Sec. 18 (old) of the Specific Relief Act made by the Nagpur High Court. The Supreme Court case referred to above, namely, *Silla Chandra's* case,[4] has not expressed any opinion on this aspect of the matter and left the question open. The Supreme Court in *Kalyanpur Lime Works* case[5] also had no occasion to consider whether the expression "imperfect title" can take in the case of absence of title. *Pundilik Daryaji's* case[6] has been referred to in Mulla's Commentary on Contract and Specific Relief Act and no adverse comment has been made in regard to that decision.

It may be stated that prior to the passing of the Specific Relief Act (Act No. 47 of 1963) there was a decision to show that Sec. 18 of the Specific Relief Act is applicable to cases where a person who has no title in the

1. A.I.R. 1949 Nag 83.
2. Holroyd v. Marshall, (1864) 10 H.L.C. 191.
3. A.I.R. 1967 Bom. 267.
4. A.I R. 1964 S.C. 1789.
5. A.I.R. 1954 S.C. 165.
6. A.I R. 1949 Nag. 83.

property enters into a contract to sell the property. In the Specific Relief Act of 1963, Sec. 13 is a provision corresponding to Sec. 18 of the old Act. The material portion of Sec. 13 of the new Act reads :

> "13. (1) Where a person contracts to sell or let certain immoveable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this chapter), has the following rights. . . . . .".

The position has thus been certified by the Legislature by introducing the words "having no title". It can, therefore, be safely concluded that Sec. 18 of the old Specific Relief Act was equally applicable to cases where the person entering into an agreement of sale had no title to the property at the date of the agreement.[1]

10. Title of auction-purchaser is imperfect till confirmation of sale.—An auction-purchaser pending confirmation of the sale has only an imperfect title to the property. He is compellable to make good the contract out of the interest that he subsequently obtains on confirmation. Where, therefore, an auction-purchaser agrees to reconvey the properry to the judgement-debtor subject to his depositing certain sum of money under O. XXI, R. 89, C.P.C., which the latter actually deposited, it was held that Sec. 18 [Sec. 13 (new)] applied and he is liable to make good the contract out of the one-half the property that he gets on confirmation of the sale.[2] In *Pundilik Daryaji* v. *Jainarayan Maliram*,[3] the defendant purchased certain fields which were sold by auction for arrears of land revenue, and passed a *chithi* in favour of the plaintiff agreeing to sell these fields to him for a certain amount after the sale was confirmed. It was stipulated that in the event of the sale being not confirmed the contract to sell between the parties would not operate and that in such an event the earnest money was not to be refunded. The sale was, however, duly confirmed, and then the vendee sued for specific performance. The defendant urged that there was no mutuality in the contract and so the plaintiff could not be given the relief. Overruling the contention, it was held that the contract that was entered into was valid and was capable of specific performance, that the doctrine of mutuality could have no application as the Specific Relief Act lays down the rights and disabilities in respect of doubts as to title both in respect of vendor and of the vendee under Sec. 17 (new) and Sec. 13 (new) of the Specific Relief Act, respectively, the two sections [Sec. 13 and Sec. 17 (new)] being complementary to each other, that the rights of a vendee who brings a suit are not to be deduced by an attempted application of the doctrine of mutuality to the conditions laid down in Sec. 17 (new) but are to be determined by the conditions in Sec. 13 (new) which defines the right of the purchaser ; and that the words "imperfect title" in Sec. 13 (new) include the absence of title and certainly include the very contingent interest far greater than a *spes successionis*, which exists when a person who has bid at an auction-sale, has deposited the money and has done everything that is necessary for him to do and has only to wait for the confirmation of the sale when possession, except for unforeseen circumstances, would come to him.

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1. Muthabathula Arijayya v. Rambala Venkata Surya Gopala Krishnamurthy, A.I.R. 1974 A.P. 240 at pp. 248-49 ; I.L.R. (1973) A.P. 994.
2. Nataraja Padayachi v. Nagamuthu Padayachi, 37 I.C. 761.
3. A.I.R. 1949 Nag. 83 at pp. 84, 85 ; 1948 N.L.J. 424.

11. Court sale.—There can be no question of any equities in the case of a court sale.[1]

12. Sale of land taken on lease from the Government.—Where the lease of land from the Government contained a clause that it cannot be transferred without the consent of the Government, it cannot be contended that any contract for selling the land is invalid. A condition of this nature cannot make the contract invalid. The only effect of such a requirement is that the decree for specific performance, if passed, has to be subject to the approval of the State Government to be given on the application of the defendant.[2]

13. Contract for sale of non-existent property.—In *Prem Sukh Gulgulia* v. *Habib Ullah*,[3] an agreement of sale was executed by a person who had no title to any one of the properties he had agreed to sell. He expected to buy them at a court sale to be held the next day. The learned Judges proceeded to determine whether what had been agreed to be sold was "a mere possibility of a like nature" as the expectancy of a heir-apparent or the expectancy of a relation to get a legacy from a kinsman then living. The learned Judges observed at page 358 :

> "There was no doubt an element of chance so far as Ex. I was concerned at the time of its execution for the vendor may or may not have been successful in buying any one item of property at the Court sale, that was held later on ; but the chance was not so remote as in those two cases mentioned, namely, of the heir-apparent or of the relation to obtain a legacy from a living kinsman. Transfers of non-existence, or as it is conveniently called after-acquired property, provided they are not of the nature contemplated in Sec. 6 (*a*), Transfer of Property Act, are perfectly valid. The transfer would be regarded in a court of justice as a contract to transfer after the vendor had acquired title and would fasten upon the property as soon as the vendor acquires it.[4] The principles laid down in these cases have been followed in India.[5] If that be so, we do not see any ground for holding a contract for sale of non-existent property, that is, of property which is not of the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, to be bad in law. There is nothing in the Contract Act or any law which makes it invalid."[6]

14. Imperfect sub-soil or mining rights.—A long series of recent decisions by the Board has established that if a claimant to sub-soil rights holds under the zamindar or by a grant emanating from him, even though his powers may be permanent, heritable and transferable, he must still prove the express inclusion of the sub-soil rights.[7]

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1. Nanak Chand v. Gandu Ram, A. I. R. 1938 Lah. 36 at p. 361 : 177 I. C. 746: 40 P. L. R 202.
2. Nimar Industrial Corporation Private Ltd., Khandwa v. Madhya Pradesh Electricity Board, Jabalpur, A. I. R. 1973 M. P. 281 at p. 288 : 1973 Jab. L. J. 872.
3. A. I. R. 1945 Cal. 355.
4. Holroyd v. Marshall, (1864) 10 H. L. C. 191 ; Collyer v. Isaacs, (1882) 19 Ch. D. 342 and Tailby v. Official Receiver, (1888) 13 A. C. 523.
5. *See* Khobhari Singh v. Ram Prosad Roy, (1908) 7 C. L. J. 387.
6. Muthabathula Arijayya v. Rambala Venkata Surya Gopala Krishnamurthy, A. I. R. 1974 A. P. 240 at pp. 246-47 : I. L. R. (1973) A. P. 994.
7. Gobinda Narayan Singh v. Sham Lal Singh, 58 I. A. 125: A. I. R. 1931 P. C. 89.

In *H. V. Low & Co.* v. *Raja Bahadur Jyoti Prasad Singh Deo*,[1] the grants not being in writing must, to be effectual, be earlier in date than 1883, for since then such grants have required to be by written instrument. Consequently the grantees in order to establish the inclusion of the sub-soil rights in their grants would have to prove that the terms of oral grants made half a century ago expressly included these rights. Where, as here, there is no evidence that the grantees have ever claimed or worked the minerals, the possibility of the grantees being now able to prove that the mineral rights were expressly granted to their predecessors is reduced to a contingency so remote as to be practically negligible.[2]

15. Title based on will.—A purchaser is not entitled in the absence of circumstances of suspicion to refuse a title made under will, because the will has not been proved against the heirs or he does not join.

16. Doctrine of feeding the grant by estoppel.—The doctrine of feeding the estoppel has been discussed at some length by P. B. Mukherji, J., in *Panchanan Pal* v. *Nirode Kumar*.[3] It was stated : "The doctrine of feeding the estoppel has two statutory recognitions. One is contained in Sec. 43 of the Transfer of Property Act and the other is contained in Sec. 18 (*b*) [Sec. 13 (*b*) (new)] of the Specific Relief Act." The learned Judge proceeds to say : "Section 43 applies to the case of a transfer by an unauthorized person who subsequently acquires interest in the property transferred. A charge is not a case of transfer of interest in immoveable property and this is not a case of conveyance or sale but it arises at a stage prior to the stage of sale or conveyance. Similarly, the case contemplated in Sec. 18 (*b*) [Sec. 13 (*b*) (new)] of the Specific Relief Act is a case of sale and uses the language of imperfect title." Then again "It is then argued that apart from the two statutory provisions for feeding the estoppel, there are general principles independent of those two statutes which can be applied. As at present advised, I am not of the opinion that where statutes expressly make provision for feeding the estoppel only in particular cases and thereby impliedly excluding others, it is possible to invoke undefined principles of feeding the estoppel. Feeding the estoppel is based on the doctrine of feeding a grant. The grant is of interest in immoveable property. Where no grant or transfer of interest in immoveable property is involved, it is extremely doubtful whether the doctrine of feeding the estoppel can at all be applied. That is the reason why these two statutory provisions make only reference to sales, leases and other transfers of interest and make no reference whatever to charge."

The doctrine of estoppel is essentially a rule of evidence. It is based on the rule of equity. It operates between the parties or privies directly concerned by the act or omission, which enacts a bar of estoppel. This doctrine has a basis in English law. In India the rule has been accepted and incorporated in a modified form in Sec. 115, Evidence Act ; Sec. 18 (*a*), Specific Relief Act, 1877 ; Sec. 18 (*a*), Specific Relief Act, 1963 ; and Sec. 43, Transfer of Property Act, 1882. In Specific Relief Act and the Transfer of Property Act, 1882, the application of the doctrine has been extended.

17. English and Indian law—Applicability of the doctrine.—Under the English law the doctrine is an application of equity brining about an

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1. A. I. R. 1931 P. C. 299 at p. 301, affirming Jyoti Prasad Singh Deo v. H. V. Low & Co. Ltd., A I. R. 1930 Cal. 561.
2. Fry, p. 895 ; Colton v. Wilson, 3 P. Wms. 190.
3. A. I. R. 1962 Cal. 12 at p. 16.
4. *Ibid.*

equitable estate on acquisition.[1] Under the Indian law no equitable estate is created but it gives right to an obligation.

The rule as contained in this section is what is known under the English Common Law as estoppel by deed which was extended by *Pikard* v. *Sears*[2] to estoppel by representation.

Where a representation is a term of the contract or of a transfer made for consideration the promisee or transferee need not rely upon the doctrine of representation embodied in Sec. 115, Evidence Act. He can rely upon two other doctrines—the doctrine of the Common Law called "estoppel by deed" coupled with the doctrine of "feeding the estoppel" and the doctrine of equity, that "equity treats that as done which ought to be done."

Under both these doctrines knowledge on the part of the promisee or transferee that the transferor did not have the authority to transfer the property which he purported to transfer is immaterial and does not deprive of the benefit of the doctrines except when the contract or transfer is illegal or invalid.

Estoppel by deed is based on the principle that when a person has entered into a solemn engagement by a deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive nature as to admit of no contradictory proof.[3]

This doctrine being merely a rule of evidence does not perfect the title of the transferee. The title is perfected under the doctrine of feeding the estoppel. This doctrine was explained by their Lordships of the Privy Council in two cases. In *Rajapakshi* v. *Fernando*,[4] the Privy Council enunciated the English doctrine thus :

> "Where a grantor had purported to grant an interest in land which he did not at the time possess but subsequently obtained the benefit of his subsequent acquisition goes automatically to the earlier grantee, that is, it feeds the estoppel."

In *Tilakdhari Lal* v. *Khedan Lal*,[5] the doctrine was restated as follows :

> "If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first."

In none of the two cases, however, the Indian law was considered by their Lordships. Inasmuch as under the English doctrine the subsequently-acquired interest "automatically passes to the grantee" it is obvious that the state of knowledge of the grantee is immaterial except in certain specified cases.

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1. Collyer v. Issacs, (1881) 19 Ch. 342 ; Tailby v. Official Receiver, (1888) 13 A. C. 523; Holroyd v. Marshall, (1862) 10 H. L. C. 191.
2. (1837) 6 A. & E. 469.
3. Halsbury's *Laws of England* (Hailsham Edition), Vol. 13, para. 513, p. 45
4. A. I. R. 1920 P. C. 216.
5. A. I. R. 1921 P. C. 112 at p. 118.

It has, however, been held that where the truth appears by the same instrument there can be no estoppel, unless a clear intention is expressed in the deed to disregard the rule.[1]

In *Folly* v. *Arbuthnot*,[2] it was held that where one party executes a deed whereby he attorns tenant to the other so as to give him a right of distress, he is stopped from denying the existence of that right although the instrument shows on its face that there is no reversion in the other party which would support it. In *Burgis* v. *Constantine*,[3] Gorell Barnes, P., laid down the rule that—

"Where a person who knows the truth of the circumstances under which the deed has been executed, whether he has acquired such knowledge personally or through his agent, cannot set up an estoppel in his own favour, if the circumstances were such as to make the deed invalid between the original parties.

"If the deed is not invalid between the original parties, there does not appear to be anything in the English doctrine of estoppel by deed to debar a person from pleading estoppel even if he knew the truth of the circumstances under which the deed has been executed.

"When the deed is invalid, e. g. if it is prohibited by law, or when the transfer is intended to be a fraud upon third parties, it would be against public policy to allow the transferee to take advantage of the estoppel, but no such public policy is involved in a case where the deed is not invalid and although the transferee knows that the transferor is not empowered to make the transfer he does take the transfer and pays good consideration for it in the hope that the transferor is bound to acquire title to the property professed to be transferred at some future date."

Thus under the doctrine of estoppel by deed, knowledge of the truth on the part of the transferee is material only when the transfer is invalid in law and not otherwise.

Under Sec. 43, Transfer of Property Act, the transfer of the subsequently, acquired property takes place automatically as in the English law, but it takes place at the moment the transferee exercises the option that the interest shall stand transferred to him.

This is the first matter in respect of which the Indian law differs from the English law and the second matter in respect of which it differs is that it does not apply the doctrine of feeding the estoppel so as to impair the rights of subsequent transferee in good faith for consideration without notice of the existence of the option in the prior transferee. Both these deviations in the Indian law have no bearing upon the question whether the state of knowledge of the first transferee is material.

It is true that Sec. 43 makes a reference to the fraudulent or erroneous representation by the transferor to the effect that he is authorized to transfer the interest which he professes to transfer. But this is not a deviation from the English law because under that law also such a representation is implied in the doctrine of estoppel by deed upon which the doctrine of feeding the estoppel is based.

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1. Halsbury's *Laws of England* (Hailsham Edition), Vol. 13, para. 516, p. 458.
2. (1859) 4 Deg. & J. 224.
3. (1908) 2 K. B. 484.

The same is the position under the doctrine of equity that equity treats that as done which ought to be done. This equity creates a personal obligation which compels the transferor to perform his contract when he is able to do so on the acquisition of the subsequent interest. The principle underlying it was very fully stated in *Holroyd* v. *Marshall*,[1] where Lord Westbury, L. C., observed :

> "It is quite true that a deed which professes to convey property which is not in existence at the time is as conveyance void at law simply because there is nothing to convey. So in equity a contract which engages to transfer property which is not in existence cannot operate as an immediate alienation merely because there is nothing to transfer.
>
> "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract there is no doubt that a court of equity would compel him to perform the contract and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.
>
> "This of course assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the contract."

In *Collyer* v. *Issacs*,[2] Jessel, M. R., observed :

> "The creditor had a mortgage security on existing chattels and also the benefit of what was in form of assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment in fact constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign a property which is to come into existence in the future, and when it has come into existence equity treating as done that which ought to be done fastens upon that property, and the contract to assign thus becomes a complete assignment."

In the application of this doctrine of equity it is immaterial that the promisee or transferee knew the truth, namely that the promisor or the transferor had no authority to transfer the interest which he purported to transfer.

In *Kabul Chand* v. *Badri Das*,[3] the equity was applied although the truth was known to the transferee.

In *Viraya* v. *Hanumanta*,[4] a Hindu coparcener agreed to sell family property as if he was the owner. The purchaser sued to enforce the transfer and pending the suit one of the two other coparceners died. The purchaser was held entitled to half the property.

In *Gaya Din* v. *Kashi*,[5] the plaintiff was suing for pre-emption, and in order to raise money for the litigation in anticipation of a decree, mortgaged

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1. (1862) 10 H. L. C. 191.
2. (1881) 19 Ch. D. 342.
3. A. I. R. 1933 All. 22.
4. I. L. R. 14 Mad. 459.
5. I. L. R. 29 All. 163.

the property in suit. After he obtained a decree and got possession, equity treating that as done which ought to be done, gave the mortgagee a charge on the property and placed him in the position of a mortgagee.

In *Deb Nath Moral* v. *Sashi Bhusan Moral*,[1] a landlord made a settlement of a non-transferable holding. The settlement was invalid at the time it was made because the *raiyat* had not abandoned the holding. But the subsequent abandonment of the holding by the *raiyat* validated the settlement.

In *Loot Narain* v. *Showkee Lal*,[2] a *ghatwal* mortgaged his *ghatwal* land by *zuripeshgi* lease and shortly after the mortgage the zamindar got a decree by which the *ghatwal* tenure was extinguished and evicted the mortgagee.

Some years later the zamindar granted the *ghatwal* a permanent lease to the same land. The *ghatwal* was held liable to make good the *zuripeshgi* lease out of his new estate. The true position then is best described in the words of Westbury, L. C., in *Holroyd* v. *Marshall*[3] :

> "It is quite true that a deed which professess to convey property which is not in existence at the time, is, as a conveyance, void at law, simply because there is nothing to convey. So, in equity a contract which engages to transfer property, which is not in existence cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract."

To the same effect are the observations of Jessel, M. R., in *Collyer* v. *Issacs*[4] :

> "A creditor had a mortgage security on existing chattels and also the benefit of what was in form of assignment of non-existing chattels which might be afterwards brought on the premises. That assignment in fact constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity treating as done that which ought be done, fasten upon that property, and the contract to assign thus becomes a complete assignment ; *see* also *Tailby* v. *Official Receiver*.[5]

These principles were applied in the case of *Khobhari Singh* v. *Ram Prosad Roy*,[6] where the Court was called upon to decide the validity of a

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1. A. I. R. 1934 Cal. 82.
2. 2 C. L. R. 382.
3. (1862) 10 H. L. C. 191 : 33 L J Ch 193.
4. (1882) 19 Ch. D. 342 : 51 L. J. Ch. 14.
5. (1888) 13 A. C. 523 : 58 L. J. Q. B. 75.
6. (1908) 7 C. L. J. 387.

mortgage of property, purchased at a sale for arrears of revenue, the title wherein had not at the time of the execution of the mortgage vested in the auction-purchaser. It was ruled that a mortgage of non-existent property, though inoperative as a conveyance is operative as an executory agreement, which attaches to the property, the moment it is required, and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. The same doctrine had been previously applied in the cases of *Mackinlay* v. *Dunlop*[1] and *Baldeo Prashad Sahu* v. *Miller*.[2] Reference may also be made to the decisions of the Allahabad High Court in *Bansidhar* v. *Sant Lal*[3] and *Gaya Din* v. *Kashi Gir*.[4]

When the *ghatwal* transferred the disputed property to the predecessor-in-interest of the defendants, no title passed from the *ghatwal*. On 23rd November, 1912, when this suit was instituted, the respondents had not acquired a title by adverse possession. The result would thus follow that the defendants were not proper parties to the suit. This position they are not prepared to accept ; they maintain that as soon as the resumption was completed on 12th June, 1902, the title vested in them by virtue of conveyance of 19th May, 1902. But precisely the same argument is available to the plaintiffs; and they urge there the moment the resumption was completed on 12th June, 1902, the mortgage of 1st September, 1901, ripened into an unimpeachable transfer. In their Lordships opinion there is no possible escape from the position that there is a valid charge on the second parcel enforceable at the instance of the plaintiffs.[5]

The restriction was subsequently removed and as to the enlarged interest Mookerjee, J., said that the deed was operative as executory agreement which attaches to the property the moment the restriction is removed and is transferred by equity to the mortgagee.[6]

In the applicaion of this equity it has been sometimes said that this equity applies when there is no representation and if there is representation then Sec. 43 will apply. Mulla, for example, has expressed this view at pages 212 and 213. With great respect, this view is erroneous.

Even where there is no represeentation by the transferor that he had authority to transfer the interest which he purported to transfer, such a representation is implied when nothing is said to the contrary in the deed of transfer. For instance, Sec. 55 (2), Transfer of Property Act raises such a presumption in the case of a sale:

> "The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same."

Thus unless the contrary is stated in the deed of sale, it will be presumed that there is a representation by the seller that he has power to transfer the interest which he purports to sell. The knowledge of the buyer in such a cash is immaterial.

Even if the buyer knew that the seller has no power to transfer the interest, he is entitled to the benefit of the contract and to enforce the sale

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1. (1850) 1 Taylor and Bell 498.
2. I. L. R. 31 Cal. 667.
3. I. L. R. 10 All. 133.
4. I. L. R. 29 All. 163.
5. Surendranath Dey v. Rajindra Chandra Chandra, A. I. R. 1918 Cal. 419 at pp. 420-21.
6. Extracted from Mulla's *Transfer of Property Act*, 3rd Ed., pp. 212-13.

according to its terms and may hold the seller responsible in damages,[1] or claim a return of the purchase money if he is dispossessed by reason of a defect in title.[2]

In *Rinsa Ansa Teli* v. *Mohanlal Madangopal Marwari*,[3] an endeavour to link up Sec. 55 (1) (*g*) with the provision annexing the implied contract to the interest of the transferee, was attempted and reference was made to *Natho Khan* v. *Burtonath*.[4] There, their Lordships of the Judicial Committee observe as follows :

> "The purchase deed contained the express declaration that the property was sold free from incumbrances and consequently by Sec. 55 (1) (*g*), sub-sections(2)(*sic*), Transfer of Property Act, the vendor must have been deemed (*sic*), to contract with the buyer that he had power to transfer the property so sold, and consequently that the property was free from burdens."

The form of the two Acts, however, is different and the English Act appears to be on this point, much more clearly drafted. There can be no possible doubt the Parliament in England, when it legislated and used the words "in whom that estate or interest is for the whole or any part thereof" meant any part of the estate or interest whether that estate or any part thereof was created by a conveyance by way of sale, lease, mortgage, settlement, etc. If that estate or interest is split up part going to *A* and part going to *B*, *A* or *B* or both may enforce the implied covenant. *Held* that the plaintiff can recover from defendant 2.[5]

Now the suit is in substance a suit for refund of the purchase-money but the plaintiffs have alternatively asked for a decree :

> "If the plaintiffs be not deemed entitled to recover the consideration money a decree for the amount in claim may, by way of damages, be awarded to the plaintiffs against defendant 1."

But in the view taken it is immaterial to consider whether the suit is a suit for refund of the purchase-money or a suit for damages for breach of the covenant under Sce. 55, Cl. (2), Transfer of Property Act. In *Tricomdas Coverji Bhoja* v. *Gopinath Jiu Thakur*,[6] it was pointed out by the Judicial Committee that to a suit for royalties due under a registered lease of certain land with the right to dig coal, (Art. 55 new), Limitation Act "for compensation for breach of a contract in writing registered" and providing a six years period of limitation, and not (Art. 97 new) for "a suit for arrears of rent" and giving only three years, must be held to be applicable. It will be noticed that the suit which was before the Privy Council was a suit which directly came within (Art. 97 new), Limitation Act. It was undoubtedly a suit for arrears of rent and Art. (97 new) clearly applied giving only three years for the commencement of the suit. But the Judicial Committee pointed out that if (Art. 55 new) does apply to a case then it is quite immaterial to consider whether the case does not fall under some other provision of the Limitation Act.

Multanmal Jayaram v. *Budhumal Kevalchand*[7] is conclusive of this question. The facts were as follows : In 1911 the plaintiffs bought two

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1. Ram Chunder Dutt v. Dwarka Nath, I. L. R. 16 Cal. 330 ; Basaruddi Sheik v. Enajaddi, I. L. R. 25 Cal. 298.
2. Velayapa Rowthen v. Bava Rowthen, A. I. R. 1916 Mad. 633 (1) ; Subaraya Reddiar v. Rajagopala, A. I. R. 1915 Mad 708 ; Mohamad Ibrahim v. Nakched, 7 A. L. J. 752.
3. A. I. R. 1938 Nag. 257.
4. A. I. R. 1922 P. C. 126 : 66 I. C. 107.
5. Rinsa Ansa Teli v. Mohanlal Madangopal Marwari, A. I. R. 1938 Nag. 257 at pp. 258-59.
6. A. I. R. 1916 P. C. 182 : I. L. R. 44 Cal. 759 : 44 I. A. 65.
7. A. I. R. 1921 Bom. 252 ; I. L. R. 15 Bom. 955.

lands under a registered sale-deed, and went into possession. One of the lands was let to a tenant. The tenant claimed the land as his own; and established his title to the land in 1913 ; the decree was confirmed by the High Court in 1916. In 1917 the plaintiffs sued their vendors for cancellation of the sale of 1911 and to recover the consideration money together with the amount spent by them in improving the land and the costs incurred by them in defending the suit brought by the tenant. The Trial Court held that the consideration for the sale failed in 1913 when the tenant established his claim in a court of law and that the suit was barred by Art. 97 (new), Limitation Act. On plaintiff's appeal it was held by the Bombay High Court that Art. 116 (old) applied and that time began to run from the date when the tenant established his title to the land in 1913. The learned Chief Justice in deciding the case prominently referred to a decison of the Madras High Court in *Subbaroya Reddiar* v. *Rajagopala Reddiar*.[1] That was a suit by purchasers to recover the amount paid by a them to the defendants or their predecessors for a certain property on the ground that the consideration for the sale failed when the plaintiffs were deprived of possession. In deciding the case the learned Judge in the Madras High Court said as follows :

> "In the present case, the conveyance was *prima facie* unimpeachable, and I do not think the construction to which the release of Gnanammal lent itself in the eye of law, can be said to amount to a knowledge of the defect of title. On the second question as to when the cause of action for damages arose, a very large number of cases were quoted before me. These cases can, roughly speaking, be classified under three heads : (*a*)where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property ; (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale ; and (*c*) where though the title is known to be imperfect, the contract is in part carried out by giving possesstion of the properties."

Now stopping here for a moment it will be noticed that the present case falls under head (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale. It was contended that the sale was not voidable but void *ab initio* since it has been found that Mst. Lakhpat had no title whatever to convey. But this point was very completely dealt with in the judgment of the High Court, where it was pointed out that a transaction cannot be regarded as void *ab initio* where both the parties consider that the vendor has a good title to convey. This being so, as between the parties to this legislation it cannot be regarded that the sale was void *ab initio* and there is no doubt that possession was taken under the voidable sale. Now proceeding the learned Judge continued to say as follows :

> "In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to and so long as his possession is not disturbed, he is not damnified."

The learned Chief Justice of the Bombay High Court adopted the reasoning of this case and held that in the case before him time began to run only when the tenant established his claim as against the vendor and the vendee. It must, therefore, be held that time began to run from 14th July,

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1. I. L. R. 38 Mad. 887 : 23 I. C. 570 : (1914) M. W. N. 376.

1919, and as the suit has been brought within six years from that date the suit is well within time.[1]

So long as the person whose rights have been infringed, remains in possession of the property, limitation does not begin to run against him. On the principle enunciated above so long as Sahu Ram Kumar remained in possession of the property whether in his own right or as a *lambardar*, in which capacity he must be deemed to have been holding as representative of the entire coparcenary body including himself, he need not have brought this suit. Thus, it is when actual dispossession takes place that the real infringement comes into being and it is only then that limitation begins to run.[2]

Where the respondents purport to convey full title in the suit property and the appellant is entitled to rely on Sec. 55 (2) of the Transfer of Property Act, his knowledge that the title was defective will not in such circumstances preclude him from suing for recovery of his purchase money.[3]

In India there is a statutory guarantee for good title unless the same is excluded by the contract of parties.[4] The question of the knowledge of the purchaser does not affect the rights to be indemnified under the Indian Statute Law. Even in England, if on the face of the conveyance a *prima facie* title is secured, knowledgs of facts which may lead to the discovery of flaws will not affect the claim to compensation.

When the cause of action for damages arose ? The law can be classified under three heads :

(*a*) Where from the inception the vendor has no title to convay and vendee has not been put in possession of the property ;

(*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale ; and

(*c*) where though the title is known to be imperfect, the contract is in part carried out by giving possession of properties.

In the first class of cases, the starting point of limitation will be the date of the sale. That is Bakewell, J. S.'s view in *K. A. Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudripad*.[5] In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed, to the decisions of Judicial Committee of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur*,[6] and in *Bassu Kamar* v. *Dhum Singh*,[7] are authorities for this position. In that third class of cases also it is said that the cause of action will arise only on the disturbance of possession. No question of concurrence of third parties either to avoid or perfect the title arises in this case.

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1. Mst. Lakhpat Kuer v. Durga Prasad, A.I.R. 1929 Pat. 388, at pp. 389-391.
2. Sahu Avadesh Kumar v. S. Zakaul Husain, A.I.R. 1944 All. 243 at p. 245.
3. *Vide* Subarraya Reddiar v. Rajagopala Reddiar, A. I. R. 1915 Mad. 708 : 23 I.C. 570, and Thekkemannengath Raman v. Kakkesseri Pazhiyot Manakkal Karnavan, (1915) 27 I.C. 939; K. Vellayappa Rowthen v. K. Bava Rowthen, A.I.R. 1916 Mad. 633.
4. *Vide* Sec. 55, Cl. 2, Transfer of Property Act.
5. (1913) 21 I.C. 740.
6. I.L.R. 19 Cal. 128 ; 18 I.A. 158.
7. I.L.R. 11 All. 47 : 15 I.A. 211 : 5 Sar. 260 ; 21 I.C. 450.

The authority for his proposition is *Narsing Shivbakas Marwadi* v. *Pachu Rambakas Marwadi*.[1] Miller, J., in the case reported as *K. A. Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudripad*,[2] gives a qualified assent to the proposition laid down in that case. It is impossible to see "how the sale can be said to have been without consideration and consequently void *ab initio* where possession has been given under the contract of sale".

If the widow, Gnanammal, did not recover possession the plaintiff would never have been disturbed. The sale was not void *ab initio*. It was only voidable if Gnanammal chose to avoid it; even if this view is not correct, thus in this case where under an invalid contract possession had been given until that possession is interfered with the purchaser is not bound to ask for the return of his purchase money on the possible ground that at some future time his sale may be impeached. Thus the cause of action for this suit arose only when under the decree obtained by Gnanammal the possession of plaintiff was disturbed. The decisions of *Ardesir* v. *Vajesingh*,[3] *Shivaram Govind Desai* v. *Bal Daji Desai*,[4] and *Amrita Lal Bagchi* v. *Jogendro Lal Chowdry*,[5] all relate to cases where no possession passed to the vendee and consequently the consideration failed at the date of the sale. The judgments reported as *Rajagopalan* v. *Thirupanathal Thambiran*,[6] *Sriramulu* v. *Chinna Venkatasami*,[7] and *Venkatanarasimhulu* v. *Peramma*,[8] are cases where possession passed to the vendee and there was subsequent deprivation of possession.[9]

The same presumption is implied in a mortgage[10] and the knowledge of the mortgagee about the true facts is immaterial. As the plaintiff included the disputed lands in his demise to defendant 1, he must be deemed to have contracted that he was the *jenmi* of these disputed lands also. The question of the knowledge of the mortgagee as to the defect of title in the mortgagor is irrelevant as has been held in two recent cases in this Court in the analogous question between vendor and purchaser: see *Ragava Iyengar* v. *Samachariar*,[11] *Subbaraya Reddiar* v. *Rajagopala Reddiar*,[12] and *Arunachala Aiyar* v. *Ramasami Aiyar*.[13] Sub-question 3 (*c*) need not therefore be answer d. As regards the question of acquiescence or waiver, question 3 (*d*), their Lordships of the Privy Council hav doubtless held in *Partab Bahadur Singh* v. *Gajadhar Baksh Singh*,[14] that a mortgagee whose mortgage was created in 1851 and who lost portions of the mortgaged properties in 1853, 1858 and 1864 by acts beyond the mortgagor's control cannot claim compensation after having acquiesced for thirty years in the diminution of his security. But the mortgage in that case was executed before the Transfer of Property Act came into force and that fact might make some difference as is suggested in the later case, *Abdullah Khan* v. *Basharat Hussain*,[15] decided by their Lordships of the Privy Council. Thus the defendant 1's statutory right given by the breach of the covenant attached to the mortgage transaction under Sec. 65, Act 4 for 1882, cannot be taken away, except by an express release of such rights by defendant 1 or by acquiescence of such a very long duration that a release can be safely presumed. In this case, defendant 1's former unsuccessful litigation of 1890 in respect of the disputed lands came to a close

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1. (1913) 20 I.C. 254 : I.L.R. 37 Bom. 538.
2. (1913) 21 I.C. 740.
3. I L.R. 25 Bom. 593 : 3 Bom. L.R. 190.
4. I.L.R. 26 Bom. 519 : 4 Bom. L.B. 410.
5. (1912) 15 I.C. 707 : I.L.R. 40 Cal. 187.
6. I.L.R. 30 Mad. 316 : 17 M.L.J. 149.
7. I.L.R. 25 Mad. 396.
8. I.L.R. 18 Mad. 173.
9. Subbarraya Reddiar v. Rajagopala Reddiar, A.I.R. 1915 Mad. 708 at pp. 709-10.
10. *See* Sec. 65 (*a*), Transfer of Property Act.
11. A. I. R. 1915 Mad. 689 ; 22 I. C. 40.
12. A. I. R. 1915 Mad. 708 ; 23 I. C. 572.
13. A. I. R. 1915 Mad. 742 : 25 I. C. 618.
14. I. L. R. 24 All 521 : 29 I. A. 148.
15. I. L. R. 35 All. 48 : 17 I. C. 737 : 40 I. A. 31.

only in 1897 : This suit was brought in 1905 and defendant 1 who has paid nothing for *michavaram* after 1895 except the 16 *paras* of paddy annually spent for the temple festival cannot be said to have by his conduct released his claim for compensation for the breach of the covenant given by the mortgagor as to his title to the disputed lands.[1] The contrary view expressed in *Tulsiram* v. *Tukaram*[2] was merely *obiter* and not necesrary for the decision of the same.

The decision in *Gangabai* v. *Beswant Balappa*[3] is not contrary to the above statement of the law for in that case the transfer was invalid in law, being of property which could not have been transferred on the date of the transfer.

So also the representation mentioned in Sec. 43 may be either express or implied. Though property vests in the receiver by operation of law the transfer by him is a transfer by one party to another and cannot be said to be a transfer by operation of law in favour of his vendee. There is always an implied covenant by the vendor that he has title to sell. Section 55 contains implied covenant in sales of immoveable property and there can be little doubt that when a person sells property, there is an implied covenant that he has power to sell. Even assuming that all that the Official Receiver can sell is the right, title and interest of the insolvent, still the Official Receiver covenants that he has authority to transfer such right, title and interest as the insolvent has. It is of course open to him by apt covenants to protect himself against any of the infirmities of title or any disputes which may arise as regards the sale. But in the present case it is not contended that the Official Receiver has done so. In the present case the Official Receiver who had no power to sell has sold the property. There is as regards the vendee who had no notice that no vesting order was passed and who was entitled to assume that the Official Receiver was clothed with the requisite authority, the implied covenant that he has title to sell and therefore an erroneous representation that he is authorized to transfer immoveable property, when as a matter of fact he had no such power. The transferees in this case paid consideration for, and if the Official Receiver subsequently got authority to transfer the property, there is no reason why such subsequent authority should not operate so as to validate the antecedent sale. The case comes strictly within the wording of Sec. 43. In cases where after a sale, it is sought to rectify any defects in the power of the Official Receiver it is desirable that notice should go to all the parties interested in the property and their objections should he heard as there may arise cases where it is undesirable that the Court sbould exercise its discretion when it is passing orders the effect of which would be to validate invalid transactions long afterwards and affect the right of third persons in the present case there is no hardship shown. It has been held by a Full Bench of the Madras High Court in *Balvenkata Seetharam Chetty* v. *Official Receiver, Tanjore*,[4] that the conditional power of a Hindu father to dispose of his son's interest vests in the Official Receiver, and that decision governs the present case so far as this point is concerned.[5] It will be implied when the law makes it an implied term of the transfer. There is no reason why if knowledge of the transferee is immaterial when applying the doctrine of equity it should be necessary when applying the doctrine of Sec. 43.

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1. Parasurama Pattar v. Venkatachalam Pattar, A. I. R. 1914 Mad. 661 : 21 I. C. 701 ; Thekkemannengath Raman v. Kakkesseri Pazhiyot Manakkal Karnavan, A. I. R. 1915 Mad. 1215 at p. 1218.
2. A. I. R. 1924 Nag. 363 at p. 365.
3. I. L. R. 34 Bom. 175.
4. A. I. R. 1926 Mad. 994 (F. B.).
5. Pinnamamem Basava Sankaram v. Garpati Narasimhulu, A. I. R. 1927 Mad. 1 at pp. 3 and 6 ; *see* also Muthiah Chettiar v. Doraiswami Pillai, A. I. R. 1927 Mad. 1091.

Turning now to the cases decided in India under Sec. 43, Transfer of Property Act, it has to be conceded that a vast majority of them do lay down the proposition contended for on behalf of the respondent and the reasoning underlying most of those cases is that because Sec. 43 makes a mention of an "erroneous or fraudulent representation" there is an implication that the representation must be believed to be true and the transferee must have acted in that belief and that this could not be the case if he knew the truth.

In some cases, e. g. *Mulraj* v. *Inder Singh*,[1] an additional reason has been given, namely that Secs. 6 and 43, Transfer of Property Act, would otherwise conflict but this reason can hardly support the conclusion drawn in these cases, for the conflict between the two sections can be avoided by holding that Sec. 43 applied where property is transferred on the basis that it is a transfer of an existing property, whereas Sec. 6 (*a*) applies to cases where ostensibly the right of inheritance is transferred, and that where both parties know that the transfer is being made not of an existing property but of a future right of inheritance, the transaction is a fraud upon the statute and void.[2] These cases, therefore, are a class apart and are, with respect, perfectly good decisions on facts.

Some of the other decided case are distinguishable on facts. For instance, in some cases there was no bargain for the transfer of the interest which was subsequently acquired, e. g. *P. Bengaram* v. *K. Subbaraju*.[3]

In some there were circumstances apparent from the deed of transfer itself showing that the transferor had no right to transfer at all or no right to transfer beyond his lifetime.[4] It was argued that the plaintiff's suit is barred by Sec. 43, Transfer of Property Act, and reliance is placed on the case in *Shyam Narain Misir* v. *Mangal Prasad Misir*.[5] First of all Sec. 43, Transfer of Property Act, was never pleaded by the defendant in the written statement, and moreover the case is clearly distinguishable. As stated before, the sale-deed is not on the record, and it cannot be said with certainty as to what representations were made when the property was sold to the predecessor of the defendant, but one may safely assume that as Mst. Hansrani was an executant of the sale-deed in her own right the parties knew perfectly well that the immediate title in the property rested with Mst. Hansrani, and there was no erroneous representation on the part of Ram Narain that he was owner of the property. The vendee knew prefectly well the state of affairs and there was no inducement, and as held by the Lower Appellate Court,

> "In the absence of the sale-deed itself and evidence on the appellants' side proving that Ram Nain induced the vendee to believe him (Ram Nain) as an owner of the property and that the vendee had no knowledge himself on the point, Sec. 43, Transfer of Property Act, can have no application. The plaintiffs' suit having been brought within 12 years of the death of Mst. Hansrani is clearly within time.[6]"

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1. A. I. R. 1926 All. 102 at p. 102.
2. *See* also Bindeshwari Singh v. Har Narain Singh, A. I. R. 1929 Oudh 185; Ram Bharosay v. Bhagwandin, A. I. R. 1943 Oudh 196; Shyam Narain v. Mangal Prasad, A. I R. 1935 All. 244; Dwarka Prasad v. Nasir Ahmad, A. I. R. 1925 Oudh 16.
3. I. L. R. 31 Mad. 159.
4. Gangabai v. Baswant Ballappa, I. L. R. 34 Bom 175.
5. A. I. R 1935 All. 244 : 153 I. C. 163 : I. L. R. 57 All. 474 : 1935 A. L. J. 13 : 4 A. W. R 1121.
6. Mst. Maina v. Bhagwati Prasad, A. I. R. 1936 All. 557 at p. 560.

It has been laid down in *Pandiri Bangaram* v. *Karumoory Subbaraju*,[1] that the benefit of Sec. 43, Transfer of Property Act, can only be claimed by a person who has acted on the erroneous representation of the party who subsequently acquires an interest in the property. The decision has been followed in *Mulraj* v. *Indar Singh*,[2] and there is also a similar observation in *Jagannath* v. *Dibbo*.[3] Learned counsel for appellant referred to *Tilakdhari Lal* v. *Khedan Lal*,[4] where their Lordships set out the principle of law which is contained in Sec. 43, Transfer of Property Act. But that principle was merely set out with the observation that it had not been presented to the courts below and that it had not been raised in the case and therefore their Lordships did not consider the application of that doctrine. So the ruling is no authority on the point.[5]

In some others, the transferor, who subsequently acquired the interest, had joined along with the then owner of the property merely for the satisfaction of the transferee both parties knowing that he had no present interest.[6]

In *Kabul Chand* v. *Badri Das*,[7] already cited, Niamatullah, J., speaking about the construction of Sec. 43 stated that much could be said on either side.

In *Narain Rao* v. *Abbas Sahib*[8] Sadasiva Iyer, J., expressed grave doubts about the correctness of the current view.

In *Ram Lal* v. *Shiama Lal*,[9] although Sec. 43 was not applied, the equitable doctrine of feeding the grant was applied and in effect the benefit of Sec. 43 was given, and in *Jagmohan Singh* v. *Sitaram Singh*,[10] Stuart, Judicial Commissioner, definitely held that belief in the erroneous representation and acting upon it were not necessary for the purpose of taking the benefit under Sec. 43. In *Ganga Baksh* v. *Madho Singh*,[11] it was observed that the section partly reproduces the doctrine of what is commonly known in England as a grant feeding the estoppel shorn of some of its technicalities, but it applies as only to a case where a transfer is for consideration. This rule enjoins that all persons interested either in the mortgage security or in the equity of redemption are to be joined as parties to any suit on the mortgage. The object of doing so is not merely to avoid multiplicity of suits, but also to enable the interested parties to raise necessary defences open to them in law, so that the same may be taken into consideration in dealing with the claim under the mortgage and in passing the preliminary decree thereon.

That this is imperative is also inferable from the fact that O. XXXIV, R. 4, C. P. C., provides for the passing of preliminary decree fixing a time for payment into Court of the amount for which the preliminary decree had been made and in default whereof giving of a right to the plaintiff therein, to apply for a final decree directing that the mortgage property or sufficient part thereof be sold and the proceeds of sale paid into Court and applied in payment of what has been found due under the preliminary decree.

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1. I. L. R. 34 Mad. 159 : 8 I. C. 388.
2. I. L. R. 1926 All. 102 : 92 I. C. 471.
3. I. L. R. 31 All. 58 : 1 I. C. 818.
4. A. I. R. 1921 P. C. 112 : 57 I. C. 465 : I. L. R. 48 Cal. 1 : 47 I. C. 239 (P. C.).
5. Jagernath Prasad v. Mst. Dhanpati, A. I. R. 1934 All. 969 at pp. 970-71; *See* also Bijleshari Bakhsh Singh v. Gajadhar, A. I. R. 1941 Oudh 123; Rashmani Dasi v. Surja Kanta Roy, I. L. R. 32 Cal. 832.
6. Ladu Narain Singh v. Goberdhan Das, A. I. R. 1925 Pat. 470 at p. 471.
7. A. I. R. 1938 All. 22.
8. A. I. R. 1915 Mad. 1085.
9. A. I. R. 1931 All. 275.
10. A. I. R. 1917 Oudh 50.
11. A. I. R. 1955 All. 288 (F. B.).

In *Mata Prasad* v. *Ram Charan Sahu*,[1] a suit for sale on a mortgage was brought against the ostensible purchaser of the mortgaged property. The latter pleaded that she was not the real purchaser but was merely a *benamidar* for her three sons. The Court, however, declined to accept this plea and gave a decree against the defendant upon the record treating him as the real purchaser. Subsequently, the sons sued for possession of the same property and it was therein held that the previous decision in the mortgage suit did not operate as *res judicata*. The following observations of their Lordships of the Allahabad High Court at page 450 (of I. L. R. All.) : (at pp. 174, 175 of A. I. R.) are apposite :

> "It is argued on behalf of the appellants that, on the admitted statements of the plaintiffs-respondents in their plaint, their mother Musammat Sheolagna was a *benamidar* for them, and if she was a *benamidar* for the plaintiffs-respondents, a decree passed against her in that capacity is binding upon the plaintiffs also, if the parties in the present litigation are the same who were parties in the former litigation and the questions in issue were the same.....We do not think that the rule of *res judicata* is applicable to the circumstances of the present case. It appears to us that the rule has been made applicable in case of decrees in favour of or against a *benamidar*, where the real owner has allowed the dispute to be fought out between his *benamidar* and a third party and has abstained from coming forward. The principle upon which the rule has been applied to cases fought in the name of a *benamidar* is well expressed in *Gopi Nath* v. *Bhugwat Pershad*,[2] where the learned Judges held that :
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> 'the proper rule is that in the absence of any evidence to the contrary it is to be presumed that the *benamidar* has instituted the suit with the full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself.'
>
> "In other words, if the litigation is carried on with the full knowledge and authority of the real owner and the latter does not wish to come forward he is bound by the decree. In the present case Musammat Sheolagna protested that she was a *benamidar* and she did not want to carry on the litigation which the defendants first party brought against her, though not in her capacity as a *benamidar*, but wanted her sons to be brought on the record as defendants in the case. She gave information of the real state of the transaction of the 10th of January, 1891, to the defendant first party who not only failed to take advantage of this information but contradicted it.
>
> "It cannot, therefore, be said that the rule contended for by the learned Advocate for the appellants is applicable to the circumstances of the present case. Moreover, the decree against Musammat Sheolagna was not passed as *benamidar* for her sons but on an express finding that she was the real owner and not *benamidar* of her sons. The rule, therefore, that a decree against the *benamidar* binds the real owner does not hold good in the present case."

In *Mohunt Das* v. *Nil Komul Dewan*,[3] a son against whom a suit ought to have been instituted, conducted on behalf of his mother a suit wrongly

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1. I. L. R. 36 All. 446 : A. I. R. 1914 All. 173.
2. I. L. R. 10 Cal. 697.
3. 4 C. W. N. 283.

brought against her, knowing all the time that he and not the mother should have been sued, but there being nothing to show that it was by reason of any representative or conduct of the son that the plaintiff was led to think that the mother was the right person to be sued. In the circumstances it was held that the decree in that suit was not binding on the son, and did not estop him, in the subsequent suit against him, from contesting the validity of that decree. What has been propounded in this case was a principle similar to the one in *Mata Prasad* v. *Ram Charan Sahu*,[1] referred to earlier. Their Lordships of the Calcutta High Court observed as follows :

> "Now the rule of law applicable to judgments and decrees *inter partes* is that they bind only parties and privies. The only extension, given to this rule by our courts, is that a decree against a *benamidar* binds also the beneficial owner.
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> * * * *
>
> "But the rule which makes a decree against a *benamidar* binding on the beneficial owner is based upon the ground that the *benamidar* acts in concert with the beneficial owner, or rather that the beneficial owner acts through the.....*benamidar*, and on the further ground that it is by the act and conduct of the beneficial owner that the *benamidar* is held out to the world as the rightful owner ; so that the beneficial owner cannot fully complain, if a decree made in a suit which the plaintiff was led to institute against the *benamidar* by reason of the acts and representations of the beneficial owner is sought to be used as binding against him."

Applying the principles laid down in these two cases to the facts of the cases in *Devathi Subbarayudu* v. *Puvvadi Chinna*,[2] there are clear indications of the *benamidar* protesting against his having been made a party to the suit and indicating in whom the beneficial interest vested and disclaimed any interest in the suit property.

In these circumstances, if it was intended by the plaintiff that the mortgage decree passed in that suit should bind the plaintiffs, it was clearly his duty to implead them as party-defendants to the suit, in which case it would have been open to the plaintiffs to raise the appropriate defences and resisted the passing of a decree, and in the event of a preliminary decree being passed, take necessary steps either to prefer an appeal or make or deposit of the decree amount so as to prevent a sale of the mortgage property in which they were interested.[3]

Estoppel under this section and Sec. 11, C. P. C., and Sec. 115, Evidence Act.—To take the doctrine of estoppel by deed and the doctrine of feeding the estoppel first. Under the English law, estoppel is of three kinds: estoppel by judgment, estoppel by deed and estoppel *in pais*. Estoppel by judgment is embodied in the Indian law in the doctrine of *res judicata*. Their Lordships are not concerned with it here.

The doctrine of estoppel *in pais* is embodied in Sec. 115, Evidence Act, whereas the doctrine of estoppel by deed coupled with the doctrine of feeding

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1. I L. R. 36 All. 446 : A. I. R. 1914 All. 173.
2. A. I. R. 1960 A. P. 592.
3. *See* also Gur Narayan v. Sheo Lal Singh, 46 Ind. App. 1 : A. I. R. 1918 P. C. 140 and Prokash Chandra v. Mahima Ranjan, A. I. R. 1947 Cal. 310 : 51 C. W. N. 273 ; Devathi Subbarayudu v. Puvvadi Chinna, A. I. R. 1960 A. P. 592 at pp. 598-99.

the estoppel where the deed is a transfer for consideration is embodied in Sec. 43, Transfer of Property Act, with slight modifications.

Though there is a considerable analogy between the doctrine of English law as to the conveyance by estoppel, and the doctrine of Roman-Dutch law which prevails in Ceylon, that doctrine is not identical with that of the English law. The mode of reasoning by which it is reached is different, and the conclusions are not necessarily the same. This law admitted what was called the *exceptio rei vendidate at traditio*. Under this exception the purchaser who had got possession from a vendor who at the time had no title could rely upon a title subsequently acquired by the vendor not only against the vendor but against anyone claiming under the vendor ; and though delivery (*traditio*) was part of the defence ; if the purchaser had acquired possession without force or fraud he could use the exception though he had never received actual delivery from the vendor. Also if he had once been in possession without force, or fraud, and had since lost possession he could recover it by the *publician* action, using the exception as a replication to any defence set up by the vendor or those claiming title under him. The principle does not rest upon estoppel by recital and is broader in its effect than the English rule.

Under the Roman-Dutch law, the question is, what was the property purported to be conveyed; and on all principles of construction, the recitals can only be looked at for the purpose of assisting the courts to arrive at the determination of the actual effect of the conveyance. The recitals as to how the tarnsferor got the title to the property are not material if the transferor had no title at the time, under the Roman-Dutch law, his subsequent acquisition would make the transfer effective.[1]

18. Principle.—The principle underlying Sec. 43, Transfer of Property Act, 1882, is that "if a man sells an estate to which he has no title and after the conveyance acquires the title he will be compelled to convey it to the purchaser".[2] It is an extension of the rule of estoppel that the tranferor who induced the transferee to pay money for the transfer on his own representation that he had title cannot be allowed to plead that he had no title on the date of the transfer but acquired it only subsequently.[3] The rule does not apply unless there is a representation by the transferor whtch is believed by the transferee and the transferee relying on the truth of that representation has changed his position to his own detriment.[4]

In the case of *Amrit Narayan Singh* v. *Gaya Singh*,[5] their Lordships of the Judicial Committee held that the right of a Hindu reversioner in the lifetime of the widow was a mere *spes successionis* and was not capable of being transferred. The learned Judge (Mukherjee, J.) was, however, of the opinion that it is possible for the reversioner to treat the alienation as operative against the *spes successionis* and by giving his consent to the transfer debar himself from claiming the property if the succession opened in his favour.

Section 43, Transfer of Property Act, however, partly produces the doctrine of what is commonly known in England as a grant feeding the estoppel shorn of some of its technicalities but it applies only to a case where a transfer is for consideration. A gift of property in which a transferor has no interest will not be protected under this section if the transferor acquires title

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1. Fernando v. Gunatilaka, (1921) 2 A. C. 357.
2. Sugden's *Vendors and Purchasers*, 14th Ed., p. 355.
3. Mokhada Devi v. Umesh Chandra, I. L. R. 7 C. L. J. 381.
4. Ladu Narain Singh v. Gobardhan Das, A.I.R. 1925 Pat. 470 at p. 471 : I.L.R. 4 Pat. 478.
5. A. I. R. 1917 P. C. 95 : 45 Ind. App. 35 (P. C).

to the property after the gift. Where a reversioner has joined in the execution of a deed of a gift executed by a Hindu widow the fact that he purports to be one of the donors will not affect his interest under Sec. 43. The principle laid down in Sec. 43, Transfer of Property Act, or its adaptation will not, therefore, debar a reversioner who has consented to a gift made by a Hindu widow from claiming the property if succession opens in his favour. The transfer can, therefore, be protected only on the ground laid down in *Fateh Singh* v. *Thakur Rukmini Rawanji Maharaj*,[1] and followed by the High Courts of Bombay and Madras.

The position, therefore, is that in a large part of the country the view has prevailed that a reversioner, who has consented to a transfer made by a Hindu widow, though he may not have himself received any consideration will not be allowed to claim the property on the death of the Hindu widow if the succession opens in his favour. In the referring order this position has been noticed by Kidwai, J., who has stated :

> "It may be that the principle adopted by the various Full Benches is a further development of a widow's power to alienate and, having now been accepted by four High Courts for a period of about 25 years, should not be negatived but so far as Oudh, at least, is concerned this principle was not accepted and it would not be given effect to the rule of *stare decisis*."[2]

In *Tan Soon Thye* v. *L. E. DuBern*,[3] in which his Lordship the Chief Justice has held that in his opinion,

> "although *prima jacie* a sum payable 'on demand' is repayable forthwith and the words 'on demand' are whether or not the parties intended that the words 'on demand' should be treated as an integral and operative part of the agreement depends upon the true construction of the agreement into which the parties entered".

In *Secretary of State* v. *Radhika Prasad*,[4] where Schwabe, C. J., held that the question to be considered is whether the words "on demand" are mere words, or whether looking at the whole document, it is really intended that the demand should be made before the liability to pay arises.

This principle has been enunciated in a number of cases, both in India and in England. In this particular case there can be no doubt that the words "on demand" appearing on the promissory note must, in the language of Schwabe, C. J., be held to be mere words, it never having been the intention of the parties that the loan should be payable immediately on demand.[5]

It is a well-known proposition of law that the mortgagor is estopped from pleading that he was not entitled to mortgage the property which he mortgaged. He is also estopped from defeating the claim of the mortgagee in any property which he had mortgaged and which he did not actually own at the time of the mortgage and had subsequently come into his possession This is the principle which is enacted by Sec. 43, Transfer of Property Act. The question has been discussed in Wiltsie on *Mortgage Foreclosure*,[6] and the whole case law on the subject—English and American—has been discussed at length. It is stated as follows :

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1. A. I. R. 1923 All. 387 : I. L. R. 45 All. 339 (F. B.).
2. Ganga Bakhsh Singh v. Madho Singh, A. I. R. 1955 All. 288 at pp. 291-92.
3. A. I. R. 1933 Rang. 188 : I. L. R. 11 Rang. 328.
4. A. I. R. 1923 Mad. 667 : 74 I. C. 785 : I. L. R. 46 Mad. 259.
5. Miss J. J. Villa v. C. A. Petley, A. I. R. 1934 Rang. 51 at p. 53 ; *see* also Rajapaksi v. Fernando, (1920) A. C. 892 ; Fernando v. Gunatilaka, (1921) 2 A. C. 357.
6. 3rd Ed., pp. 637, 691 and 692.

"A party who mortgages his property with covenants of title is estopped from pleading in defence to a foreclosure that at the time of the execution of the mortgage he had no title to, nor interest in, the mortgage premises, or any part thereof; neither can he set up as a defence a defect in his title."

Their Lordships find the following observations which are based on the cases cited therein :

"Thus where a mortgagor in his mortgage warrants the title to lands which he really does not possess, and subsequently acquires title thereto, the title subsequently acquired inure to the benefit of the mortgagee, the same as if the entire title had been originally possessed by the mortgagor, and will stop such mortgagor, and all persons claiming under him, from subsequently asserting any title against the mortgagee and those claiming under him. The reason for this seems to be that the mortgagor will not be permitted to attack a title, the validity of which he has covenanted to maintain.

"The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase. And hence, the mortgagor and those in privity with him, in good faith and fair dealing should be for ever thereafter.precluded from gainsaying it."[1]

In *Ram Lal* v. *Shiama Lal*,[2] it was argued for the respondent that Sec. 43, Transfer of Property Act, did not apply in terms, possibly it does not. The case of *Mulraj* v. *Inder Singh*[3] was cited on behalf of the respondent. But that case is distinguishable. There, it was pointed out that to allow the particular party to rely on Sec. 43 and to take his stand on it would mean that he would be allowed to defeat the provisions of Sec. 6, Transfer of Property Act. In this case the mortgagors were not transferring their future right to succeed, which would be a mere possibility. In this case they actually entered into an agreement with Azizuddin that Azizuddin would sell his rights to them and they would purchase it. By agreement Azizuddin was declared to be the owner of the property and Azizuddin had every right to sell the property. *Held* that on the principle of "feeding the estoppel" the plaintiffs are entitled to enforce their mortgage against the groves.

Estoppel by deed is based on the principle that when a person has entered into a solemn engagement by a deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive nature as to admit of no contradictory proof.[4]

This doctrine being merely a rule of evidence does not perfect the title of the transferee. The title is perfected under the doctrine of feeding the estoppel. The doctrine was explained by their Lordships of the Privy Council in two cases. In *Rajapakai v. Fernando*,[5] the Privy Council enunciated the English doctrine thus :

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1. Abdul Ahad v. Brij Narain Rai, A.I.R. 1935 All. 269 at pp. 270-73 : 1935 A.L.J. 214.
2. A. I. R 1931 All. 275 at p. 276 : 1931 A. L. J. 73.
3. A. I. R. 1926 All. 102 : 92 I. C 471 : I. L. R. 48 All 150.
4. Halsbury's *Laws of England* (Hailsham Edition), Vol. 13, para. 513, p. 456.
5. A. I. R. 1920 P. C. 216.

"Where a grantor had purported to grant an interest in land which he did not at the time possess but subsequently obtained, the benefit of his subsequent acquisition goes automatically to the earlier grantee, that is it feeds the estoppel."

In *Tilakdhari Lal* v. *Khedan Lal*,[1] the doctrine was restated as follows:

"If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes.

"In such a case there is nothing on which the second grant could operate in prejudice to the first."

19. **Clause (b).**—The principle of this clause may be traced to *Bain* v. *Fothergill*,[2] wherein it was observed that "a vendor is bound to do everything that he is able to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance" in order to attract the application of the clause it is not necessary to establish that the concurrence of a third party is necessary but also that such third party is under legal obligation to convey his concurrence on his being asked to do so by the vendor or the lessor. "Equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to acquire."[3] The clause sets up a sound proposition of law and makes it impossible for Indian courts to give decisions decreeing specific performance of a contract by the husband to get the assent of his wife to an alienation, the wife being not bound under the law to do so.[4] But a vendor cannot be permitted to say that he did not mean to acquire an interest which is necessary to enable him to convey the property. If he can get it, he may and will be compelled to do so, and it is not available defence that he had not got it at the commencement of the action.[5] The plaintiff contracted with the defendant and his landlord that the plaintiff would give a plot of land to the landlord in exchange for that held by the defendant under the landlord; that the plaintiff was to be given actual possession of the plot held by the defendant and that the defendant was to get an equal plot from the landlord out of the lands got by him in exchange from the plaintiff, the defendant received the money but refused to vacate. It was held that on the defendant's landlord giving him a plot out of the lands given by the plaintiff in exchange the defendant was bound to vacate and give possession to the plaintiff.[6]

Bain v. Fothergill.

There was an agreement between the parties for the sale of certain lands including both *sir* and *khudkasht* with cultivating rights in the *sir*. But according to the law to which property was subject it was necessary to obtain the sanction of the Revenue Officer for transfer of the cultivating rights. It was held by their Lordships of the Privy Council that in such a case there was an implied covenant in the agreement that the contractor would do all things necessary to effect such transfer including an application to the Revenue Officer for sanction to the said transfer, and consequently the Court had jurisdiction to make a decree for specific performance directing the vendor to apply for sanction and convey the property on receipt thereof and that such a decree could be executed under

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1. A. I. R. 1921 P, C. 112 at p.118.
2. L. R. 7 H. L. 158.
3. Dart, Vol II, p. 1073.
4. Story's *Equity*.
5. Dart, Vol. II, p. 1073.
6. Kangli Debi v. Ichamoyi Debi, 35 I.C. 840.

O. XXI, 32 (5), C. P. C.[1] It may be remembered that in the Central Provinces, from which the above-noted case went up to Privy Council, a Revenue Officer could not under law refuse sanction if certain conditions had been fulfilled and therefore he could be said to be bound to give sanction within the meaning of this clause.

Again, in *Mrs. Chandnee Widya Vati's*[2] case, the plaintiff entered into a contract for sale of a house belonging to the defendant and built on a leasehold plot granted by the Government. One of the terms in the agreement between the parties was that the vendor shall obtain the permission of the Chief Commissioner to the transaction of sale within 2 months of the agreement and if the said permission was not forthwith coming within that time, it was open to the purchaser to extend the date or treat the agreement as cancelled. The defendant made an application to the proper authorities for the necessary permission but withdrew it later on. The plaintiff then called upon the defendant to fulfil her part of the contract but when she failed to do so, a suit was instituted for specific performance of the contract or, in the alternative, for damages. It was argued before their Lordships of the Supreme Court that the contract was not enforceable being of a contingent nature and the contingency not having been fulfilled. Their Lordships repelled the argument in the following words :

> "The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.
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> "In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant-vendor, without any sufficient reasons, withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the defendant, within one month from today, shall make the necessary application to the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question, and further that within one month of the receipt of that sanction she shall convey to the plaintiff the property in suit. In the event of the sanction being refused, the

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1. Seth Moti Lal v. Seth Nanhe Lal, A.I.R. 1930 P.C. 287 at p. 290 : 57 I. A. 333 : 128 I. C. 652 : 26 N. L. R. 333 : 68 M. L. J. 223 : 35 C. W. N. 93.
2. A. I. R. 1964 S. C. 978.

plaintiffs shall be entitled to the damages as decreed by the High Court....."

The principle laid down in the aforesaid decision of the Supreme Court was followed later on in *Nathulal* v. *Phoolchand*.[1]

Where the concurrence of the third party cannot be procured or is impossible to be procured in law or fact, the specific performance will not be decreed and the case is one for damages.[2] Where the defendant had contracted to sell the property as per the terms and conditions set out in the agreement and since that agreement is valid, the plaintiff has a right to enforce the performance thereof.

In *Abdul Satar Haji Ibrahim* v. *Shah Manilal Talakchand*,[3] the defendant was competent to pass any such agreement and bind himself personally by the terms or conditions set out therein for transferring the property. What obviously prevented him from passing any such transfer in pursuance of the agreement was due to the statutory restriction on him contemplated in Sec. 38 of the Ordinance or Sec. 40 of the Administration of Evacuee Property Act. He was not competent to effect a valid title in the plaintiff during that period. The title to the property that way was rather an imperfect title in him. The restriction came to an end and the property has been restored to him under Sec. 16 (1) of the Administration of Evacuee Property Act. By that event, the title in him over the property became full and perfect which he can pass on to anyone by passing a registered sale-deed or the like. During that period, on the other hand, it was not possible for the plaintiff to enforce his right to obtain a valid transfer of the property. But his right to enforce it revived and that way arose as soon as it became a free property of the defendant liable to be transferred in accordance with law, and more so, as the plaintiff's right had remained unaffected as stated in sub-section (3) of Sec. 38 of the Ordinance or of Sec. 40 of the Act. It was attempted to be urged by Mr. Oza that Sec. 18 requires or presupposes a valid agreement and that the fact about the title being defective was known to the plaintiff. In other words, according to him, the plaintiff knew that it was an evacuee property and that in spite of it he had chosen to obtain an agreement for sale from the defendant. The defendant was competent to pass any such agreement and bind himself and that it was valid. That right of the defendant to fulfil the contract, or of the plaintiff to enforce that contract had merely remained suspended till such time that the property came back to him. On his getting back the property he was bound to make good the contract. This is not a case where something which was invalid by reason of any disqualification prevailing or incompetence on his part to transfer the property and the same being removed, he is called upon to fulfil the contract. Such a contract would be void *ab initio* by reason of transferor's incapacity to contract or incompetence to contract. Therefore, under Sec. 18 (new Sec. 13) of the Specific Relief Act the plaintiff was entitled to compel the defendant to make good the contract after the property in question came to be restored to him under Sec. 16 (1) (new Sec. 12) of the Act.

It was then urged that the performance of the contract depended on the volition of third party, namely, the Deputy Custodian of Evacuee Property and that when such is the case, having regard to Sec. 21 (old) of the Specific

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1. A. I. R. 1970 S. C. 546 ; Balwant Singh v. Rajaram, A. I. R. 1975 Raj. 73 at pp. 77-78 : 1974 R. L. W. 482,
2. Sadwell v. Webster, (1890) 29 L. J. Ch. 73 ; Howell v. George, I. L. R. 1 Mad. 1 ; *see* also I. L. R. 33 Mad. 359.
3. A. I. R. 1970 Guj. 12.

Relief Act, the relief claimed by the plaintiff cannot be given by the Court. The emphasis was that it depended upon the volition of the Custodian and it cannot be said that he shall necessarily act and issue a certificate as required by the defendant. In that respect, he invited a reference to the case of *Shree Ambarnath Mills Corporation, Bombay* v. *D. B. Godbole*.[1] In that case the question that arose was as to whether there is an enforceable agreement of sale wherein it was provided that the price for which the properties were agreed to be conveyed to the plaintiff was indefinite and that it was to be determined by an expert appointed in this behalf by the Government of India, Ministry of Rehabilitation. It was then observed as under :

> "The Government of India is not a party to this agreement and is under no obligation to appoint any person to determine the market value of the properties. The determination of the market value must, therefore, depend upon the volition of a person other than the parties to the agreement. The agreement also does not contain any indication whether the person designated in this behalf is to be accepted by the parties as an expert in ascertaining the market value. Again, the quantum of property to be conveyed to plaintiffs is indefinite."

In those circumstances, the specific performance of the contract was not granted. In *Abdul Satar Haji Ibrahim* v. *Shah Manilal Talakchand*,[2] however, there is no such question of compelling or requiring the Custodian to issue the necessary certificate. All that the agreement provided was that the defendant should apply to the Custodian for obtaining a certificate. That obviously meant to move the Custodian for enabling him to execute the sale-deed in accordance with law. It did not, therefore, depend upon the volition of any party to the contract much less to that of the Custodian for, after all, the Custodian was to act according to the provisions of the Ordinance and he had to decide as to whether any such certificate should be issued or not, and pass orders on any such application given by the defendant for that purpose. It did not depend upon the performance of any act so as to say that he may act or may not act according to his own personal wish or volition. In fact, Sec. 21 (old) refers to the volition of the parties—obviously meaning the parties to the agreement, and not of any party, such as a statutory authority with powers to act according to the provisions governing the same.

Section 22 (old) of the Specific Relief Act gives discretion to a court to pass a decree for specific performance of the contract and the Court is not bound to grant such relief merely because it is lawful to do so. At the same time as provided therein, the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Turning to Cl. I, it is obvious that there has been no fraud or misrepresentation shown on the part of the plaintiff in obtaining the agreement for sale. It was the defendant who can be in the know of the property declared as an evacuee property and an assurance was given by him to the plaintiff that he would obtain the certificate from the Deputy Custodian of Evacuee Property to fulfil the contract. He took away the earnest money and left the plaintiff to his fate. Besides, there is no evidence that the property was worth more than the price agreed to be given by the plaintiff. In fact it was valued at Rs. 12,000 in the notification by which it came to be declared as evacuee propery. Besides, it appears from the evidence of Ratilal that the Custodian had chosen to auction this property

1. A. I. R. 1957 Bom. 119. 2. A. I. R. 1970 Guj. 12.

for sale and the highest bid was of Rs. 16,000 only in 1956. That, however, could not be given effect to as later on, the property came to be restored to the defendant. There is no suggestion whatever made even in the evidence of Ratilal that the property was worth more than Rs 20,000 or so at the date when the contract took place. The price agreed to be paid by plaintiff under the agreement was therefore quite adequate and there is hardly anything to justify as to say that any unfair or undue advantage was at all taken by the plaintiff. Nor would there arise any question of hardship to the defendant as neither of the parties possibly visualized when the property would revert back to him or that the price would shoot up and he would stand to suffer in 1958. One has to consider the circumstances prevailing at the date of the agreement and not as to what happened subsequently. Such considerations cannot be taken into account. A future increase in the price of a property agreed to be sold cannot be a good ground for refusing enforcement of any contract for sale of an immoveable property. In this connexion, Mr. Desai inivited a reference to the case of *Muthukumaraswami Goundan* v. *Ranga Rao*,[1] where it has been observed as follows :

> "The mere fact that the defendant entered into a losing bargain or one where plaintiff will reap great gains is clearly not enough ground to deprive the plaintiff of the benefit of his contract. However wide the jurisdiction of the Court may be to grant succour to persons who have been victimized there is no power to grant relief to a person whose only complaint is that the bargain is foolish and improvident. If the Court were to strike down a bargain on the ground that it was not wise on the part of one of the contracting parties to have entered into it, it would be assuming an overriding power to interfere with the freedom of contract."

Thus, the mere ground that the prices that have gone up in 1958 when he is required to execute the contract for sale, cannot justify the Court to refuse the relief sought for enforcement of the contract. In fact, if turning to the explanation to Sec. 12 (old) of the Specific Relief Act, it clearly provides that "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money and that the breach of a contract to tranfer moveable property can be thus relieved." In other words, when a contract is to transfer immoveable property, the Court has to presume that it cannot be relieved by compensation and there is hardly anything to show that the compensation can serve as an adequate relief in the circumstances of this case.[2]

Whether there was a specific condition in the agreement for obtaining the permission or not, the result would be the same, for the seller is bound to do everything in his power to effect a valid sale. The provisions of the Tenancy Act do not specifically or otherwise make contracts of sale invalid. Even where, in Tenancy Laws, there is a condition that a valid alienation can be effected only on the fulfilment of certain conditions relating to ceiling, it was held by a Bench of the Mysore High Court in *Nominath Appayya* v. *Jamboorao*,[3] that the agreements were not invalid, but are enforceable. That was a case where the plaintiff sued for specific performance of an agreement of sale executed by the defendant in his favour, under which he agreed to convey to the plaintiff certain lands. Section 31 of the Bombay Tenancy and

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1. I.L.R. (1964) 2 Mad. 500.
2. Abdul Satar Haji Ibrahim v. Shah ManilalT alakchand. A.I· R.1970 Cuj. 12 at pp. 22-25.
3. A.I.R. 1966 Mys. 154.

Agricultural Lands Act (67 of 1948) prohibits a person from holding land in excess of the ceiling area. This section is subject to Sec. 35, which declares that where the area of land in the possession of a person exceeds the ceiling area, in consequene of an acquisition made by any of the modes or processes referred to by it, the excess acquisition would be an invalid acquisition.

In was held, that the nullification of only the excess acquisition which is the limited aim of the section does not fit into the theory that it prohibits an agreement of sale whose implementation might assist the purchaser to be in possession of land exceeding the ceiling area, that there is nothing either in Sec. 34 or Sec. 35 expressly or impliedly prohibiting any such agreement of sale ; that the agreement would fall within the third paragraph of Sec. 23 of the Contract Act only when it was possible to say that such illegal acquisition was the inevitable and necessary consequence of the performance of the agreement ; that if such is not the position and by reason of many things which are possible, the plaintiff who wishes to sue on the agreement can ask for delivery of possession of the property which had been agreed to be sold to him without such delivery of possession producing any illegal acquisition to which Sec. 35 refers, the performance of the agreement would not defeat the provisions of the iaw, and that such an agreement can therefore be enforced. By a parity of reasoning, in *Syed Jalal* v. *Targopal Ram Reddy*,[1] there was nothing in the contracts of sale of agricultural lands which contemplate performance of an unlawful act or that an unlawful or illegal act is a necessary consequence of the agreement. In *Vita Food Products Incorporated Ltd.* v. *Unus Shipping Co. Ltd.*,[2] Lord Wright observed that "Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedienoe to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

A mere agreement to sell *simpliciter*, not followed by possession, can be enforced by a suit for specific performance. A contract of sale followed by possession, under the general law, would, subject to the fulfilment of the requirements of Sec. 53-A of the Transfer of Property Act, have enabled a person in possession to use it as a shield to defend his possession. But having regard to the provisions of Sec. 47 read with Sec. 98, no right to possession capable of being upheld under the special enactment can be conferred by means of a permanent alienation or other transfer, unless the prior permission of the Tahsildar is obtained. For the purpose of Sec. 53-A, not only should there be a valid contract of sale, but the transferee should in part-performance of the contract take possession of the property or any part thereof or the transferee being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract, and further that the transferee has performed or is willing to perform his part of the contract. If any of these conditions are not fulfilled, the defence of Sec. 53-A will not be available. The possession referred to here is lawful possession, not unauthorised or unlawful or wrongful possession. It is not necessary to negative the defence of Sec. 53-A that the contract of sale should also be void or illegal. Though the contract is lawful since possession without the prior sanction of the Tahsildar cannot be regarded as authorised under Sec. 98, the remedy of Sec. 53-A will not be available. However, if the vendee files a suit for specific performance on the basis of the agreement of sale, and a decree is granted and the vendor applies for and obtains sanction from the Tahsildar

1. A.I.R. 1970 A.P. 19.

2. (1939) A.C. 277.

in terms of the decree, a sale-deed will have to be executed by him, or if not by him by the Court, in which case the possession of the vendee would be legal. For these reasons, their Lordships were unable to agree with the decision of Munikanniah, J., in *Vasudeo Reddy* v. *Venkatareddy*,[1] that the defence of Sec. 53-A would be avilable to a person who has entered into possession under a contract of sale without a valid right to possession under a permanent alienation or other transfer effected without obtaining the sanction of the Tahsildar.

It follows, therefore, that if possession is wrongful or unauthorized, no suit for a permanent injunction for delivery of possession can be brought. But where in a suit for specific performance, the plaintiff who is in possession asks for an injunction restraining the defendant from applying to the Tahsildar under Sec. 98 of the Tenancy Act for summary eviction, an injunction can be granted pending the suit, till such time as a decree is not passed, or if a decree is granting specific performance, till such time as permission under Sec. 47 is not refused.[2]

The undertaking of the defendant as vendor that he shall take steps under the U. P. Zamindari Abolition and Land Reforms Act to obtain *bhumidhari* rights in the *sirdari* land agreed to be sold is by itself enforceable under the terms of the contract evidenced by the document. Section 13 (*b*), (old) of the Specific Relief Act can usefully be referred to in this connection which says that if the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence. The Court has the power and jurisdiction under Sec. 13 (*b*) (old) of the Specific Relief Act to compel the defendant to take steps and obtain *bhumidhari* rights in the *sirdari* land agreed to be sold.[3]

20. Application of Cl. (c).—This clause is limited in its application to sales, and can be availed of where the vendor both *may* and *can* redeem the property sold.[4] The clause was intended to be limited to the case where the transaction between the parties is still incomplete by reason of the conveyance not having been made or the purchase-money paid or both. For after the transaction has been completed, if the purchaser is charged with prior encumbrance, his remedy, if any, is to sue the vendor for breach of contract.[5]

Application of Cl. (C).

21. Clause also applies to a vendor, where the vendor undertakes to discharge the encumbrance.—The clause applies not only to undisclosed encumbrances but also to cases where the vendor undertakes to discharge the encumbrance on the property, he in effect contracts to sell the property unencumbered and that would attract the application of the clause.[6] The Court granting specific relief is entitled to direct the vendor to discharge the

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1. (1962) 2 Andh. W.R. 462 : A.I.R 1963 A.P. 232.
2. Syed Jalal v. Targopal Ram Reddy, A. I. R. 1970 A. P. 19 at pp. 30, 32.
3. Pahunchi Lal v. Man Singh, A. I. R. 1971 All. 444 at p. 448 : 1971 A. W. R. (H. C.) 338.
4. Dr. Bannerji's *Tagore Law Lectures*, App. C. 56.
5. Collett, pp. 168-69.
6. Kathamuthu Pillai v. Subramaniam, A. I. R. 1926 Mad. 569 at pp. 569-70 : 92 I. C. 715 : 1926 M. W. N. 27, *per* Deva Doss, J. ; *see* also Venkataranga v. Ramasami, 93 I. C. 670 : A. I. R. 1926 Mad. 173.

encumbrance which he undertook to do before he is paid the consideration for sale.[1] Where the vendor's predecessor-in-title created a mortgage on the property agreed to be sold to the purchaser with a letter of indemnity against all claims of third parties and the mortgage is denied by the vendor as being nominal and intended only to defraud creditors Kumaraswami, J., directed an inquiry into the truth and liability under the mortgage, in the presence of the mortgagee, in the purchaser's suit for specific performance itself, to enable the purchaser to be free from future risk and liability.[2] Where the purchaser discovers defects in the property before the conveyance he can either rescind the contract or successfully oppose a suit for specific performance,[3] but if the defects are discovered after the conveyance he must make out a case of fraud in order to set aside a sale.[4] Where the vendee subsequent to the purchase discovered that the vendors had no interest in the property, and thereupon he called upon the plaintiffs (the vendors) to make out a good title or to pay his deposits and the plaintiffs-vendors refused to do either and sued for the payment of the residue of the purchase-money, it was held that the defendant was not liable to pay the plaintiffs the balance of the purchase-money. The purchaser was entitled to say that the condition of sale implied that the vendors had some title, however defective it might be, and he had received at auction no information which could be regarded as giving him a notice to the contrary.[5]

Indemnity against claims.

Procedure when validity of mortgage is denied.

In the absence of an express covenant that the vendors should themselves clear off the encumbrances before executing the sale-deed, it cannot be enforced against any transferees from those vendors as part of the contract which they have become liable to perform. Section 55, Cl. 1, sub-clause (*g*) of the Transfer of Property Act imposes a statutory liability upon all vendors of immoveable property to discharge all encumbrances on the property existing at the time of sale except when the property is sold subject to encumbrances. Clause 2 which provides for the benefit of contracts mentioned in that rule passing to every person to whom the interest is transferred, relates only to the implied contracts mentioned in that particular rule, viz. that the transferor has a subsisting transferable title and, if the vendor is in a position of trust to the buyer, that he has not encumbered the property. There is no similar provision for the benefit of implied contracts in Cl. 1 passing to transferees.[6]

Here on the finding of fact that vendor undertook to discharge the encumbrances, the purchaser was entitled to insist upon his discharging them before a conveyance is effected through Court. He is entitled to ask the Court to give a direction in the decree that the encumbrances should be discharged before the consideration from the sale is paid to him. The case in *Eastern Mortgage and Agency Company* v. *Md. Fazlul Karim*[7] does not apply to the facts of this case. There it was held that it was open to a vendee to resist a suit for specific performance on the ground that the defects in the property were not disclosed by the vendors. But here the 1st defendant did undertake to discharge the encumbrances on the property and the plaintiff

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1. M. Kathamuthu Pillai v. Subramaniam, Chettiar A. I. R. 1926 Mad. 569 at p. 570.
2. Mayappa Chettiyar v. Kolandaivelu Chettiar, A. I. R. 1926 Mad. 597 at p. 599 : 1926 M. W. N. 459 : 92 I. C. 715.
3. Repvoy v. Bevridge, (1888) 20 Q. B. D. 523.
4. Brownite v. Campbell, (1880) 5 A. C. 937 ; *see* also Eastern Mortgage and Agency Co., Ltd. v. Mohammed Fazlul Karim, A. I. R. 1926 Cal. 385, *per* Mukerji, J.
5. Motivahoo v. Vinayak, I. L. R. 12 Bom. 1.
6. Venkatarama Aiyar v. C. S. Ramasamy Aiyar, A.I.R. 1926 Mad. 173 at p. 174 : 1926 M.W. N. 271.
7. A. I. R. 1926 Cal. 385.

is entitled to enforece the the terms of that agreement. The argument that Sec. 18 (*c*) applies only to disclose encumbrances and does not apply to cases where the vendor undertakes to dischrge the encumbrance of the property before the sale cannot be accepted. When the vendor undertakes to discharge encumbrances on the property, he contracts to sell the property encumbered and therefore Cl. (*c*) applies to a case like this.[1] Where the vendor fails to so discharge the mortgage the purchaser is entitled to damages for loss of bargain, even though he was aware of the existence of the mortgage.[2]

Clause (*c*) is an exception to the maxim *caveat emptor*.

22. Caveat emptor.—The principle of *caveat emptor* requires the vendee to be careful and see that he buys after satisfying himself about the title and being properly indemnified by covenants in the deed of purchase.[3] The present clause is an exception to the maxim *caveat emptor* and covers only the case of a contract of sale where the vendor professes to sell unencumbered property. This profession may be made either by false statement or by silence where there is a duty to speak.[4] Where the purchaser of a house under a covenant of title was ejected from a portion of the house under a decree which the vendor was aware of, but which he fraudulently concealed from the purchaser, the latter would be entitled to get damages; but a negligent purchaser who failed to observe the rules of *caveat emptor* cannot have the benefit of the clause.[5] The maxim *caveat emptor* applies to a negligent purchaser in respect of encumbrances as well as to other defects and he is bound to make enquiry regarding them when he is affected by notice of them.[6] But where the vendor is guilty of fraud by *actively* concealing a fact, which was material for the purchaser to know and ignorance of which induced him to purchase, the fact that he could or might have ascertained that fact does not afford any defence and he, being a party defrauded, is entitled to rescind the contract.[7]

Remedy independent of this section provided by Sec. 55, Transfer of Property Act.

23. May compel.—This section allows the purchaser who has purchased an encumbered property which was represented expressly or by implication to be unencumbered a remedy by compelling the vendor to redeem the mortgage.[8] Apart from the remedy under this section in the provinces to which the Transfer of Property Act applies if the purchaser discovers that the property sold by the vendor as unencumbered is in reality subject to an encumbrance, the vendee can pay it off himself under Sec. 55, Transfer of Property Act, and deduct this amount from the price remaining unpaid.[9] But if the whole price has already been paid, he can claim damages in a separate suit.[10] Where the purchaser discovers defect in the property before conveyance he can either rescind the

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1. Kathamuthu Pillai v. Sundramaniam Chettiar, A. I. R. 1926 Mad. 569 at pp. 569-70.
2. (1922) 2 K. B. 181 at p. 183 : 111 L.J.(K. B.) 717:167 L.T. 1833 : (1942) 2 All E.R. 263.
3. Gour v. Chandra, 25 W. R. 45 ; Gajapathi v. Alagia, I. L. R. 9 Mad. 89.
4. Dr. Bannerji's *Tagore Law Lectures*, p. 138, citing Chadwick v. Manning, (1896) A.C 231 at p. 238 and Turner v. Green, (1895) 2 Ch. 205 ; 1 Ames. 366.
5. Gajapathi v. Alagia, *supra*.
6. Nelson.
7. Morgan v. Government of Hyderabad, I. L. R. 11 Mad. 419 ; Udell v. Atherton, (1862) 7 H. & N. 181.
8. Motivahoo v. Vinayak, I. L. R. 12 Bom. 4 ; Munirunnisa v. Akbar Khan, I. L. R. 30 All. 175 ; Nabin Chandra v. Krishnabasna, I. L. R. 38 Cal. 458 ; *see* also I. L. R. 12 Mad. 158.
9. *See* Transfer of Property Act, Sec. 55 and notes thereto ; *see* Ayyari Subba Row v. Kondamudi Varadaiah, A. I. R. 1913 Mad. 482 at p. 484.
10. Gajapathi v. Alagia, *supra* ; Munirunnisa v. Akbar Khan, supra ; Nabin Chandra v. Krishnabasna, *supra*.

contract or successfully oppose a suit for specific performance.[1] But if the purchaser discover material defects after the conveyance, he must make out a case of fraud in order to have the sale set aside.[2] Even in areas to which the Transfer of Property Act does not apply, the principles underlying Sec. 55 of that Act have been held to apply on the ground of justice, equity and good conscience.[3] Section 55 (5) (*b*), Transfer of Property Act, provides that the purchaser may pay off the encumbrance himself out of the unpaid purchase money, if any, in his hands. Where he has paid the whole consideration before discovery of the encumbrance, he may sue for damages.[4] Where the property sold was subject to an outstanding lease, the purchaser was allowed to deduct from the purchase price the amount, the promises were depreciated by reason of such lease.[5] If the debt for the payment of which money is left with the purchaser is scaled down the vendor will have the benefit of it.[6]

24. Mortgage decree, purchase of.—The purchaser of a mortgage decree free of encumbrance has a right to compel his vendor to pay off encumbrance upon the decree and make over the decree to him free of encumbrance.[7]

25. Lease.—Where the property sold is subject to a lease the purchaser may be allowed an abatement in view of the depreciation due to the lease.[8]

In *Hem Chandra Choudhary* v. *Ajodhya Bala Choudhary*,[9] the stipulation in the lease in the case was that the time at which the option is to be exercised is not a fixed period. Nor the price which is to be paid for the property is specified. It is is said that reasonable price should be paid. But there is no provision as to how the reasonable price will be determined if there is a dispute. In the case of *Venkatachalam Pillai* v. *Sethuram Rao*,[10] the stipulation was as follows:

> "If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land."

In the stipulation under consideration, it is said that the lessee will buy the land if he agrees to do so. Obviously he is not bound by this stipulation to buy the land even if it is offered to him. So, in brief, in the stipulation (1) no time-limit is fixed; (2) no price is specified ; and (3) it is clearly said that the lessee will buy it if he agrees to do so. In these circumstances, this stipulation cannot be a completed contract there being no completed contract, the question of specfic performance of violation of a contract cannot arise.[11]

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1. Reeve v. Bevridge, (1888) 20 Q. B. D. 523; Gabeallero v. Henry, (1874) 9 Ch. 447.
2. Browhite v. Campbell, 5 A. C. 937; E. M. & Agency Co. v. Fazlul Karim, A. I. R. 1926 Cal. 385 at pp. 389-90.
3. See I. L. R. Lah. 241; I. L. R. 8 Lah. 544; 78 P. R. 1903; 12 P. L. R. 1903 Sup.; 51 P. R. 1917; 6 P. R. 1912 (Rev.); 36 P. L. R. 1913; 85 P. R. 1902; 124 P. L. R. 1902.
4. Ganapathi v. Alagia, I. L. R. 9 Mad. 89 at p. 91.
5. Eppstein v. Kuhn, 19 L. R. A. N. S. 117; Benerji, App. 56.
6. Satyanarayanamurti v. Sathiraju, A. I. R. 1942 Mad. 525 at p. 526.
7. Khetri Das v. Agannala, 9 C. W. N. 178.
8. Eppstein v Kuhn, (1908) 10 L. R. N. S. 117.
9. A. I. R 1969 Assam 43.
10. A. I. R. 1933 Mad. 322.
11. Hem Chandra Choudhary v. Ajodhya Bala Choudhary. A. I. R. 1969 Assam 43 at p. 45.

26. **Demise in praesenti.**—In *H. V. Rajan* v. *C.N. Gopal*,[1] the first respondent gave on lease to the respondent 2 his cinema theatre for five years commencing from 1st March, 1942, ending with 28th February, 1947. Clause 14 of the lease deed provided :

> "After the expiry of the period of five years fixed under this lease, the lessees shall have the option and liberty to renew or extend the lease for another period of five years but subject only to such terms and conditions as may be mutually agreed upon."

On 2nd May, 1946, respondent 1 issued a notice intimating respondent 2 that as the lease will expire at the end of February, 1947, he should "take such action as may be necessary to give effect to the same and deliver possession".

Respondent 2 replied on 13th May, 1946, that he wished to exercise his option to renew the lease for a further period of five years. On 2nd September, 1946, respondent 1 gave on lease to the appellant his cinema theatre by a registered lease. Ultimately on 3rd March, 1947, respondent 1 filed a suit for eviction of respondent 2 for delivery of possession and for payment of arrears of interest together with costs, interest, mesne profits, etc. To this suit appellant was not a party.

Respondent 2 and respondent 1 filed separate appeals in the High Court. When these appeals were pending respondent 1 executed a registered lease deed on 16th August, 1950, in favour of respondent 2 purporting to be under a compromise. This lease deed was for 10 years in the first instance with an option to extend it for five years, and thereafter for another five years, on a monthly rental of Rs. 1,800.

On 21st August, 1950, after the lease was executed in favour of respondent 2, respondent 1 purported to cancel the lease in favour of the appellant and deposited Rs. 18,000 in the appellant's bank account on the same date, which, however, was returned by the appellant to the first respondent by cheque on 4th September, 1950. On 14th November, 1950, the first respondent and the second respondent withdrew their appeals pursuant to a compromise petition filed in the Court. Appellant then filed the suit on 27th November, 1950, for specific performance of the agreement of lease dated 2nd September, 1946, for possession for damages, for mesne profits and for interest and costs.

It was held the lease in favour of the appellant was a demise *in praesenti* and on that basis the appeallant would have been entitled to mesne profits because on the day when possession could have been given, the second respondent with full notice of the lease in favour of the appellant and with the knowledge that respondant 1 had not renewed it continued in possession.

27. **Clause (d)—Failure of vendor's or lessor's suit on ground of imperfect title —Rights of vendee or lessee.**—This clause is based on *Turner* v. *Mariot*,[2] *Middleton* v. *Mayany*,[3] and *Thomas* v. *Buxton*.[4] If a contract for sale or lease falls through by reason of the default or want of title of the vendor or lessor the opposite party is entitled to have his money back with interest and to a lien for the amount on the subject-matter of the contract.[5]

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1. A. I. R. 1975 S. C. 261 at pp. 262, 263, 265 : (1975) 2 S. C. J. 1.
2. L. R. 8 Eq. 744.
3. 2 H.& M. 233.
4. L. R. 8 Eq. 129.
5. Kishen v. Ramchunder, 3 W. R. 28.

If the purchaser is at fault, he cannot recover the deposit or any part of it.[1]

28. **Distinction between Cl. (c) and Cl. (d).**—Under Cl (*c*) it is the purchaser or lessss who is the plaintiff suing to compel the vendor or lessor to perfect the title which was contracted. Under Cl. (*d*) it is the vendor or the lessor who is the plaintiff suing to enforce specific performance and failing by reason of his imperfect title, and then instead of suit being simply dismissed with costs, the defendant is entitled to the special relief of a decree for the return of his deposit with interest and his costs togther with a lien for the same on the property agreed to be sold or let.[2]

Nature of deposit.

29. **Deposit.**—A deposit possesses a two-fold character. It is a part-payment and is also in the nature of money staked.[3] If the purchase is carried out, it goes against the purchase-money but primarily it is a guarantee that the purchaser means business.[4] A deposit is not a penalty but a payment in part of the purchase-money made as a guarantee for performance of the contract. It results from this that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained. Thus if it is provided by the terms of a contract that if the purchaser should fail to comply with the conditions, the deposit should be forfeited to the vendor and the vendor should be entitled to re-sell the property and recover from the purchaser the deficiency upon re-sale the deposit though forfeited is to be taken into account in estimating the loss on a re-sale and it is to be deducted from the deficiency upon re sale so as to diminish the deficiency.[5]

30. **Return and retention of deposit.**—As stated above the deposit is paid as a guarantee for the performance of the contract and where the contract goes off by default of the purchaser the vendor is entitled to retain the deposit.[6] Even where there is no clause in the contract as to the forfeiture of deposit, if the purchaser repudiates the contract he cannot have back the money as the contract has gone off through his default.[7] *A* entered into a contract with *B* for the purchase of lands belonging to the latter for rupees forty one thousand. Out of it rupees four thousand was paid in advance, rupees twenty thousand was agreed to be paid by means of mortgage and the balance before three months when the conveyance was to be executed. The contract provided that the sum of rupees four thousand was to be forfeited if there was any delay on the part of the purchaser. In part-performance of this contract a sale of a portion of the lands was effected in favour of *M* after a month. Just before the date for payment *B* gave notice to *A* that if the sale was not completed on or before the agreed dates the contract would be avoided. *A* failed to perform the contract before the date. Subsequently *B* sold the land to third parties

1. Bishnn v. Radha, I. L R. 19 All. 489.
2. Collet; *see* also Haji Mohd. Mitha v. Musaji Essaji, I. L R. 15 Bom. 657.
3. I. L. R. 53 Mad. 14.
4. Soper v. Arnold, 14 A.C. 435.
5. Ockenden v. Henly, (1858) E. B. & E. 48; Vellore Taluk Board v. Gopalasami, I. L. R. 38 Mad. 801 : 26 I. C. 226.
6. Collins v. Stimson, (1883) 11 Q B. D. 142; *see* also (1885) L. R. 1 Ch. App. 512.
7. Roshanlal v. Delhi Cloth and General Mills, I. L. R. 33 All. 166; Bishan Chand v. Radhekishan, I. L. R. 19 All 489; Balwanta v. Bira, I. L. R. 23 Bom. 56; H V. Low & Co. Ltd. v. Raja Bahadur Jyoti Prasad Singh Deo, A.I.R. 1931 P.C. 299 at p. 301 : 58 I.A. 392 : 61 M.L.J. 699 : 1931 A.L.J. 1112: 33 Bom. L.R. 1544 : 35 C.W. N. 1246 : 135, I. C. 632 : A. I. R. 1931 P.C. 89, foll. case of lease; but not liable to forfeiture if it is not paid as earnest but only as part of purchase money.

and realized rupees one thousand and five hundred in excess of sum stipulated by *A*. *A* brought a suit for specific performance of the contract or in the alternative to recover rupees four thousand paid by him. It was held that *A* was neither entitled to a decree for specific performance nor to the return of the deposit.[1]

If the vendor sues for specific performance, but specific performance is refused on the ground that he could not give a title free from reasonable doubt, the purchaser is entitled to a return of his deposit.[2]

It has been held by their Lordships of the Privy Council in *Jamshed Khodaran Irani* v. *Burjorji Dhanjibhai*,[3] that the mere fact that time is specified for the performance of a certain act, is not, by itself, sufficient to prove that time is of the essence of a contract. The Court has to look at the substance and not merely at the letter of the contract and ascertain whether the parties really and in substance intended more than that the act should be performed within a reasonable time.[4]

Under Sec. 55 (6) (*b*), Transfer of Property Act, the purchaser is entitled to a charge on the property for the earnest-money when he properly refuses to accept the delivery of the property. The question for determination in such a case is whether having regard to the terms of the contract and the circumstances of case, the purchaser is justified in refusing to accept the title for the property which the seller was able to give. If he was bound to accept it, he cannot claim to receive back that which under the terms of the contract itself he agreed to forfeit.[5] Where a purchaser refuses to complete the contract alleging that the title is defective he is entitled to a refund of the deposit if he was justified in refusing the title but not if he was bound to accept the title. Thus where a vendor agrees to sell land and the buildings thereon, but it turns out that the only interest he has in the land is a revocable licence to occupy the land, and the purchaser refuses to complete, he is entitled to a return of the deposit.[6] It does not necessarily follow from the dismissal of a suit for specific performance that an order for the refund of any part of the money should also be denied.[7] Earnest money is a part of the purchase price where the transaction goes forward. It is forfeited when the transaction falls through by reason of the fault or failure of the vendee[8] but the contract cannot be rescinded and deposit cannot be forfeited by the vendor after bringing his suit for specific performance.[9]

31. Contract containing clause as to disposal of deposit.—Where a contract contains a clause as to what is to be done with the deposit if the contract is not performed, the Court must be guided by the terms of the

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1. Natesa Aiyar v. Appavu Padyachi, 19 I. C. 462 : 24 M. L. J. 488 : 1913 M. W.N. 341 : 13 M. L. T. 391 : I. L. R 38 Mad. 178.
2. Haji Mohamed Mitha v. Musaji Esaji, I.L.R. 15 Bom. 657 at p. 669 ; Seethamamma v. Patta Reddi, A. I. R. 1940 Mad. 739 at p. 740; *see* also H.V. Low & Co. Ltd v. Raja Bahadur Jyoti Prasad Singh Deo, A.I.R. 1931 P. C. 299 : 135 I.C. 632 : 58 I. A. 392.
3. A I.R.1915 P.C. 83 : 32 I.C 246 : I.L.R. 43 All. 26 ; I. L. R. 40 Bom. 289.
4. Raghubir Das v. Sundar Lal, A. I. R. 1931 Lah. 203 at p. 206 : I. L. R. 11 Lah. 699.
5. Ibrahimbhai v. Fletcher, I. L. R. 21 Bom. 827 at p. 853.
6. *Ibid*.
7. Raghunath v. Chandra Protapo, 17 C. W. N. 100 : (I. L. R. 31 All. 68; I. L. R. 21 Bom. 827; I. L. R. 24 Cal. 897 ; 27 Ch. D. 89 ref.).
8. Kanwar Chiranji v. Harswarup, A. I. R. 1926 P. C. 1 at p. 2 : 94 I. C. 782: 50 M L.J. 629 : 24 A. L. J. 248: 30 C.W.N. 188 : 23 L. W. 172 : 1926 M.W N. 145.
9. Public Trustee v. Pearlberg, C. A. (1940) 2 K B. 1 at pp. 12, 22, 24 : 56 T.L.R. 489 : 164 L. T. 114 : (1940) 2 All E R. 270 (contract for sale of freehold cotton mill), *per* Luxmoore, L.J., p. 22.

contract and the rights of the parties are to be determined as in the case of any other contract.[1] In the absence of any specific provision, the question whether the deposit is to be forfeited depends on the intent of the parties to be collected from the whole instrument.[2] Even when there is no clause for the forfeiture of deposit in the contract, the plaintiff is not entitled to a refund of the deposit when there was repudiation of the contract on his part.[3] But when there is no repudiation of the contract by the purchaser nor any conduct on his part amounting to repudiation, he is entitled to a return of the deposit, though specific performance is refused.[4]

32. **Where time is not of the essence, no forfeiture of deposit.**— It must, however, be remembered that if time is not of essence of the contract and the purchaser offers to complete within a reasonable time from the date for the performance of the contract fixed in the contract the vendor is not entitled to treat the deposit as forfeited even though the contract provides for forfeiture for failure to complete the contract on the date fixed.[5] It cannot be laid down as a general proposition that in all cases when the Court refuses specific performance, the vendor is entitled to retain the deposit. In order to enable the vendor to do so there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which make his conduct amount to a repudiation on his part of the contract.[6]

It is noteworthy that every payment made by the purchaser to the vendor is not in the nature of a deposit, liable to be forfeited if the purchaser violates his contract.[7] It is doubtful that the rule in *Howe* v. *Smith*[8] is applicable to a case where the price was payable by instalment and all but the last instalment has been paid. In such a case the question might well arise whether the rights of the parties must not be adjusted upon the footing of a restitution *ad integrum*.[9] The test in each case is, "Did the parties mutually agree, expressly or by implication that the sum paid was to be treated, not merely as part-payment but as a guarantee for the performance of the contract."[10] The question is one of intention of the parties to be collected from the terms of the instrument. Is every instalment paid by the purchaser a deposit? This is to be gathered from the terms of a contract taken as a whole.[11]

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1. Howe v. Smith, (1884) 27 Ch. D. 89 at p. 97.
2. Palmer v. Temple, 9 Ad. & Ell. 508.
3. Mangobinda v. Baisogmaff, 67 I. C. 714 : A.I.R. 1922 Cal. 104; Fazle Ahmad v. Rajendra Nath Roy, A.I.R. 1926 Cal 339 at p. 343 ; *see* also I.L.R 38 Mad. 178 ; 19 I.C. 462 (F.B.); 26 I.C . 121 : 27 M. L. J. 482 ; *cf.* I.L.R 24 Cal. 897
4. Alokeshi Dasi v. Harachand Dasi, I.L.R. 24 Cal. 897; *see* also I.L.R. 21 Bom. 827 (F.B.); I.L.R. 23 Bom. 56.
5. Jamshed Khodaran Irani v. Burjorji Dhanjibai, I. L. R. 40 Bom. 287 (P. C.) : 43 I. A. 16 : 32 I. C. 246 : 20 C. W. N. 744 : 3 L. W. 239 : 38 M. L. J. 186 : 18 Bom. L. R. 163 : 23 C. L. J. 385 : 1 M. W. N. 229 : 19 M. L. T. 184.
6. Howe v. Smith, (1884) 27 Ch. D. 89 : 32 W. R. 802 : 48 J. P. 773 : 50 L. T. 573 : 53 L. J. Ch. 1055.
7. Corawall v. Henson, (1900) 2 Ch. 298.
8. (1884) 27 Ch. D. 89 : 32 W. R. 802 : 48 J. P. 773 : 50 L. T. 573 : 53 L. J. Ch. 1055.
9. Cornwall v. Henson, *supra* ; Gee v. Perse, 2 De. G. & Sm. 325.
10. Soper v. Arnold, 14 A. C. 429.
11. Raghunath v. Chandra Protap, 17 C. W. N. 100 ; Nawab v. Arman, 53 I. C. 875 : 24 C.W.N. 40 : 30 C.L.J. 113; Balwanta v. Bira, I. L. R. 23 Bom. 56 ; Roshanlal v. Delhi Cloth and General Mills, I. L. R. 33 All. 166 ; Bishen v. Radha, I.L.R. 19 All. 489 ; Natesan v. Appavu, I.L.R. 33 Mad. 375 ; *see* also I.L.R. 38 Mad. 178.

33. Separate suit for return of deposit.—The dismissal of a purchaser's suit for specific performance does not bar a separate suit for return of the deposit.[1] It is, however, manifestly just and proper that the right to specific performance of a contract, or in the alternative, to a return of the earnest money should be determined in one and the same suit. If the plaintiff has not in his suit for specific performance made a claim in the alternative for a return of the deposit, he should be allowed to amend the plaint though the amendment may be asked for at a late stage.[2] Some cases have gone so far as to hold that the Court can in refusing a decree for specific performance, grant a decree for the refund of deposit although the plaintiff has not asked for any such alternative relief.[3] A general prayer for "other suitable relief, which is usually added in all plaints would not answer the purpose," and it has been held by the Privy Council that a prayer for "such a further relief as the nature of the case may require" in a suit by the purchaser for the specific performance of the contract for the sale of land cannot be held to include a claim for damages or a refund of the deposit money in the alternative, but means only such further relief as is ancillary to the main specific relief claimed.[4]

Separate suit not barred but a claim in the alternative should be made in the suit for specific performance.

34. Suit for damages—Deposit.—In a suit for damages by the vendor the plaintiff is legally bound to give credit for the deposit with him and he cannot recover more than the difference between the loss incurred by him and the deposit money.[5] If in a case where the contract falls through the purchaser's fault, the vendor chooses to sell the property or allows it to be resold, he must do so within a reasonable time and he will not be permitted to add to the amount of damages by waiting till the market falls and subject-matter of the sale deteriorates.[6]

35. Salami, suit for recovery of.—In a suit for recovery of *salami* by an intending lessee on the ground of intending lessor's "want of title" the test of the plaintiff's right to recover the *salami* is whether action for specific performance at the instance of the intending lessee could have been successfully resisted by the intending lessee on the ground that the lessor's title was defective. The onus is on the intending lessee to establish that the lease tendered by the intending lessor was on account of his imperfect title not such as he, the lessee, could be required to accept. If he fails to establish this justification of his rejection of the lease, he forfeits his *salami*.[7]

Onus on lessee to establish imperfect title of lessor.

1. Prangodan Pirumtoducka, I. L. R. 27 Mad. 380 ; Muni Babu v. Koer Kamta Singh, A. I. R. 1923 All. 321 at p. 321 : I. L. R. 45 All. 378 : 72 I. C 36.
2. Ibrahimbhai v. Fletcher, I. L R. 21 Bom. 827 at pp. 851, 852 ; Howe v. Simth, (1884) 27 Ch. p. 89 : 32 W. R. 802 : 8 J P. 773 : 50 L.T- 573 : 53 L.J. Ch. 1055 ; Scott v. Alveraz, (895) 2 Ch. 603.
3. Daropi v. Jaspat Rai, 49 P. R. 1905 : 28 P. L. R. 1905 ; Raghunath v. Chandra Protap, 1 C. W. N. 100; Muni Babu v. Koer Kamta Singh, I.L. R. 45 All. 378 : A. I. R. 1923 All. 321 ; Sher Nawaz v. Gopal, 1 A. W. N. 22.
4. Brickless v. Snell, (1916) 2 A. C. 599 : 38 I. C. 123 (P. C.).
5. President, Vellore Taluk Board v. Gopalsami Naidu, I. L. R. 38 Mad. 801 ; Ockendan v. Henley, (1858) 27 L.J.Q. B. 361 ; Shutteworth v. Clews, (1910) 1 Ch. D. 176.
6. Dr. Banerji's *Tagore Law Lectures*, p. 425 ; *see* also I. L. R. 19 All. 535.
7. H.V. Low & Co, Ltd. v. Raja Bahadur Jyoti Prasad Singh Deo, A. I. R. 931 P. C. 299.

Purchaser is entitled to interest under Cl. (*d*).

36. Interest on deposit.—*Prima facie* a purchaser is entitled under the present clause to interest on the sum paid by him as advance, when the vendor's title is imperfect and not free from doubt and when there is nothing in his conduct to disentitle him to the same he must be awarded interest. The observation in *Emery* v. *Grocock*,[1] *Mullings* v. *Trinder*[2], and *Mogride* v. *Clapp*[3] go to show that when a vendor's title depends not upon a question of law but upon proof of a disputed fact, that fact must be proved, and if the vendor does not prove it, he cannot be held to have made out a good title. To the same effect is the rule stated in Williams on *Vendor and Purchaser*. Under the heading "Questions of fact" the author concludes the discussion as follows:

> It appears that where there is a real ground of suspicion of some matter which would cause a defect in the legal title to the property sold, the Court may, unless the suspicion be removed by sufficient evidence, pronounce the title to be too doubtful to be forced on the purchaser, or may at least do so if its acceptance would leave him exposed to the reasonable probability of adverse litigation.

It is difficult to interpret Sec. 18 (*d*) in that absolute manner. Section 35, C. P. C., which provides that the costs of an incident to all suits shall be in the discretion of the Court is no doubt made subject to the provisions of any law for time being in force. But it seems unreasonable to hold that Sec. 18 (*d*), Specific Relief Act, lays down an absolute rule, independent of the conduct of the purchasers as defendants in the course of the specific performance suit. The object of Sec. 35, C. P. C., is clearly to enable the Court to award costs in the light of the conduct of the parties in the suit. In the present case, the learned Subordinate Judge has found that on some points the contentions of the purchasers were not true and that they either had not the whole amount of money required to enable them to complete the contract or for some other reason they decided to resile from the contract.[4]

37. Importance of time-factor in commercial contracts.—Law is well settled that notwithstanding that a specific date is mentioned for the completion of a contract, one has not to look at the letter, but at the substance of the agreement, in order to ascertain the real intention of the parties; that is, whether, in substance, the parties intended that the execution should take place within a reasonable time. The dictum that the letter of the contract is to be disregarded and the substance should be looked into may be excluded by any plainly expressed stipulation. The language of the stipulation must, however, show in unmistakable terms that the intention of the parties was to make their rights dependent upon the observance of the time-limit. If the language shows that the imposition of time-limit was merely of secondary importance, the disregard of time-limit does not amount to anything more than disregarding nothing striking at the very foundation of the contract. In a contract for sale of immoveable property, time-limits are ordinarily presumed to be subordinate to the main purpose of the agreement. In commercial contracts, however, time factor goes to the root of the matter and is of the essence of the contract.

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1. I.L.R. 6 Mad. 54 : 22 R. R. 236.
2. (1870) 10 Eq. 449 : 39 L. J. Ch. 833 : 23 L. T. 580 : 18 W. R. 1186.
3. (1892) 3 Ch. 882 : 61 L. J. Ch. 534 : 67 L. T. 100 : 40 W. R. 663.
4. Bhottiprolu Seetharamamma *v.* Ramireddi Patta Reddi, A. I. R. 1940 Mad. 739 at pp. 742-43 : 1940 M. W. N. 14.

The rule is, however, subject to some well-recognized exceptions. Those exceptions are :

(*i*) When one party is guilty of undue delay in performing his part of the contract and the other party has given reasonable notice that the contract is to be completed within reasonable time ;

(*ii*) when the character of the property is such that the Court would not exercise jurisdiction in allowing specific performance ;

(*iii*) when from other circumstances it would appear to the Court that decreeing specific performance is likely to result in injustice.

In such cases, apart from any question of expressed intention the circumstances themselves exclude the exercise of jurisdiction for specific performance.[1]

38. Costs.—Clause (*d*) ought not to be interpreted as depriving the Court of any discretion in the matter of costs if the vendor's suit for specific performance is dismissed on the ground of imperfect title. It would be unreasonable to hold that this clause lays down an absolute rule, independent of the conduct of the purchaser as defendants in the course of the suit for specific performance. Section 35 of the Code of Civil Procedure clearly enables the Court to award costs in the light of the conduct of the parties to the suit.[2]

Clause (*d*) does not in any way restrict the general power of Court to award costs.

New	Old
CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED	(*b*) *Contracts which cannot be specifically enforced*
14. Contracts not specifically enforceable.—(1) The following contracts cannot be specifically enforced, namely :	**21. Contracts not specifically enforceable.**—The following contracts cannot be specifically enforced :
(*a*) a contract for the non-performance of which compensation in money is an adequate relief ;	(*a*) a contract for the non-performance of which compensation in money is an adequate relief ;
(*b*) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms ;	(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms ;
(*c*) a contract which is in its nature determinable ;	(*c*) a contract which is in its nature revocable ;

1. Sachidanand Patnaik *v.* Messrs. G. P. & Co., A. I. R. 1964 Orissa 269 at p. 272.

2. B. Seetharamamma *v.* Ramireddi Patta Reddi, A. I. R. 1940 Mad. 739 at p. 743 ; 1940 M. W. N. 14.

New	Old
(*d*) a contract the performance of which involves the performance of a continuous duty which the Court cannot supervise.	(*d*) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date.
(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced ; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.	And, save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced ; but if any person who has made such a contract other than an arbitration agreement to which the provisions of the said Act apply, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.
(3) Notwithstanding anything contained in Cl. (*a*) or Cl. (*c*) or Cl. (*d*) of sub-section (1), the Court may enforce specific performance in the following cases :	
(*a*) where the suit is for the enforcement of a contract,—	
(*i*) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once :	
Provided that where only a part of the loan has been advanced, the lender is willing to advance the remaining part of the loan in terms of the contract ; or	

New

(*ii*) to take up and pay for any debentures of a company ;

(*b*) where the suit is for,—

(*i*) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership ; or

(*ii*) the purchaser of a share of a partner in a firm ;

(*c*) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land :

Provided that the following conditions are fulfilled, namely :

(*i*) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work ;

(*ii*) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief ; and

(*iii*) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

Old

Illustrations

To clause (a)—A *contracts to sell, and* B *contracts to buy, a lakh of rupees in the four per cent. loan of the Central Government* ;

A *contracts to sell, and* B *contracts to buy, 40 chests of indigo at Rs. 1,000 per chest* ;

in consideration of certain property having been transferred by A *to* B, B *contracts to open a credit in* A's *favour to the extent of Rs. 10,000 and to honour* A's *drafts to that amount* ;

the above contracts cannot be specifically enforced, for in the first and second, both A *and* B *and in the third* A, *would be reimbursed by compensation in money.*

To clause (b)—A *contracts to render personal service to* B ;

A *contracts to employ* B *on personal service* ;

A, *an author, contracts with* B, *a publisher, to complete a literary work* ;

B *cannot enforce specific performance of these contracts* ;

A *contracts to buy* B's *business at the amount of a valuation to be made by two valuers, one to be named by* A *and the other by* B. A *and* B *each name a valuer but before the valuation is made,* A *instructs his valuer not to proceed* ;

by a charter-party entered into in Calcutta between A, *the owner of ship, and* B, *the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London* ;

A *lets land to* B, *and* B *contracts to cultivate it in a particular manner for three years next after the date of the lease* ;

A *and* B *contract that, in consideration of annual advances to be made by* A, B *will for three years next after the*

Old

date of the contract, grow particular crops on the land in his possession and deliver them to A *when cut and ready for delivery* ;

A *contracts with* B *that, in consideration of Rs. 1,000 to be paid to him by* B, *he will paint a picture for* B ;

A *contracts with* B *to execute certain works which the Court cannot superintend* ;

A *contracts to supply* B *with all the goods of a certain class which* B *may require* ;

A *contracts with* B *to take from* B *a lease of a certain house for a specified term at a specified rent, "if the drawing-room is handsomely decorated', even if it is held to have so much certainty that compensation can be recovered for its breach.*

To clause (d)—A *and* B *contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed either* A *or* B *might at once dissolve the partnership.*

To clause (g)—A *contracts to let for twenty-one years to* B *the right to use such part of a certain railway made by* A *as was upon* B's *land, and that* B *should have a right of running carriages over the whole line on certain terms and might require* A *to supply the necessary engine-power, and that* A *should, during the term, keep the whole railway in good repair. Specific performance of this contract must be refused to* B.

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1. Legislative changes.—This section corresponds to the old Sec. 1 of the repealed Specific Relief Act, 1877. Sub-clauses (*a*) and (*b*) of old Sec. 21 of the repealed Act have been reproduced verbatim in the new Cls. (*a*) and (*b*) of sub-section (1) of Sec. 14 of the present Act. Sub-clauses (*c*), (*f*) and (*h*) of the old Sec. 21 have been deleted and sub-clause (*c*) has been re-enacted in the new Sec. 11 (2) of the present Act. The present Cl. (*c*) of sub-section (1) of the new Sec. 14 reproduces the language of the old Sec. 21 (*d*) with this change that in the place of the word "revocable" in the new sub-clause (*c*), the word "determinable" has been substituted. Sub-clause (*d*) of the new Sec. 14 (1) reproduces the language of sub-clause (*g*) of the old Sec. 21, with this modification that in the place of the words "extending over a longer period than three years from its date", the words "which the Court cannot supervise" have been substituted. Sub-section (2) of the new Sec. 14 reproduces the language of the last clause of the old Sec. 21 with this change that the word "and" has been added in the beginning of the present sub-section (2) of Sec. 14. Sub-section (3) along with the proviso to it has been newly inserted in the section. Illustrations to the (old) Sec. 21 have been considered unnecessary and therefore have been deleted.

2. Reasons for the change.—This Sec. 14 has been enacted in its present shape and form in pursuance of the acceptance of the recommendations of the Law Commission of India as contained in their Report on the Specific Relief Act, 1877. They write about the (old) Sec. 21 of the Act :

> "Some of the clauses of old Sec. 21 require in our view amplification.
>
> "(*Old*) *Clause* (*a*) —Thus while as a general rule, contracts to lend or mortgage are not specifically enforced, as they come under Cl. (*a*) (of old Sec. 21) there are certain exceptional cases where specific performance has been granted by the courts upon the assumption that damages would not afford adequate relief in such cases, and these exceptions should be mentioned in the section itself, to make it comprehensive.

"These exceptional cases are as follows :

(1) Where a loan has been advanced either in whole or in part by the lender on a contract to execute a mortgage but the borrower refuses to execute the mortgage, specific performance of the contract can be obtained if the borrower is not willing to repay the loan at once.[1] Where a part of the loan only has been advanced, the lender must be ready and willing to advance the remaining sum according to the agreement.

(2) Another such case is the special performance of a contract to subscribe for debentures of a company. Though Sec. 122 of the Companies Act, 1956, provides for the specific performance of such a contract we think it would be expedient, for the sake of comprehensiveness, to make a provision in this section.

"No change is necessary in Cl. (*b*) of (old) Sec. 21.

"Pollock and Mulla[2] point out that Cl. (*c*) of (old) Sec. 21 appears to be redundant inasmuch as under Sec. 29 of the Contract Act a contract 'which is not certain, or capable of being made certain', is void. We agree with this view and recommend that Cl. (*c*) of (old) Sec. 21 be omitted.

"*Clause* (*d*).—As the illustration to Cl. (*d*) of (old) Sec. 21 says, an agreement for partnership is not generally specifically enforced.[3] But there are some exceptional cases where such agreements have been enforced. Thus where the parties have actually entered on the partnership by having commenced the business to be carried on in partnership, a suit lies for obtaining execution of a formal deed of partnership.[4] A contract for the purchase of the share of a partner has also been specifically enforced.[5]

"We therefore propose to provide for such cases. We also suggest that the word 'revocable' in Cl. (*d*) be substituted by the word 'determinable' for as Pollock and Mulla[6] observe, the expression 'revocable contract' is inaccurate.

"*Clause* (*e*).—We have transferred Cl. (*e*) to a separate section relating to trusts, which we have suggested.[7]

"In view of the (new) Sec. 8 proposed by us under Cl. (*f*) of (old) Sec. 21 it appears to us to be unnecessary and should be omitted.

"*Clause* (*g*).—In Cl. (*g*) of (old) Sec. 21 the limit of three years which is a departure from the English rule is artificial and arbitrary. We have no hesitation in recommending the omission of the time-limit and substitution of the proper rule, viz., that the Court will not decree specific performance if the contract involves the performance of such a continuous duty that the Court is not able to supervise it.

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1. Jewan Lal Daga *v.* Nilmani Chaudhuri, A. I. R. 1928 P. C. 80 ; Fry, *Specific Performance*, 6th Ed., p. 24 : 49 Am. Juris., Sec. 83, p. 101.
2. *Specific Relief Act*, 8th Ed., p. 790.
3. Lindley on *Partnership*, 11th Ed., p. 582; Halsbury, 2nd Ed., Vol. 31, para. 486.
4. Byrne *v.* Reid, (1902) 2 Ch. 735; Vindachala *v.* Ramaswami, (1863) 1 M.H. C.R. 341.
5. Dodson *v.* Downey, (1901) 2 Ch. 620.
6. *Specific Relief Act*, 8th Ed., p. 790.
7. *See* Sec. 12, App. I.

"A contract to build or repair would come within Cl. (*g*) of (old) Sec. 21 and would not, generally be specifically enforced.[1] But such a contract is enforced in England[2] and in America[3] in certain exceptional circumstances. Such a contract would be specifically enforced if the building or work is defined by the contract with sufficient particularity so as to enable the Court to determine the exact nature of the work, or that the plaintiff has a substantial interest, in the performance of the contract, so that compensation for its breach would not be an adequate relief and that the defendant has under the contract obtained possession of the land on which the work is to be carried out.

"In our view provision should be made in the clause for such a case.

Clause (*h*).—We recommend the omission of Cl. (h) of (old) Sec. 21 in view of the new provision recommended by us in Sec. 18 (of the Bill)."[4]

In the Notes on Clauses it has been stated in this section : "This is Sec. 21 of the existing Act with the following amendments :

(*i*) In sub-clause (1), Cl. (c) of (old) Sec. 21 has been omitted as unnecessary in view of Sec. 29 of the Indian Contract Act, 1872;

(*ii*) clause (f) of (old) Sec. 21 has been omitted in view of Cl. 8 of the Bill ;

(*iii*) in item (d) the word 'determinable' has been substituted for the word 'recoverable' as the expression 'revocable contract' is not accurate ;

(*iv*) clause (e) of (old) Sec. 21 has been incorporated in Cl. (12) of the Bill ;

(*v*) in item (d), Cl. (g) of (old) Sec. 21 the limit of three years, which is artificial and arbitrary, has been omitted, and the proper rule applicable in such cases substituted ;

(*vi*) sub-clause (3) (of present section) is new and incorporates the exceptional cases in which specific performance is granted, notwithstanding the provisions of sub-clause (1)."[5]

3. Principle of the section.—This section deals with those contracts which are not specifically enforceable by the courts of law and the test laid down in the matter of determining the enforceability or non-enforceability of the contracts is (1) whether for the breach of contracts, adequate relief in the form of pecuniary compensation could be suitably awarded ; (2) whether the performance of the contract depends upon the personal qualifications, technical knowledge or skill or volition or capacities of the parties or whether the contract runs into so many minute details that it becomes impossible for

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1. Ramchandra v. Ramchandra, I. L. R. 22 Bom. 46.
2. Halsbury; 2nd Ed; Vol. 31, para, 365, p. 333 ; Fry, 6th Ed. p. 48 ; Dart, *Vendor and Purchaser*, Vol. II, p. 879 ; V. Wolverhampton Corporation v. Emmons, (1901) 1 C.B. 515
3. Pomeroy, *Specific Performance*, 3rd Ed; Sec. 23 ; Story, *Equity Jurisprudence* 1920, p. 308.
4. Law Commission of India, Ninth Report (Specific Relief Act, 1877) at pp. 20-22.
5. Notes on Clauses on Cl. 13 at pp. 4 and 5.

the courts to enforce the specific performance of such contract ; (3) whether the contract is such that is in its nature determinable and (4) whether the contract requires continuous performance of duty which it is impossible for the Court to supervise. The principle behind this section is that the contract should be capable of being specifically enforced and the test whether the contract is such as could be enforced specifically has been laid down in Secs. 10, 11 and 13 of the Specific Relief Act, 1963, while in this Sec. 14 (1., Cls. (a) to (d), it has been laid down that such contracts detailed therein shall not be specifically enforced. This section specifies those contracts which from their very nature cannot be specifically enforced or which it is impossible to compel specific performance.

Sub-section (2) of this section provides about the enforceability or non-enforceability of the agreements to refer present or future difference, between the parties to arbitration. It says that leaving aside those cases covered by Arbitration Act, 1940, (Act 10 of 1940), no contract to refer present or future disputes between the parties to arbitration shall be specifically enforceable. In the cases of arbitration agreements the provisions of the Arbitration Act, 1940, shall apply. It further says that where the parties have entered into an agreement to refer their present or future disputes or difference to arbitration the agreement though not specifically enforceable may yet operate at a bar to any suit by any such party who himself has refused to perform his part of the agreement and still sues in respect of any of the subject-matter about which he has contracted in the agreement. Such a suit would be barred and would not be maintainable.

Sub-section (3) of this section operates as a rider to the effectiveness of the operation of Cl. (a), or (c), or (d) of sub-section (1) of this section. It operates as a proviso to sub-section (1) and says that irrespective of the provisions of Cl. (a) or (c) or (d) of sub-section (1) of this section, the Court may in suitable cases enforce specific performance of contract where the contract relates to the execution of a mortgage or furnish any other security for securing the repayment of any loan where the borrower is not willing to pay it back at once.

But this specific performance can be ordered only when the lender who has advanced a part of the money or loan is himself ready and willing to pay the remainder of the contractual sum in accordance with the terms of the contract.

The Court may in a suit for a specific performance of a contract take up and pay for any debenture of a company and enforce its specific performance.

The Court may also enforce specific performance of a contract where the suit is for the execution of a formal deed of partnership and where the parties have already commenced their business in partnership or where the suit is for the purchase of a partner in a share of a firm. It may also enforce specific performance of a contract where the suit is for the enforcement of a contract of any building or the execution of any other work on the land. But there are important conditions which should first be fulfilled before such performance can be ordered and they are as follows : (i) The building or other work of the nature referred to in sub-section (3) of the section should be precisely described in the contract in clear and unequivocal terms so as to enable the Court to determine the exact nature of the work ; (ii) the plaintiff has a substantial interest in the performance of the contract and the interest of such a nature that compensation in terms of money would not afford

adequate relief to him ; (iii) the defendant has, in pursuance of the contract obtained possession over the whole or the part of the land over which the building is to be constructed or the work is to be executed.

4. Scope of the section.—Section 14 of the Specific Relief Act, 1963, sets out certain contracts which cannot be specifically enforced and a contract which may be enforced at a time to be selected by one of the parties thereto and not at the instance of the other is not enumerated as one, which is incapable of specific performance. Thus in a case where the defendant had solemnly agreed to recovery of property on payment of settled money which was one of the consideration for the sale of the property, it was held that there was no equitable ground on which the defendant could evade this obligation under the agreement and that the agreement in question could not be held to be void on the ground of the absence of mutuality and was therefore specifically enforceable.[1]

Section 21 (old) of the Specific Relief Act, 1877, which corresponds to Sec. 14, Specific Relief Act, 1963, speaks of a contract which cannot be specifically enforced, and of them is one of such a nature that the Court cannot enforce specific performance of its material terms. The section itself gives an illustration to this type of contract, namely, "A contracting with *B* to execute certain works which the Court cannot superintend." This limitation in relation to the Court's power to direct specific performance appears to be in conformity with the prevailing English view in 1877 as seen from *Ryan v Mutual Tontine Westminister Chambers Association.*[2] By *Carpenters Estate Ltd. v. Davies*,[3] the English courts on the Chancery side would appear to have modified its view and recognized exception to the normal rule that a court will not enforce specific performance of a contract to build. One of the reasons behind the policy of the rule is what is to be found in the Illustration for Sec. 21 (*b*). In the second case of the Chancery Court in 1940, specific performance was granted to carry out certain works. That, of course, was a peculiar case on facts. A vendor had sold certain land to purchasers for building development retaining other land adjoining it. As part of the terms of the sale, the vendor covenanted to make certain roads and lay certain mains, sewers and drains on the land retained. The covenant having been broken, the purchaser brought an action for specific performance. While granting specific performance the Court gave its reasons.

> "that in the present case there should be an order for specific performance as that constituted the only adequate remedy and the work to be done was sufficiently clearly defined."

The Court would appear to have been weighed by the fact that the defendant was actually in possession of the land of which the works had to be carried out. The counterpart in India of Sec. 21 in the old Act is Sec. 14 in the Specific Relief Act, 1963, and it is clear from its provision that they have been modelled more or less on the views of the Chancery in *Carpenters Estate .Ltd. v. Davies*,[4] and analogous cases. Sub-section (3) of Sec, 14 provides by sub-clause (*c*) that specific performance of contract for construction of any building or execution of any other work on land can be enforced subject to certain conditions mentioned in the proviso to it, namely (1) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature

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1. R. R. Ghadge v. L. S. Ghadge, A. I.R. 1960 Bom. 105 at p. 107.
2. (1893) 1 Ch. 116.
3. (1940) 1 Ch. 160.
4. *Ibid.*

of the building or work; (2) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief ; and (3) the defendant has in pursuance of the contract, obtained possession of the whole or any part of the land relying on the provisions in the old Act and on which the building is to be contructed or other work is to be executed. Mr. Raja Aiyer relying on the provisions in old Act and *Kashinath v. Agra Municipalty*,[1] has pressed that quite apart from the validity of the suit agreement, no specific performance of an agreement to construct a building could be granted not only because that Court cannot conveniently supervise the execution, but also the agreement itself does not contain specific details relating to the proposed construction.

In view of the completion of the building the argument, becomes academic for the Court's power is a matter of procedure and it can take note of subsequent events pending the appeal and give relief in the light of them. Further, if the building had been almost completed even before the suit was instituted, the argument for the defendants on this part of their cases loses its force. In any case, under the provisions of the new Act, the Court's power is wider.[2]

5. "Adequate relief"—The words "adequate relief" are not capable of precise definition. They have not been defined in the act in any other law. Therefore the commonsense view of the words must be resorted to and accepted The words "adequate relief" generally speaking connote "relief which is considered sufficient". But the question is "by whom"? "by the plantiff", ? or "by the defendant" ? "or by the Court" ? Normally, the relief that is considered sufficient by one party to a dispute is not considered so by the other party and in such controversies in courts, it is the latter who are called upon to determine the adequacy or inadequacy of the relief claimed, contested and given- This question came up for consideration before Walsh, Ag. C. J; *Brij Ballabh Das v. Mahabir Prasad*[3] and the learned Judge who delivered the judgment of the Division Bench said : "They asked for specific performance, and it was only in the final alternative that they claimed a sum to recoup their loss as estimated by them as damages if their claim for specific performance was not allowed. But the plaintiffs were claiming what they were *prima facie* entitled to, namely, a lease of a particular shop, and there may be many reasons why they desire and are willing to pay for a particular shop, and why they are unable to do more than give a rough statement of the loss which they will suffer if they do not get it, preferring the shop to any form of pecuniary compensation. If the matter or rather the meaning of the word 'adequate' is to be judged from thier point of view, then it is clear that they do not consider it adequate, otherwise they would ask for the money and not for specific performance. The foregoing reasoning seems to show that the word 'adequate' in Sec, 21 (old) (of the Specific Relief Act) must be adequate in the mind of the Court, for some reason found as a fact and stated by the court for holding it to be adequate, inspite of the opinion of the plaintiffs that it is inadequate. The illustration in Sec. 12 (old) is a useful guide to what is meant. If one looks first at the illustration to Sec. 21 (old), sub-section (*a*), which the learned Judge was construing, one will see that it deals with moveable property and with contracts of a commercial nature. But turning back to the explanation to Sec. 12 (old), it is clear that the Legislature did not intend that persons who entered into contracts to transfer or lease

1. A. I. R. 1939 All. 375.
2. K. M. Jaina Beevi v. M. K. Govindaswami. A. I. R. 1967 Mad. 369 at pp. 370-71.
3. A. I. R. 1924 All. 529 at p. 529.

immoveable property, should be allowed to escape from them to suit their own convenience by alleging that the person in whose favour the contract was made, could be compensated in money, because that explanation requires the Court to presume that such compensation cannot be adequate unless and until the contrary is proved."

As regards the adequacy of compensation in a suit for specific performance of a contract relating to immoveable property the presumption is that damage to immoveable property cannot be adequately determined in terms of money unless the defendant on his part who wants to avoid the specific performance of a contract in respect to immoveable property shows that adequate relief could be granted in terms of money and in such an event the burden lies on him to prove the adequacy of relief in terms of money. Discussing this question Malik, C. J. in *Hari Krishna Agarwal* v. *K.C. Gupta*[1] says : "in the case of immoveable property, as it is difficult to assess the damage, the presumption is that damages would not be sufficient compensation and the courts would specifically enforce the contract unless the defendant can prove that damages would be adequate relief. The question has been more clearly and better discussed in Pomeroy's book on *Specific Performance of Contract*, 3rd Ed. The learned author has pointed out that in cases of contracts for the purchase of lands or things that relate to realities those being of a permanent nature were expected to have a special value, and if a person agreed to purchase them, it was on a particular liking to the land, and such contracts were different from the contracts entered into about goods in the way of trade and that was how the rule started but later it came to be assumed by the courts that in all contracts for sale of land damages were inadequate compensation for a breach of contract. The learned author has further pointed out that the situation has changed and land was offered, brought and held simply as merchandise for mere purposes of pecuniary profit, possessing no interest in the eyes of the purchaser and owner other than its market value, but the rule having once been established has now become universal and the actual motives and design of the purchaser are never enquired into, for it is assumed in every instance that damages are inadequate relief for the breach of a land contract.

"So far as we are concerned, the law is laid down in the Specific Relief Act. Section 12 (old) of the Act sets out the cases in which specific performance is enforceable. Clause (c) of (old) Sec. 12 provides that the specific performance may be granted.

> "when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief'

and the explanation to the section provides that 'unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved'. It has, therefore, made it a question of burden of proof it being assumed that in cases of a breach of contract to transfer immoveable property it may be possible for the defendant to prove that damages would be adequate relief. Section 21 (old), Cl. (a), Specific Relief Act, provides that a contract cannot be specifically enforced for the non-performance of which compensation in money is an adequate relief."

6. Hire-purchase agreement.—The question of the enforceability of hire-purchase agreement arose in *Abdul Rahman Nizami* v. *Manikram Hanumanbux Bajaj*.[2] The facts of the case were as follows :

1. A. I. R. 1949 All. 440 at p. 443, 2. A. I. R. 1941 Rang. 177 at pp. 177-79,

"By a contract dated 4th October, 1937, between the parties there was an agreement to sell by hire-purchase certain cinema apparatus for the price of Rs. 24,000, payable as to Rs. 5,000 on the date of execution and as to the balance in equal monthly instalments. The seller was Mr. A. R. Nizami and the purchaser was the present respondent. Clause (3) of the agreement ran :

'It is also agreed that as long as there remains any sum outstanding for the price of the articles sold the articles shall remain the property of A. R. Nizami.

'*Clause* 4 : That the said Mr. M. H. Bajaj may at any time return the articles sold provided that he does so in good working order and all amounts due by way of instalments have been paid.

'*Clause* 5: That if any instalment is not paid on the 5th of each month the said A. R. Nizami will allow fifteen days grace and on the expiration of that period he will be entitled to take possession of the articles wherever they might be found and he may recover the full amount of the instalments due up to that date as well as the cost of putting the machinery in working order as if on demand and in such event the said Bajaj shall have no further right or claim in respect of the said articles'."

The cinema apparatus belonged to Mr. Nizami and Mr. Bajaj was to put it in order before returning it to Mr. Nizami. According to the terms of the agreement, if any instalments were not paid by Mr. Bajaj, Mr. Nizam ; was to take possession of the cinema apparatus as well as recover the amount of unpaid instalments due and the cost of putting it in order. Subsequently the partles fell out and the disputes arose. Mr. Bajaj decided to return the apparatus and wrote to Mr. Nizami in this regard and requested him to arrange to take back the apparatus according to the terms of the agreement. Mr. Nizami thereupon wrote that his engineers would examine the apparatus within a week and then he would take back the material. Subsequently the dispute arose between the parties whether articles returned were in good working order or not at the time of their return. The dispute was that Mr. Nizami claimed instalments as and when then fell due under the agreement while Mr. Bajaj claimed rent at the rate of Rs. 100 a day from the date he offered to return the articles to Mr. Nizami. The Court found that Mr. Nizami had refused to take delivery of the apparatus according to the terms of the agreement. On the other hand, he sought Mr. Bajaj's acceptance of a new term of a contract that he should be allowed to go and test the apparatus and take it away until after it was tested. The Court rejected the argument advanced on behalf of Mr. Nizami that he was only obliged to take away the articles (apparatus) if after the conclusion of the test, they were found in good working order and that the contract had been complied with and said : "But he had been already informed by Mr. Bajaj of the latter's intention to return the apparatus and if he found that it was not in good working order it seems to me that he could only accept the articles in the condition in which they were and debit Mr. Bajaj with the cost of putting them in good working' order and claim that amount by way of damages for breach of contract Dunkley, J , who concurred in the order passed by his colleague Roberts, C. J., at pages 178-79 said : "Now, one has only to read the plaint to realize at once that the suit was not maintainable. The plaint set out that in

accordance with the agreement between the parties the respondent was to purchase these goods and to pay for them by certain instalments ; that he had failed to pay the instalments as due ; and therefore the plaintiff-appellant asked for a decree, first, for the amount of all instalments which had fallen due up to the date of suit, and secondly, for a declaration that the defendant-respondent was liable to pay all the remaining instalments as set out in the agreement. Clearly therefore the suit was a suit a for the specific performance of a contract if or the sale of goods. Under Sec. 12 (now Sec. 10), Specific Relief Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief. Under Sec. 21 (now Sec. 14) a contract for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced. How it can be said that the failure of a person to perform his obligations under a hire-purchase agreement for the sale of goods cannot be adequately compensated in money passes my comprehension."

7. **Suit for recovery of money.**—A suit for recovery of money in pursuance of a contract can never be treated as a suit for specific performance of a contract. In *Maung Ni v, Maung Aung Ba*,[1] the question came for consideration before a Division Bench of the Court and it was stated by the Court : "The payment of money is not regarded as specific relief under the Specifie Relief Act, 1877, *vide* the provisions of Sec. 21 (*a*) and Sec. 12 of that Act, the relief provided in that Act being relief *in specie*, that is the performance of a specific act or the delivery of particular articles, and not the payment of money, unless of course the contract is for the delivery of particular coins."

The Court quoted with approval the statement of law made in *Kunj Behari Bardhan* v. *Gosto Behari Bardhan*[2] to the effect that "A suit for the recovery of money can in no sense be treated as a suit to enforce a contract."

8. **Contract to reconvey property**—As observed by a Division Bench of the Bombay High Court in *R.S. Ghadge L. S. Ghadge*,[3] an agreement to reconvey land to the vendor at any time on repayment of the sale price could not be said to be void on the ground of absence of mutuality and was specifically enforceable.[4]

9. **Specific performance of an agreement**—The Law is that Court will refuse specific performance of an agreement, where damages are the proper remedy, i. e. where the subject-matter of the contract is a sum of money or a political pension and that person enters into an agreement with his credi:ors to pay regularly a certain sum of money out of the pension towards the discharge of his debt. In a suit to enforce the agreement against the political pensioner, it was held that the Court cannot specifically enforce such an agreement, to compel the political pensioner to draw his pension and pay his creditors. Such an agreement is not specifically enforceable, and that he cannot be forced or compelled to pay his creditors out of his political pension.[5] Simllarly, a suit for specific performance of an agreement to pay a certain sum of money by instalments has been held to be incompetent and not legally maintainable and the Court is not empowered

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1. A. I. R. 1926 Rang. 198 at p. 199.
2. 22 Cal. W. N. 65 (1908) 27 C. L. J. 486. 62 I. C. 500.
3. AIR 1960 Bom. 105.
4. Dave Ramshankar Jivatram v. Bai Kailasgauri, A.I.R. 1974 Guj. 69 at p. 72.
5. Satraji Dongro Chand v. Madho Singh, A.I.R. 1927 Mad. 604 at p. 607.

to enforce such agreement.[1] In *Maya Ram* v. *Parag Dat*[2] discussing about suits for specific reliefs, Mahmood, J, said : "In considering suits for specific relief the most important rule to be borne in mind is that 'the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so.' This rule has been enunciated by the Legislature in Sec 22 (now Sec. 20) of the Specific Relief Act (1 of 1877) in the clearest terms. The section goes on to lay down that 'the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a court of appeal.' The learned Judge expressed his doubts whether, even when the whole of money agreed upon has been paid, the plaintiff will be entitled to sue for specific performance of the agreement." In *Meenakshi Sundara* v. *Rathnasami*,[3] Abdul Rahim, J; said : "It is settled law that the Court will not specifically enforce an agreement, to lend or to borrow money whether on security, or not.[4] But specific performance was ordered in *Ashton* v. *Corrigan*[5] and in *Hermann* v. *Hodges*[6] where the money had actually been advanced and all that remained to be done was the execution of the mortgage agreed upon. In *Ashton* v. *Corrigan*[7] Sir John Wickens, V. C.; said :

> 'I doubt whether a contract to execute a mortgage, which the mortgagee may enforce by a sale the day after its execution, is one which the Court will specifically perform and I know of no reported case in which such relief has been given where the right to it has been contested. However on the authority of the cases cited from Seton on *Decrees*, I will make the decree.

In *Hermann* v. *Hodges*,[8] where the defendant did not oppose the decree, I ord Selborne, L. C; said that he had no doubt of the propriety of making the decree asked for unless the defendant was prepared to pay off the advance at once. Both were cases in which, so far as one can gather, the entire amount had been advanced. That is also how the scope of the rulings is stated in Fry's *Specific Performance*.[9] The question then is whether specific performance can be decreed where only a part of the advance has been made. In the last reference it is stated in the foot-note that in an Irish case, *Hunter* v. *Langford*,[10] specific performance was ordered of an agreement to grant a mortgage for amount of £80,000 of which £1,000 was already advanced. But this report has not been available to me. In *Bass* v. *Chvely*,[11] where the plaintiff agreed to advance £3,000 and actually advanced £600 in part, the defendant apparently submitted to a decree for specific performance according to the terms of the contract. It cannot be said that the question, where a contract to lend money on security can be specifically enforced if only part of the amount to be lent had been advanced, was considered and decided by the Master of the Rolls.

"On the other hand, there is the decision of the Court of Appeal of England,[12] and the House of Lords in *South African Territories* v. *Wallington*,[13]

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1. Hukam Singh v. Khunilal, 8 A. L. J. 1282.
2. 5 All. 44 at pp. 48-49.
3. A. I. R. 1919 Mad. 322 at pp. 325-26.
4. *See* Rogers v. Challi, (1859) 27 Beav. 175 Sic el v. Mosenthal, (1862) 30 Beav. 371 and Lanios v. Gurety, (1873) 5 P. C. 346.
5. (1872) 13 Eq. 76.
6. (1873) 16 Eq. 18.
7. (1872) 13 Eq. 76.
8. (1873) 16 Eq. 18.
9. 5th Ed. Sec. 54, and Halsbury's *Laws of England* Vol. 27. Sec, 125, 73 and Vol. 21. Sec. 135, p. 75.
10. (1828) 2 Mol. 272.
11. (1829) Tamlyn 80 ; 48 E. R. 33.
12. South African Territories v. Wallington, (1897) 1 Q. B. 692 : 66 L. J. Q. B. 551.
13. (1898) A. C. 309 67 L. J. Q. B. 470.

where the defendant had applied for and paid 10 per cent, deposite on some debentures, it was held that the company was not entitled to a decree directing the defendant to pay the rest of the instalments according to agreement. In the Court of Appeal, Chitty, J., observed :

> 'It is cleor that no specific performance of a contract to lend and borrow money can be granted at the suit either of the proposed lender or the proposed borrower. It is immaterial whether the loan is to be on security, or whether the loan is to be for a fixed period, and it can make no differonce whether the loan is to be made in one sum or by instalments.'

"This view of the law was confirmed by the House of Lords. No doubt the decree passed by Wright, J., which was In question in the appeal was rather peculiar. It did not in so many words grant specific performanee, but gave a decree for the entire amount unpaid and one of the arguments advanced in support of the decree was that the contract was for purchase ef debentures on certain terms. But Sir Robert Reid, afterwards Lord Loreburn, also argued that if the respondent had paid all the instalments and the debentures hau heen with held, the respondent would be entitled to specific performance and the remedy must be mutual. The learned Lords however did not think that specific performance could be extended to a case like the one before them where only part of the advance had made been ma de The principle of the decision of the House of Losds in *South African Territories* v. *Willington*[1] and the other English cases has been followed in this Court in *Rajagopala Aiyar Sekh Eovnod Rowther*[2] to which I was a party, and in *Shaik Salim* v. *Sadarijan Bibi*[3] In all those cases however the suit was by the borrower. The general rule of English law, which in these cases is followed in India, is not that the courts will compel performance of contracts according to their tenor ; on the other hand, the proper remedy according to English Common Law for the breach of a contract is compentation by way of damages for the loss arising from the breach. The courts of equity however assumed jurisdiction to compel the defaulting party to carry out the contract in its terms, in a class of cases where damages would not be an adequate remedy. Hence one of the conditions for the exercise of this equitable jurisdiction has always been that the common law remedy should be inadequate. Section 21 (old), Specifie Relief Act, therefore says that a contract for the non-performance of which compensation in money is an adequate relief, cannot be specifically enforced. An ordinary contract to lend or borrow money, whether on security or otherwise, comes within this category.

"But supposing money has already been advanced and the borrower refuses to execute a mortgage according to the agreement, the lender would apparently be prejudiced if the loan were to remain without security, and it is difficult to see what difference it would make in this respect whether the entire loan had been advanced or only a portion, if in the latter case the lender has been ready and willing to advance the remaining sum according to the agreement. On the other hand, if the loan was liable to be repaid at once and the borrower is willing to pay it off, there would be no object in decreeing specific performanee in such a case. Hence it was that Lord Selborn in *Harmann* v. *Hodges*[4] said that he would not deeree specific performance of an agreement to borrow on a mortgage if the defendant was prepared to pay off the advace at once. If the loan was not repayable for a certain period, that would only affect the amount of damages and the method of

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1. (1893) A. C. 209 : 67 L. J. Q. B. 470.
2. (1978) 45 I.C. 161.
3. (1915) 29 I. C. 621 I. L. R. 43 Cal. 59.
4. (1873) 16 Eq. 18.

calculation. The courts of equity seem to be reluctant to force upon a man the position of a debtor if he is in a position to pay off the loan, though no doubt he will be made to compensate the other party for breach of the agreement. This seems to me to be the result of the authorities. Where however the borrower is not prepared to pay off the loan, to refuse specific performance in such a case of the agreement to execute a mortgage would be, as I have said, denying justice. In Halsbury's *Laws of England*, Vol. 21, p. 75, it is stated :

> 'In equity a mortgage is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as a security for a certain sum. The agreement may be enforced according to its terms even though the legal mortgage when executed will confer on the mortgagee an immediate power of sale.'

"This is supported by a number of decisions of the English courts. The case however is to be distinguished where no money has actually been advanced, for there would be no question there of an equitable mortgage. In India except the Presidency towns equitable mortgages are hardly recognized and it was argued by Mr. A. Krishnaswami Aiyar, that if we accepted the proposition laid down by the House of Lords in *South African Territories* v. *Willington*[1] in cases where the suit is by the borrower, the doctrine of mutuality required that the rule should be equally followed where the suit is by the lender. The two cases do not stand on the same footing. In the last case the lender would have altered his position and his money may be lost it specific performance were not decreed, while in the other case the only question would be one of damages. Besides, if the doctrine of mutuality were strictly applied to these cases, there could be no specific performonce even when the entire amount had been advanced but none of the learned Lords in their judgments in the abovementioned case suggested any doubt as to the decision in *Hermann* v. *Hodges*[2] and *Ashton* v. *Corrigan*,[3] which were cited at the Bar and the text-writers mention these cases with apparent approval." In the same case Seshagiri Aiyar, J., at page 331 dealt with the point in a different manner. He said : "The next important point is whether even if it is an agreement to give a usufructuary mortgage, a suit for specific performance is competent. The learned vakil for the appellants with his usual ability contended that, if the amount agreed upon was not fully paid, by asking for specific performance, the plaintiff would be compelling the defendant to accept the loan with reference to the balance remaining unpaid. In *South African Territories* v. *Willington*,[4] it is definitely laid down that a contract to land cannot be specifically enforced, affirming the decision of the Court of Appeal in *South African Territories* v. *Willington*.[5] That principle has been followed in this country in *Shaik Galim* v. *Sadarijan Bibi*.[6] *Ramkrishna Pattar* v. *Narayana Pattar*[7] also belongs to the same class. Mr. Krishnaswami Aiyar contended that an agreement to borrow stands on the same footing as an agreement to lend. It is not necessary for me to disagree with that contention, although I am not prepared to hold that the principle of mutuality as laid down in *Flight* v. *Bolland*,[8] is of universal application. Without quoting many cases, I may refer to *Jones* v. *Tankerville (Earl)*,[9] where the principle of mutuality has been departed from to some extent. The decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[10]

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1. (1893) A. C. 309 : 67 L. J. Q. B. 470.
2. (1873) 16 Eq. 18.
3. (1872) 13 Eq. 76.
4. (1898) A. C. 309 : 67 L. J. Q. B. 470.
5. (1897) 1 Q. B. 692 : 66 L. J. Q. B. 551.
6. (1915) 29 I. C. 621 : I. L. R. 43 Cal. 59.
7. A. I. R. 1915 Mad. 584 : 26 I. C. 883.
8. (1828) 4 Russ. 298.
9. (1909) 2 Ch. 440.
10. I. L. R. (1912) 39 Cal. 232 : 39 I. A. 1 - 18 I. C. 331 (P. C.).

does not say that such a principle is of universal application." Then again : "The principle of the English decisions followed in this century is that no person should compel another to accept a loan as he could very well advance it to another, and it would be unjust to compel the would be borrower to accept it as he could in open market procure the loan easily. But in the present case, the object of the suit is not to compel the defendant to accept the loan. The aim is to obtain the security for the money already advanced and that security having been promised by the document, the defendanr is bound to fulfil it. There is a decision of the Allahabad High Court in *Maya Ram* v. *Prag Dat*,[1] in which Mahmood, J., expresses a doubt whether, even when the whole of the money agreed upon has been paid, the plaintiff will be entitled to sue for specific performance. The learned Judge is apparently of opinion that money compensation would meet the ends of justice in such cases. I am afraid that the learned Judge has not adverted to the fact the securing of a security by a lender is far more important to him than the obtaining of a decree for money against the borrower.

"This view of Mahmood, J., is opposed to two decisions of very eminent Judges in England in *Ashton* v. *Corrigan*[2] and *Harmann* v. *Hodges*.[3] In 21 Halsbury, 75, the law is thus summarised :

> 'In equity a mortgaee is created by a contract to execute, when required, a legal mortgage, or by a contract that certain property shall stand as security for a certain sum.'

"In Fry on *Specific Performance*, the same principle is enunciated. In Sec. 54 the law is thus stated :

> 'The Court will specifically enforce a contract to execute a mortgage and that even with an immediate power of sale, where the money has been actually advanced either before or at the time of the contraet.'

"I fail to see why these principles should not be followed in this country."[4]

As regards the relief to be granted by courts in such cases, the learned Judge observes : "It was argued by Mr. Krishnaswami Aiyar that this provision in the decree indirectly compels the defendant to accept the balance of the loan. Speaking for myself, I do not think that this objection is well-founded. What the House of Lords has laid down in the case already referred to is that a party plaintiff is not entitled to claim specific performance of a contract to lend or to borrow. If he comes into Court with such a specific prayer and if there is nothing more in the plaintiff, the suit will be rightly dismissed. But where the prayer is strictly within the rights of the plaintiff, it is competent to the Court to annex conditions in the decree calculated to render justice between the parties. The domain of the rights of the parties is then passed and that of the function of the Court comes into play. The Court, in the plenary powers it possesses of exercising discretion or of imposing suitable conditions in the interests of justice, being seized of the subject-matter of the suit, can proceed to annex or disannex conditions *suo moto* in order that complete justice may be rendered. I do not think that the principle that there cannot be a suit for specific performance either to borrow or to lend has any application to the exercise of the Court's powers as above indicated."[5] Then he concluded : "There is authority for enforcing the contract in its entirety even though the full amount has not been paid. Mr. Muthukrishna Aiyer quoted *Bass* v. *Chively*,[6] wherein Sir John Leach, the

1. I. L. R. 5 All. 44.
2. (1872) 13 Eq. 76.
3. (1873) 16 Eq. 18.
4. Meenakshi Sundara v. Rathnasami, A. I. R. 1919 Mad. 322 at pp. 325-31.
5. *Ibid.* at pp. 331-32.
6. (1829) Tamlyn 80 : 48 E. R. 33.

Master of the Rolls, decreed specific performance of a contract to mortgage even though the full amount had not been paid. This case is no doubt open to the construction put upon it by Mr. Krishnaswami Aiyar that the decree was by consent. But if the decree could not be passed, the Master of the Rolls would not have acted on the consent, therefore the procedure adopted must be taken to have been legal. I fail to see why the courts should not do what the parties can agree to and impose a condition for the payment of the balance before specific performance is decreed. There is also citation in 21 Halsbury at page 75 under note (*b*) of an Irish case of *Hunter* v. *Langford*.[1] In which specific performance was ordered of an agreement to grant a mortgagee for a loan of £ 30,000 of which £ 1,000 alone had been already advanced."

As regards mortgages and the suit for specific performance of the contract on the feature of mortgage the law has been laid down by Sen, J., in *Narain Prasad* v. *Narain Singh*.[2] Speaking for the Division Bench of the Court, Sen, J., says : "Where the mortgagees failed to perform their undertaking to discharge a debt due from the mortgagor, the remedy of the mortgagor lay in a suit for compensation against the defaulting mortgagees and not by specific performance of the agreement. Specific performance cannot be compelled, where compensation is the adequate remedy. The provision of Sec. 21 (now Sec. 14), Specific Relief Act, is clear, and autrorities are not wanting."[3]

In *Allah Baksh* v. *Hamid Khan*,[4] Niamatullah, J,. while dealing with the question of acknowledgment of a time-barred debt said : "It is quite true there is an express promise to execute a deed of conditional mortgage and, if the suit had been one for specific performance, Sec. 25 (3), Contract Act, could have been invoked by the plaintiff for enforcement of an agreement to have a deed of mortgage by conditional sale executed by the defendant. We express no opinion as to whether a suit for specific performance of that nature could have succeeded on the merits, but such a suit could have been conceivably brought and in the alternative the plaintiff-appellant could have claimed damages for breach of an agreement to execute a deed of mortgage by conditional sale." In *Govind Das* v. *Sarju Das*,[5] it was held that :

> "Where it is sought to recover a time-barred debt on the strength of a subsequent promise to pay made in writing by the debtor, the document relied on must contain an express promise to pay. A promise to pay cannot be inferred from a mere acknowledgment."

Where the executant of an usufructuary mortgage has performed his full part of the contract but the mortgagee had not paid the mortgage money in full and a part of the consideration is still to be paid it was held that the mortgagor was entitled to recover possession of the mortgaged property. In *Sheopati Singh* v. *Jagdeo Singh*.[6] a similar situation arose ; the Court said: "We would like to point out one further consideration which ought to decide this question of law in their favour. Part of the sale consideration represented money belonging to the executants, and it had been left in the hands of the vendees for payment to their nominees. If the amount has not been paid as directed, there seems to be no reason why the executants should not change their mind and recover the amount themselves on the ground that, not having been paid as directed, it is their unpaid purchase money. If the transfer-

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1. (1828) 2 Mol. 272.
2. A. I. R. 1931 All. 40 at p. 44.
3. Vide South African Territories Co., Ltd. v. Wallington, (1898) A. C. 309 : 67 L. J. Q. B. 470 : 78 L. T. 426 : 46 W. R. 545 : 14 T. L. R. 298 : Hukum Singh v. Khunni Lal, (1911) 12 I. C, 952 and Phul Chand v. Chand Mal, I. L. R. 30 All. 252 : 5 A. L. J. 491 : (1908) A. W. N. 105.
4. A. I. R. 1931 All. 160 at p. 162.
5. I. L. R. 30 All. 268.
6. A.I.R. 1931 All. 95 at pp. 97-98.

ees had made the payment it would have been a different matter, but not having paid it within the time fixed or within reasonable time thereafter they have not performed their contract, and part of the sale consideration therefore remains unpaid to the vendors. We therefore see no reason why the plaintiffs should not now be entitled to recover this amount.'. Dealing with the case of a usufructuary mortgage the Court said : "The case of a usufructuary mortgage however must stand on a different footing, particularly when the possession has been delivered and the stipulation is that the profits are to be set off against the interest. According to para. 2 of the deed in question the property had to be redeemed on the payment of the principal mortgage money only after the expiry of 12 years without any further accounting. The executants have delivered possession of their property to the transferees who have not paid the whole amount contracted to be paid. Thus the executants have performed the whole of their part of the contract and the transferees have not done so. It would not be fair to the executants to let the transferees remain in possession of the property although they have not paid the whole amount, and only direct an account to be taken in future when a proper suit for redemption is instituted. The suit is not really one for the specific performance of a mere contract to lend money but to compel the defendants to perform their parts of the contract when they have obtained delivery of possession of the property.

"The case relied upon by the learned advocate for the appellants, viz. *Phul Chand* v. *Chand Mal*.[1] *Shekh Galim* v. *Sadarjan Bibi*[2] and *Yadavendra Bhatta* v. *Srinivasa Babhu*[3] were not cases of possessory mortgages, the second being one for a mere contract to mortgage. No case directly in point has been brought to our notice. In none of the cases above mentioned does it appear to have been argued that a mortgage is a conveyance and not a mere contract for sale and that by not compelling the mortgagee to pay the whole amount remaining in his hands one would be compelling the mortgagor to offer a bigger security for a much smaller amount. We think that the executants are entitled to recover the amount, and cannot be compelled to wait till they have procured money to redeem the mortgage."[4]

In *Phul Chand* v. *Chandmal*,[5] the fact were these : On 18th of April, 1903, Sheo Ram and others executed two mortgages in favour of Phul Chand and Gulab Chand defendants-appellants for Rs. 1,000 and Rs. 6,000 respectively. In respect of these sums the finding of the Court below was, that only Rs. 2,135.11 were paid by the mortgages and the remainder remained unpaid. Certain creditors of the mortgagors obtained decrees and in execution of their decrees they proceeded to attach the right to receive unpaid balance of the mortgage money and put that up for sale. These rights were purchased by the plaintiff. The plaintiff then filed the suit against the mortgagees for recovery of the amount alleged to be due by them. A decree was passed for the portion of the amount claimed, in favour of the plaintiff. The appeal was against the decree and it was urged in appeal that there wasno debt due by the mortgagee to the mortgagors which could be attached within the meaning of the Code of Civil Procedure, that the promises of the mortgagees to lend the amounts mentioned in the mortgage deeds did not constitute debts which could be attached and that the only remedy, if any, of the mortgagors against their mortgagors was a suit for damages for breach of contract, if any damages could be proved.

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1. I. L. R. 30 All. 252 : 5 A. L. J. 491 ; (1908) A. W. N. 105.
2. I.L.R. 43 Cal. 59 : 29 I. C. 621.
3. A. I. R. 1925 Mad. 62 : 80 I. C. 5 ; I. L. R. 47 Mad. 698.
4. Sheupati Singh v. Jagdeo Singh, A. I. R. 1931 All. 95 at pp. 97-98.
5. I. L. R. 30 All. 252.

Discussing these arguments Stanley, C. J., said : "The question is not free from difficulty, but it appears to us that a decision of the House of Lords, which was brought to our notice by the learned advocate for the respondents, must be taken by us to be conclusive on the point. This is the case of *The South African Territories Company Limited* v. *Willington*.[1] The facts of that case were shortly as follows. The plaintiff company issued sixteen debentures to the defendant Willington on his undertaking to pay the face value of the debentures by instalments. Wallington paid some of the real instalments, but failed to pay the balance and thereupon a suit was instituted against him for specific performance of his agreement or for damages. Wright, J., before whom the trial took place, held that the claim for specific performance could not be sustained, but gave judgment for the plaintiff company for damages on the ground that a debt had been created by the defendant's promise to pay, contained in his letter of application for the debentures. Judgment was entered for the plaintiffs for £520, the amount of the instalments due and unpaid upon the date af the writ and costs. An appeal was preferred, which was heard by Lord Esher, M. R., and Lopes and Chitty, L. JJ., who reversed the decision of the Court below and entered up judgment for the defendant. An appeal was preferred to the House of Lords, with the result that the decision of the Court of Appeal was upheld. Their Lordships held on the default of Wallington to make the payments which he had undertaken to pay, the moneys remaining due by him for unpaid instalments did not constitute a debt to the company, that the company was oniy entitled to damages for actual loss caused by the breach of contract." Lord Halsbury, L. C., in his judgment with respect to the claim for specific performance remarked that a long and uniform course of decision has prevented the application of any such remedy and I do not understand that any court any member of any court has entertained a doubt but that the refusal of the learned Judge below to grant a decree for specific performance was perfectly right. But of course in this like any other contract, one party to the contract has a right to complaint that the other party has broken it, and if he establishes that proposition he is entitled to such damages as are appropriate to the nature of the contract. "Lord Watson in the course of his judgment observed that 'the only engagement made by the respondent with the company consisted in a promise to advance money to them in loan ; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance, and later on he says : 'The only remedy open to the company was by action against the respondent for any loss or damage which they might sustain through his breach of promise'. The other Lords endorsed this view, namely, that no suit will lie to compel a party to fulfil an agreemcnt to advance money. The decision is in entire accord with the view which we expressed at an early stage of the hearing and carrying the weight which it necessarily does, must conclude his appeal. The mortgagees were never in a position to enforce specific performance of the agreement of the mortgagees to advance the full sum agreed to be lent by them. The unpaid portion of the loan did not constitute a debt due by them to the mortgagor such as could be attached under the Code of Civil Procedure. It may be that mortgagors have some ground of complaint against the mortgagees, and they may be in a position to obtain damages for the breach by the mortgagees of their contract, but this matter is not before us and we express no opinion upon it."[2]

The mere fact that the document mentions that the executants have received the sale consideration or that possession has been handed over to the plaintiff, does not mean that it can be interpreted as a deed of convey-

1. (1898) A. C. 309.
2. Fhul Chand v. Chand Mal, I. L. R. 30 All. 253 at pp. 254-55.

ance. Apart from that, there also a specific agreement contained in that document by which the executants have agreed to execute a document of conveyance whenever the plaintiff wanted. That agreement itself could be specifically enforced. Therefore, the argument that this being a document of sale and being unregistered, a decree for specific performance based on it, cannot be granted, cannot be accepted.

This agreement to execute a formal deed of conveyance could be specifically enforced.[1]

Lord Davey in *Natal Land and Colonization Co. Ltd.* v. *Pauline Colliery Syndicate*,[2] speaking for the Judicial Committee stated that a company could not by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existenee and that in order to do so a new contract must be made with it after its incorporation on the terms of the old one. Sections 21 (f), 23 (h) and 27 (*e*) of the Specific Relief Act, 1877, were perhaps based on the doctrlne of Lord Cottenham that a company after its incorporation was a successor to and took the place of the promoters in relation to contracts entered into by them for the purposes of the company and warranted by the terms of the incorporation. Though the first two sections do not seem to be rested on any theory of agency or of trust, Sec. 27 (e) was possibly founded on some kind of quasi-agency or of trust. To this extent, the Indian Legislature in enacting the Specific Relief Act, 1877, would appear to have departed from the English view in *Kelner* v. *Baxter*,[3] and *Natal Land and Colonization Co. Ltd.* v. *Pauline Colliery Syndicate*.[4] These sections in the Specific Relief Act are concerned with executory contracts and cannot possibly be applied to conveyances of immoveable properties in favour of promoters of a company under incorporation.

While the position that a promotor is neither an agent nor a trustee of the company under incorporation is correct, their Lordships were inclined to think that in respect of transactions on behalf of it, he stands in a fiduciary position.

A promotor stands in a fiduciary position with respect to the company which he promotes from the time when he first becomes until he ceases to be a promoter thereof. It is also pointed out that a promoter may acquire assets as a trustee for a company.[5]

10. Specific performance of Chit Fund Contract.—The question as to the nature, obligations, liability and rights under a Chit Fund Contract came in for decision in *Kamanatha Ayyar* v. *G. G. Narayanaswumi Ayyar*.[6] Beasley, C. J., discussed this question at some length. In this Chit Fund business there were 15 subscribers each of them subscribing Rs. 500 for 15 instalments. Except with regard to the second instalment out of which the suit arose, the same procedure was adopted with regard to the others. The fifteen subscribers subscribed each Rs. 500 making a total of Rs. 7,500. This sum of money was immediately put up in auction and sold to the subscriber or bidder who was prepared to give the largest discount. He then got the sum of money less the discount offered by himself. This discount at the first auction was divided up amongst all the subscribers except the successful bidder. The second instalment differed considerably from all the others in that the whole of the subscriptsons of the 15 subscribers amount to Rs. 500 went to the stake holder. It was in fact his price and thereafter at all the other auctions

1. Ramachandra Naidu v. Ramayya Naidu, A. I. R. 1969 Mad. 418 at pp. 418-19 422.
2. (1904) A. C. 120.
3. (1866) 2 C. P. 174.
4. (1904) A. C. 120.
5. The Weavers Mills Ltd., Rajapalayam v. Balkis Ammal, A. I. R. 1969 Mad. 462 at pp. 468-69.
6. A. I. R. 1937 Mad. 364 at p. 366.

the discount offered by the successful bidder was divided up amongst those subscribers who had not been successful at the previous autions and excluding the stake-holder. The defendant paid his subscriptions in respect of the first instalment and also the third and fourth instalments when the Chit Fund stopped. The dispute arose about the second instalment. The defendant did not subscribe his Rs. 500 as he ought to have done. Instead a promissory note payable in three years time was taken from him and, as he did not pay the amount, the suit was filed against him as I have already stated not on the promissory note because it was not sufficiently stamped, but upon the original debt, viz., Rs. 500.

The learned Trial Judge having found in favour of the plaintiff on the point of limitation then proceeded to deal with the claim upon the original debt. He dismissed the suit because he held that it was really a suit claiming specific performance of a contract to lend. Beasley, C. J., at p. 365 [A. I. R. 1937 Mad. 364] says : "This means that he regarded the stake-holder as the borrower and the subscriber as the lender and the suit against the latter as being one to enforce a contract entered into by him to lend Rs. 500 to the stake holder on the date of the second instalment. It is very difficult to see how this can possibly be a contract whereby the subscriber is to lend a certain sum of money to the stake-holder. It has been held in a case of a similar auction chit where it was contended that the Chit subscriber was a borrower from the fund that he was not a borrower, but he was merely the purchaser of a sum of money.[1] In the present case the lower Court reveres the position unsuccessfully put forward in that case and treats the subscriber as the lender and the stake-holder as the borrower. I do not agree as I quite fail to see how it can possibly be said that this is in any sense a contract entered into by a subscriber to lend money to the stake-holder. It seems to me to be more in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the Chit Fund and when the has broken his contract there is nothing at all to prevent the stake-holder from suing him for the money which he has contracted to pay."[2]

11. Sub-clause (*b*).—The principle behind this sub-clause is that the Court should refuse specific performance of a contract where it becomes impossible for it to enforce it and the conditions have been set out in detail in sub-clause (b) of this section. The language in which this sub-clause has been couched is very elastic and gives very wide discretion to the Court in the matter of its enforceobility or non-enforceability. Section 14(*b*) [Sec. 21(*b*) (old)] read with Sec. 41 (*f*) [Sec. 56 (f) (old)] of the Specific Relief Act makes it clear that a contract to render personal service cannot be specifically enforced. An injunction not to commit a breach of contract is only another way to enforce the contract. The theory is that the contract for hiring personal service is of such a personal nature that there cannot be any hope of ultimate and real success by enforcement of it by law courts. *Whitwood Chemical Co.* v. *Harnand*,[3] Lindley, L. J., observed : "I think the Court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in case of personal service than by leaving them alone ; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the Court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may

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1. *Vide* Raghwan Pattar v. Arumugham, A. I. R. 1935 Mad. 385 at p. 386 : 158 I. C. 1037 : 68 M. L. J. 283.
2. Ramanath Ayyar v. G. G. Narayanswami Ayyar, A. I. R. 1937 Mad. 364 at pp. 365-66.
3. (1891) 2 Ch. 416 at p. 428.

have apart from the extraordinary remedy of an injunction." In a case of an employee of the Municipal Board, who has been demoted or reduced in rank, the proper remedy is not an injunction against the Municipal Board, but is a suit for damages for breach of a contract. In *Shrimati Ram Piari* v. *Municipal Committee, Pathankot*,[1] the contract said : "In any case assuming that the Municipal Committee was not justified in demoting Ram Piari her remedy aepears to me to be to seek damages for breach of contract and not to enforce the contract by getting an injunction from this Court." The main reason for refusing to enforce the contract for personal service is the practical impossibility and the utter futility. Contracts for personal services where the acts stipulated for, require special knowledge, skill, ability, experience or the exercise of judgment, discretion, integrity and the like personal qualities on the part of the employees or where the services are confidential—in short, wherever the full performance, according to the spirit of the agreement, rests on the individual will of the contracting party, courts of equity have no direct and efficient means of affirmatively compelling a specific execution, at most, they could only order the acts to be done and punish the defendant refusing by fine or imprisonment.[2] The reason for the refusal of specific performance under this clause is the practical incapacity of a court to execute in such cases a decree for specific performance. Its machinery is necessarily limited and though it might impossibly enforce its decree, by attaching the person and property of the defendant, yet the cases covered by this clause are very varied and numerous, and upon a balance of convenience, the remedy by damages (the measure of which, in most of the cases, is tolerably precise) is the more appropriate and efficient relief.[3] Where a contract though seemingly one in reality consists of more than one part and is severable, the Court may grant specific performance in respect of some which are capable of performance. Thus if a person contracts to sing for the plaintiff and for none else, the contract is divisible into portions, i. e. (*i*) to sing for the plaintiff, and (*ii*) not to sing for any one else. Though specific performance could not be granted in respect of the first part it could be given in respect of the second part.[4] Where the contract is indivisible the Court will not order its specific performance. In *Dr. S. Dutta* v. *University of Delhi*,[5] the facts were these : The appellant was appointed Professor of Chemistry by the Delhi University in 1944. In 1948 the Government sanctioned a scheme called the Selection Grade for a higher grade of pay for certain professors. The appellant claimed to be entitled for the benefit of this Scheme but it was not given to him. In 1949 Dr. Seshadri was appointed by the respondent as the Head of the Department of Chemistry. The appellant took the stand that he was the Head of the Department of Chemistry and he was wrongfully superseded by Dr. Seshadri's appointment as the Head of the Department. The appellant tried to have this matter settled by means of arbitration in accordance with the provisions of the Delhi University Act, 1922, but did not succeed on account of the obstructions placed by the University authorities. The appellant therefore was compelled to file a suit on 18th October, 1949, for declaration that his removal from his position of the Head of the Department of Chemistry was illegal. The respondent on its part had also serious complaints against the appellant. In October, 1950, it was agreed between the parties that the grievances of the parties would be investigated by S. Varadachariar and Bakshi, Sir Tek Chand whose decision was to be accepted as final and

1. A. I. R. 1956 Punj. 220 at p. 222.
2. Pomeroy, 310.
3. Collett, *Specific Relief Act*, 5th Ed. p. 178.
4. Lumley v. Wagner, (1852) 1 De. G. M. G. 604.
5. A. I. R. 1958 S. C. 1050 at p. 1051 : (1959) S. C. J. 78 : 1958 S. C. A. 1098.

binding. In view of the above agreement the appellant withdrew his suit on 3rd November, 1950. On 1st August, 1951, report was submitted by the arbitrators. The appellant objected to it on the ground of its being unfair, defective and therefore was not binding on him. He filed an application before the Sub-Judge, Delhi, denying the arbitration agreement and asserting that the two references had no jurisdiction at all to make an award. In the alternative he prayed that if the award was given, it should be set aside. While this application was pending the Executive Committee passed a resolution terminating his services as a Professor of the University in view of the findings of the two references as a result of the said investigation. The Sub-Judge dismissed the application on the ground that the investigation by the two references into the mutual grievances of the parties was not a submission to arbitration and therefore no application under Sec. 33 of the Arbitration Act lay. An appeal to the High Court was also dismissed on the same ground.

The appellant claimed arbitration under the provisions of Sec. 45 of the Delhi University Act, 1922, by means of a letter, in which he appointed Professor M. N. Saha, the celebrated scientist, as an arbitrator and called upon the respondent to nominate another arbitrator. The dispute related to the denial or deprivation of the Selection Grade, his wrongful supersession by the appointment of Dr. Seshadri and his wrongful dismissal from service. The respondent did not take any action in the matter. The appellant thereupon wrote to the respondent and Professor Saha that he had appointed Professor Saha as his sole arbitrator to give award. Professor Saha informed the respondent of all this and fixed a date for hearing to which the respondent replied that he had been advised to submit that the appellant had no right to call for arbitration and that he (Mr. Saha) had no jurisdiction in the matter. Professor Saha started arbitration proceeding in which the respondent through his counsel again took the objection that the Professor had no jurisdiction to act as the arbitrator. But Professor Saha overruled the objection holding that he had jurisdiction upon which the respondent took no further part in the arbitration and the arbitration matter proceeded in his absence. Professor Saha gave his award holding that the appellant had been wrongfully deprived of this Selection Grade, that his removal was wrongful, that the dismissal of the appellant was wrongful, that he still continues to be the Professor and that he had been subjected to the harassment. This award was filed at the request of the appellant in the Court of the Sub-Judge, Delhi. The respondent raised various objections to the award. The Sub-Judge overruled the objections and passed a decree in the terms of the award. The respondent filed two appeals against the decree, one in the Court of the Senior Sub-Judge, Delhi and the other before the District Judge, Delhi. The High Court withdrew both these appeals to its own file and allowed both the appeals and set aside the award on the ground that it disclosed an error on the face of it. In the Supreme Court it was contended for the appellant that the High Court was wrong in its view that the award disclosed an error on the face of it. The High Court had held that it was not open to the arbitrator "to grant Dr. Dutta a declaration that he was still a Professor in the University, which no court could or would give him." According to the High Court this declaration amounted to specific enforcement of personal service which was forbidden by Sec. 21 of the Specific Relief Act, 1877, and therefore disclosed an error on the face of the award. The Supreme Court agreed with the above finding of the High Court and observed, "We are in entire agreement with the view expressed by the High Court. There is no doubt that a contract of personal service cannot be specifically enforced. Section 21, Cl. (*b*) of the Specific Relief Act, 1877, and the second illustration under this clause

given on the section makes it so clear that further elaboration of the point is not required. It seems to us that the present award does purport to enforce a contract of personal service when it states that the dismissal of the appellant has no effect on his status, and he still continues to be a Professor of the University. When a decree is passed according to the award, which if the award is unexceptionable, has to be done under Sec.17 of the Arbitration Act after it has been filed in Court, that decrees will direct that the award be carried out and hence direct that the appellant be treated as still in the service of the respondent. It would then enforce a contract of personal service for the appellant claimed to be a Professor under a contract of personal service and so offend Sec. 21 (*b*) (old)."

As regards the argument of the appellant that offending portion of the award was merely consequential and therefore was simply a surplusage, which could be severed without affecting the rest of the award the Supreme Court said : "We are also clear in our mind that the contention about the offending portion of the award being a mere surplusage affords no assistance to the appellant for it was not said so on his behalf that the offending portion was severable from the rest of the award and should be struck out as a mere surplusage. It, therefore, has to remain as a part of the award and so long as it does so it would disclose an error on the face of the award and make it liable to be set aside as a whole."

Clause (*b*), therefore, prohibits specific performance of a contract the terms of which run into such minute and numerous details or which from its nature is such that the Court cannot enforce specific performance of its material terms. Clauses (*c*) and (*g*) thus prevent the specific performance of a contract the terms of which cannot be fixed with reasonable certainty and the performance of a continuous duty extending over a period longer than three years from its date. The learned District Judge has taken the view that specific performance of this contract could not be decreed under any of these clauses of Sec. 21. Since the lease in favour of defendant No. 1 by defendant No. 2 did not provide any period during which alone defendant No. 1 was bound to purchase the entire amount of coal required for the manufacture of coke, it implied the performance of a continuous duty extending over a longer period than three years from its date. Clause (*g*), therefore, is a clear bar. The terms of this lease also come with Cls. (*b*) and (*c*) inasmuch as under Cl. (*b*) specific performance could not be allowed because, it will be difficult for any court to determine on every occasion the suitability of the coal dust to be supplied and whether defendant No. 1 would be bound to purchase this coal from the plaintiff. Even in terms of Cl. (*c*) the question of the price to be paid by the defendant to the plaintiff was to be determined by agreement between them and the case of no agreement being reached, it will be difficult to compel the defendant to get his supply from the plaintiff's colliery. In terms of Cl. (*c*), therefore, it is clear that the term of this contract could not be determined with reasonable certainty. The learned District Judge is right, therefore, in holding that specific performance of the contract could not be granted to the plaintiff.[1]

12. Servants of Crown.—Unless in special cases, where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown, not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the

1. Messrs. Bhowra Khankanee v. Sunil Kumar Roy, 1968 P. L. J. R. 486 at pp. 493-94.

public service. Even where there has been serious and complete failure to adhere to important and fundamental rules, as for instance in the case of a person who has been dismissed from service without any investigation into the charge as required by the rules, the remedy of the person aggrieved does not lie by a suit in Court but by way of appeal of official kind.[1]

In another case reported as *R. T. Rangachari* v. *Secretary of State*,[2] their Lordships of the Privy Council though clearly of opinion that the dismissal purporting to be thus ordered was by reason of its origin bad and inoperative have refused to grant relief by way of declaration to this effect.

In *Phabhu Lal Upadhya* v. *District Board, Agra*,[3] their Lordships ruled that in a case where the Secretary of a District Board was dismissed upon a resolution of the Board which did not comply with the requirements of Sec. 71 of the U. P. District Boards Act, the dismissal was illegal and the dismissed Secretary had a cause of action against the Board, not for a declaration or injunction or re-instatement but for the recovery of damages. The case fell within Secs. 21 (old) and 56 (*f*) (old) of this Act and so no injunction could be granted. The plaintiff was not a person "entitled to any legal character" within the meaning of Sec. 42 (old) of the Specific Relief Act and was, therefore, not entitled to a declaration ; even if this were not so, a declaration without an injunction would be nugatory, and on the ground that the conduct of the plaintiff had been such as to disentitle him to such a relief, the relief of declaration, which was discretionary, should be refused. The only relief which the plaintiff was entitled to get was the recovery of damages to compensate him for the actual loss caused to him by the dismissal.

In the case of *I. M. Lall* v. *The Secretary of State for India*,[4] a Division Bench of the Lahore High Court in conclusion observed as follows: "Following the principles laid down by the Federal Court and by their Lordships of the Privy Council in the two cases referred to above, we would grant the plaintiff a declaration that the order of removal from the Indian Civil Service in his case was wrongful, void, illegal and inoperative and that he is still a member of the Indian Civil Service. The other declarations asked for by him we are unable to give. Regarding the first declaration asked for we have already held that the Secretary of State has the power to dismiss a civil servant in India if the provisions of the Constitution Act are complied with. We cannot, therefore, hold that the order of removal was *ultra vires* of the defendant. Similarly, though we hold that being a member of the Indian Civil Service amounts to a title of 'legal character' and though we therefore give him a declaration, that he is still a member of the Indian Civil Service, once his dismissal is held to be wrongful and inoperative. We cannot give the further declaration that he is entitled to continue in and hold the office from which he was removed. Similarly, it is not within our province to grant the fourth declaration asked for that as a member of the Indian Civil Service he is entitled to various privileges secured by rules and regulations issued from time to time. As the plaintiff has succeeded substantially in this suit we direct that the defendant shall pay his costs." This case went up in appeal to the Federal Court of India and is reported in 1945, Federal Law Journal, page 129.[5] Their Lordships, Sir Patrick Spens, Chief Justice of India and Sir Zafarullah Khan accepted the finding of the Lahore High Court and held that Mr. Lall was dismissed without having been afforded the reasonable opportunity of showing cause as required by sub-section (3) of Sec. 240. It was ruled, however, that. Mr Lall. is not

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1. R. Venkatarao v. Secretary of State, A. I. R. 1937 P. C. 31 at p. 34 ; Shenton v. Smith, (1895) A. C. 299.
2. A. I. R. 1937 P. C. 27 at p. 30.
3. I. L. R. (1938) All. 252.
4. I. L. R. (1944) Lah. 325.
5. 1945-47 : 1945 F. C. R. 103.

entitled to a declaration that he has never been dismissed or that he still remains a member of the Service. His proper remedy was damages for wrongful dismissal. The case was remitted to the High Court to take such action in regard to any application by Mr. Lall for leave to amend to claim damages. Mr. Lall was, however, held entitled to his taxed costs of the appeal. There was a further appeal to the Privy Council in which the decree of the Lower Court was varied by setting aside the order of remand and by granting a declaration that the order of dismissal was void and inoperative.[1]

In *Union of India* v. *Bakhshi Amrik Singh*,[2] the facts were these: The plaintiff instituted a suit against the Union of India, four days before his retirement from the service with the allegation that the date of the birth of the plaintiff in the records of North Western Railway was wrong and the correct date of birth of the plaintiff was 18th of July, 1907 and not 15th July, 1906 and that according to the terms of the employment the plaintiff could be retired only on 18th July, 1962, that order of the Divisional Personnel Officer, retiring him from 14th July, 1961, was against the term of his employment and was, therefore, void. He, therefore, prayed for the issue of a permanent injunction restraining the defendant from retiring him as from the 14th July, 1961 and compelling to rectify the date of birth of the piaintiff as the 18th July, 1907 and postponing his retirement to 18th July, 1962. The Union opposed the grant of the temporary injunction that if it were granted the plaintiff would achieve his object even if ultimately his suit failed The Court granted temporary injunction. It was held that the balance of convenience was on the side of the defendant and not of the plaintiff. Tek Chand, J., in the course of his judgment stated: "It is not violation of every legal right which justifies the grant of an injunctive remedy. A party seeking such a relief may be precluded by reason of his own conduct from resorting to this remedy. There must be some equitable ground for interference by injunction such as a necessity of preventing irreparable mischief, or, in cases where the injury apprehended is of a character as cannot be adequately compensated by damages, or is one which must occasion constantly recurring grievance which necessitates a preventive remedy in order to put an end to repealed perpetration of wrongs. This power has to be exercised sparingly and cautiously and only after thoughtful deliberation and with a conviction on the part of the Court of its urgency and necessity." And then, "The principal function of an injunction is to furnish preventive relief against irremediable mischief. An injury is deemed to be irreparable and the mischief is said to be irremediable, when having regard to the nature of the act and from the circumstances relating to the threatened harm, the apprehended damage cannot be adequately compensated with money." He went on, "An injunctive relief must not be granted when it is prone to operate contrary to the real justice of the case. What are the hardships which had to be balanced in this case? If the plaintiff thought that he was being prematurely retired, he could claim damages measurable by the extent or the emoluments of which he had been unjustly deprived. On the other hand, if the plaintiff was actually due to retire on 14th July, 1961, on account of superannuation, he could

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1. High Commissioner of India v. I. M. Lall, A. I. R. 1948 P. C. 121 at p. 127 : 75 I. A. 225 : 1948 F.C.R. 44 : 1948 F.L.J. 23 : (1948) 2 M.L.J. 55:1948 A.L.J. 266 : 52 C. W. N. 761 : 50 Bom. L.R. 649.
2. A. I. R. 1963 Punj. 104 at p. 108.

not be permitted to remain in service after that date, and, as a result of the arbitrary exercise of the discretion, he continues in the office which he could not hold even for a day after 14th July, 1961. Against the injunctive fiat of the Court ordering his wrongful continuance in office, the defendant has no *ex post facto* remedy. In other words, in the process of the inquiry as to whether the plaintiff is being rightly retired or not the Court, by giving him a temporary accommodation and by prejudging the case, has given him the actual relief, the grant of which was throughout seriously contested. The balance of convenience in this case was on the side of the defendant and not of the plaintiff." Speaking on the principles governing the grant of temporary injunction the learned Judge says : "Courts when issuing permanent or temporary injunctions, must act in a careful and conservative manner and grant the relief only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice. If the Court is satisfied that the circumstances of the case do not entitle the grant of a perpetual injunction, a temporary injunction has *per force* to be refused. One of the prerequisites to the granting of an injunction is that the party seeking relief must establish the right that he claims. If a right is being asserted which is not justiciable, no injunctive relief can be given either temporarily or perpetually. A right not shown to be *in esse* cannot be protected by an injunction. In other words, an act which does not give rise to a cause of action cannot be restrained or its perpetration prevented. The applicant must at least make out a *prima facie* case showing that the grant of the final relief sought is within the competence of the Court."

13. Contract of employment wrongly repudiated.—It is well settled by several decisions in the courts of England as also in India that even if a contract of employment is wrongly repudiated either by the employer or by the employee courts of law are unable to decree the specific performance of such contract and force either the employer to take the employee in service or force the employee to join the service. Departure, however, has been made in cases of industrial disputes.[1]

Termination of services.

The relationship between master and servant is often a matter of contract and if such contract is wrongfully terminated, the remedy of the aggrieved party lies in an action for damages and the Court will not grant a declaration that a contract of service still subsists. Such declaration will amount to an order for specific performance of personal service which is practically forbidden in law. This will appear from Sec. 21, Cl. (*b*) [new Sec. 14, Cl. (*b*)] of the Specific Relief Act, 1877.

In *Dr. S. Dutt* v. *University of Delhi*,[2] the Supreme Court was considering the case of an award which held that a Professor of an University had been dismissed wrongfully and *mala fide*, that the dismissal thus had no effect on his status and that he still continued to be a Professor of the University. It was held that the award directed specific performance of contract of personal service, and as such a legal proposition is clearly erroneous in view of Sec. 21 (*b*) [new Sec. 14, Cl. (*b*)] of the Specific Relief Act, 1877.

In the case of *Vine* v. *National Dock Labour Board*,[3] it was held, in a case where the plaintiff's employment as a registered dock worker employed in

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1. Calcutta Chemical Co. Ltd. v. D. K. Barman, A.I.R. 1969 Pat. 371 at p. 384.
2. A.I.R. 1958 S.C. 1050.
3. (1956) 3 All E. R. 939.

the reserve pool by National Dock Labour Board was terminated by a disciplinary committee of the local board, that the local board under the statutory scheme set up under the Dock Workers Regulation of Employment Order, 1947, had no power to delegate its functions to the disciplinary committee and that the order of dismissal accordingly was a nullity. It was held in such a case that the plaintiff was entitled to a declaration that his name was never validly removed from the register as he would otherwise be disabled to work as dock worker and he continued to be an employee of the National Board. It was observed by Viscount Kilmuir, L.C , as follows :

> "This is an entirely different situation from the ordinary master and servant case. There, if the master wrongfully dismisses the servant, either summarily or by giving any insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here the removal of the plaintiff's name from the register being, in law, a nullity he continued to have the right to be treated as registered dock worker with all benefits which by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme the Court should declare his rights."

It was also observed by Lord Keith of Avonholm that :

> "Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but it could only sound in damages.'

As enunciated in the above case the position will however be different when a statute intervenes in the relationship of master and servant and the employee is given a statutory status. If there is a violation of the provisions of the statute in terminating the services of such an employee, he will be eligible for a declaration that the order terminating the service is a nullity and that he continues to be in service.

In the *Asansol Electric Supply Co.* v. *Chunnilal Daw*,[1] the company by a resolution purported to terminate the employment of the plaintiff and according to the plaintiff such resolution is void and *ultra vires*. It was held that though the plaintiff could not sue for enforcement of a contract for personal service, being barred under Sec. 21 (*b*) [new Sec. 14, Cl. (*b*)] of Specific Relief Act, 1877, there was no bar in his seeking a declaration from Court that the impugned resolution was void and *ultra vires*. The plaintiff was most vitally affected by the said resolution which afforded him the cause of action for the suit against the company and the fact that the shareholders were no parties to the suit could not defeat the suit, nor was their presence necessary for adjudication of the issues involved in the proceeding.

The plaintiff had instituted the suit for a declaration that the impugned resolution was void and *ultra vires* in that the mandatory provisions requisite for passing such resolution were not complied with. The suit therefore was not one against a wrongful dismissal nor one for enforcement of a contract of personal service. The plaintiff accordingly was entitled to establish in a court of competent jurisdiction that the impugned resolution being in violation of mandatory provisions of the statute was a nullity and of no effect and thus had no existence in law. If it was found so, he would be entitled to such declaration and be further entitled to consequential and ancillary reliefs which flow from such declaration *inter alia*, namely thta

1. A. I. R. 1972 Cal. 19.

he was in the employ of the company and for an injunction restraining the defendants from interfering with the plaintiff's service under the company. This was a far cry from a suit for declaration that a termination of service was wrongful or for enforcement of a personal contract of service. Section 21 (*b*) [new Sec. 14, Cl. (*b*)] or Sec. 42 (new Sec. 34) of the Specific Relief Act, 1877, would thus be no bar to the suit for the said declaration, as it was not for enforcement of a personal contract of service but for a declaration of a legal right that a particular resolution of a company, affecting the claimant's status, was void for non-compliance of statutory provisions which are mandatory.[1]

14. Suit for declaration that the dismissal order in breach of statutory conditions of service is invalid and nullity—Maintainability.— A case for declaration of a statutory invalidity of an act of dismissal of employee is wholly different from the enforcement of a contract of personal service. The only question requiring consideration is whether any material term of service conditions which are statutory has been violated and if so, such act must be declared to be nullity, as the aggrieved employee under the provisions of the Act has a legal right under the certified Standing Orders. Such declaration is different and far from a declaration granting enforcement of personal contract of service or re-instatement of the dismissed workman and it merely declares that the order of dismissal in breach of statutory conditions of service is invalid and a nullity, so that the employment was never terminated and the contract of service continued to be in force. The question as to whether the employer is a statutory person or otherwise is not relevant as the real question is whether the terms of service are statutory and there has been a breach of its material provisions.[2]

In the above noted case, the plaintiff was temporary workman under the company. The order of dismissal by word of mouth was in breach of a material provision of the certified Standing Order of the company.

It was held that the Standing Orders duly certified were the statutory terms and conditions of service as held by the Supreme Court. If therefore there was a breach of provision thereof, which was otherwise a material provision, there was a legal right in the aggrieved party to challenge such order as being a nullity and to obtain a decree declaring its statutory invalidity.

15. No decree will be passed which is impossible of performance.—Even though the impossibility of performing his contract is due to the defendant's own fault, equity will not decree that he shall do what obviously is beyond his power. For this reason if a vendor has no title, or if the subject-matter of a contract has been destroyed, or does not exist, or if performance by the defendant would violate the law, a court of equity, though it may award damages if the plaintiff had proper grounds for bringing a bill, will not decree specific performance. *A fortiori*, where the contract becomes impossible of performance without the default of the defendant it cannot be specifically enforced.[3] Nor will equity decree the performance of an act which requires the assent or action of a third person ; where it does not appear the third person will give the required assent or performance. This principle finds frequent application where the transfer of a valid title to real estate requires the vendor's wife to join in the conveyance. Though it was originally held in England that a vendor

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1. Asansol Electric Supply Co. v. Chunnilal Daw, A.I.R. 1972 Cal. 19 a pp. 22-25.
2. Calcutta Electric Supply Corporation Ltd. v. Ramratan Mahto, A.I R. 1973 Cal. 258 p. 262 : 77 C.W.N. 367
3. T. V. Kuchuvareed v. P. Mariappa Gounder, A. I. R. 1954 T. C. : 10 at p. 21.

would be ordered to procure his wife's signature, if necessary to complete his title, the law is now settled to the contrary in England as well as in the United States. Where the wife refuses her inchoate dower right, some courts but not all, have refused to grant specific performance with compensation for the wife's interest.

A reason sometimes given for the refusal of equity to decree performance where the defendant is unable to perform is lack of mutuality—the vendor could not have compelled performance, therefore the purchaser cannot. If this argument is sound the fact that the vendor's lack of title is remediable, because he can procure a good title by purchase, should afford no reason for a decree of specific performance against him ; but the invalidity of the argument is shown by the numerous decisions which award a purchaser specific performance with compensation, and, generally, where a third person on whose consent the defendant's ability to perform depends is shown to be willing to give the necessary consent, a decree will not be denied. Moreover, a purchaser has been allowed in some cases to take a decree if he so wished which gave him all the vendor had, but left the full right for which he had contracted dependent on a third person's action. Pecuniary inability of the defendant will not preclude a decree for payment of the price where such a decree is appropriate. Where a purchaser contracted to buy two adjacent lots from different owners for the purpose of erecting a business building thereon, to the knowledge of all parties concerned, and, thereafter, a zoning ordinance was passed prohibiting business buildings on one of the lots, this was held not to create such a hardship or impossibility as to deprive the right to specific performance, even though the adjoining vendor could not have compelled specific performance.[1]

16. No decree will be passed if it involves excessive difficulty to execute.—In contracts other than those ordinarily designated as contracts of service, it is generally true, so far as affirmative relief is concerned, that equity will not award specific performance where duty to be enforced is continuous and reaches over long period of time, requiring constant supervision by the Court. Therefore, there is no doubt that as a general rule the Court will not enforce specific performance of a building contract. The basis of equity's disinclination to enforce building contracts specifically is the difficulty of enforcing a decree without an expenditure of effort disproportionate to the value of the result. But where the inadequacy of damages is great, and the difficulties not extreme, specific performance will be granted and the tendency in modern times had been increasingly towards granting relief, where under the particular circumstances of the case damages are not an adequate remedy. In an English case the requirements for specific performance of such contracts have been thus stated. The first is that the building work, of which (the plaintiff) seeks to enforce the performance, is defined by the contract ; that is to say, that the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of land in which the work is contracted to be done. But not all American decisions where relief has been granted fulfil the third requisite, which seems merely one illustration of a

1. Williston on *Contracts*, (1937 Ed.), Sec. 1422.

situation where the second requisite is fulfilled. The modern test is whether the difficulties of supervision outweigh the importance of granting specific performance because of inadequacy of damages.

The indisposition of equity to grant specific performance of acts which require time for their performance, such as building contracts, is increased where a continuous series of acts must be performed according to the terms of the contract for an indefinite period of time. Thus, contracts which call for the operation of a railroad in a particular way for a considerable or indefinite time have not generally been enforced. But contracts involving such oversight by equity will be enforced if justice makes it imperative. Therefore, where the plaintiff has conveyed land or parted with valuable consideration in return for the promise of a railroad to maintain stations or switching tracks or to stop trains, such contracts have been enforced when not conflicting with the carrier's public duty. And in recent years a recognition by the courts of the interests of the public in the performance by public service companies of some of their obligations has established the principle that where public interests require, equity will decree specific performance of contracts though they involve a long continued series of acts. Even though no public interest is involved if the legal remedy under the particular circumstances of the case is clearly inadequate, in recent years some courts at least are disposed to grant relief if possible though the contract calls for long continued performance, as instalment contracts, or requirement or output contracts, or covenants in leases to heat and light demised premises.

A disposition has existed, where the Court was prepared to give relief calling for continuous performance to do so by a decree in form negative, though in effect requiring affirmative action; but since the defendant must act and not simply forbear there seems no reason why the decree should not so state.[1]

17. Effect of the decree—Impossible of performance.—The principle in respect of suits for specific performance of contract is that the Court will not decree any suit for the specific performance of a contract which becomes impossible of performance, nor will the Court execute such decree, which becomes impossible of execution. It matters little, that it becomes impossible of performance for the defualt of the defendant but the courts of equity will refuse either the passing of the decree or refuse to execute it, because even if such decree is passed it will be beyond the power of the defendant to comply with it. In such cases the Court may, instead of decreeing specific performance of the contract, award adequate damages. Similarly, those contracts the performance of which would violate the law, or the subject-matter of which has been destroyed or does not, in fact, exist, the appropriate relief in such cases is not the decree of specific performance of the contract but the award of adequate damages to compensate for the loss or injury to the plaintiff.

Similarly, the courts will not enforce the specific performance of these contracts for the performance of which the sanction, assent or permission or action of the third person is needed. This principle is frequently applied where the transfer of a valid title to real estate requires the vendor's wife to join in the conveyance. Though it was originally held in England that a vendor would be ordered to procure his wife's signature if necessary to

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A reason sometimes given for the refusal of equity to decree performance where the defendant is unable to perform is lack of mutuality—the vendor could not have compelled performance therefore the purchaser cannot. If this argument is sound the fact that the vendor's lack of title is remediable, because he can procure a good title by purchase, should afford no reason for a decree of specific performance against him ; but the invalidity of the argument is shown by the numerous decisions which award a purchaser specific performance with compensation, and generally, where a third person on whose consent the defendant's ability to perform depends is shown to be willing to give the necessary consent a decree will not be denied. Moreover, a purchaser has been allowed in some cases to take a decree if he so wished which gave him all the vendor had, but left the right for which he had contracted dependent on a third person's action. Pecuniary inability of the defendant will not preclude a decree for payment of the price where such a decree is appropriate. Where a purchaser contracted to buy two adjacent lots from different owners for the purpose of erecting a business building thereon, to the knowledge of all parties concerned, and thereafter, a zoning ordinance was passed prohibiting business buildings on one of the lots, this was held not to create such a hardship or impossibility as to deprive the right to specific performance, even though the adjoining vendor could not have compelled specific performance.[1] In contracts other than those ordinarily designated as contracts of service, it is generally true so far as affirmative relief is concerned, that equity will not award specific performance where the duty to be enforced is continuous and reaches over long period of time, requiring constant supervision by the Court. Therefore, there is no doubt that as a general rule the Court will not enforce specific performance of a building contract. The basis of equity's disinclination to enforce building contracts specifically is the difficulty of enforcing a decree without an expenditure of effort disproportionate to the value of the result. But where the inadequacy of damages is great, and the difficulties not extreme, specific performance will be granted and the tendency in modern times had been increasingly towards granting relief, where under the particular circumstances of the case damages are not an adequate remedy. In an English case the requirements for specific performance of such contracts have been thus stated. The first is that the building work, of which (the plaintiff) seeks to enforce the performance, is defined by the contract ; that is to say, that the particulars of the work are so far definitely ascertained that the Court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession at land in which the work is contracted to be done. But not all American decisions where relief has been granted fulfil the third requisite, which seems merely one illustration of a situation where the second requisite is fulfilled. The modern test is whether the difficulties of supervision outweigh the importance of granting specific performance because of inadequacy of damages.

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1. Williston on *Contracts*, (1937 Ed.), Sec. 1422

The indisposition of equity to grant specific performance of acts which require time for their performance, such as building contracts, is increased where a continuous series of acts must be performed according to the terms of the contract for an indefinite period of time. Thus, contracts which call for the operation of a railroad in a particular way for a considerable or indefinite time have not generally been enforced. But contracts involving such oversight by equity will be enforced if justice makes it imperative. Therefore, where the plaintiff has conveyed land or parted with valuable consideration in return for the promise of a railroad to maintain stations or switching tracks or to stop trains, such contracts have been enforced when not conflicting with the carrier's public duty. And in recent years a recognition by the courts of the interests of the public in the performance by public service companies of some of their obligations has established the principle that where public interests require, equity will decree specific performance of contracts though they involve a long continued series of acts. Even though no public interest is involved if the legal remedy under the particular circumstances of the case is clearly inadequate, in recent years some courts at least are disposed to grant relief if possible though the contract calls for long continued performance, as instalment contracts, or requirement or output contracts, or covenants in leases to heat and light demised premises.

A disposition has existed, whether the Court was prepared to give relief calling for continuous performance to do so by a decree, in form negative, though in effect requiring affirmative action; but since the defendant must act, and not simply forbear, there seems no reason why the decree should not so state.[1]

18. Contracts depending upon personal qualifications or volition. —It is well settled that contracts of personal service cannot be specifically enforced. In *Padrauna Raj Krishna Sugar Works Ltd.* v. *Kunwar Laxmi Pratap Narain Singh*,[2] the Court said: "It is well-established that no injunction can be issued, which has the effect of forcing the personal services of an employee upon an unwilling employer." In *Mair* v. *Himalaya Tea Co.*,[3] Sir W. Pagewood, V. C., observed: "Even assuming, in favour of the plaintiff, the construction given by him to the articles that he was to be irremovable, except by the authority of a general meeting, or that his acceptance of shares was conditional on his being retained as agent, the Court cannot act in his favour, as the duties of an agent are in the nature of personal service, and as such incapable of being enforced in equity." In *Nusserwanji Merwanji* v. *Gordon*,[4] the facts were these: The plaintiffs complained against a resolution dated 8th August, 1881, appointing Messrs. H. C. & L. as solicitors of the company in place of the plaintiffs. The plaintiffs said that the said resolution was *ultra vires* and prayed for an injunction to restrain the defendants from giving effect to the said resolution. It was stated that the Court will not compel one man to continue to employ another in services of a personal nature, which would depend for the efficiency upon the personal qualities of those with whom the contract was entered into, and more especially when they were services of trust and confidence. The Court then concluded with these words: "Applying this principle to the

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1. Williston on *Contracts*, (1937 Ed.), Sec. 1423.
2. A. I. R. 1954 All. 74 at p. 77.
3. (1865) L. R. 1. Eq. 411 : (1865) 13 L. T. 586.
4. I. L. R. 6 Bom. 266.

present case, it is possible to conceive any duties of the more confidential character than those of a manager of a spinning and weaving company, to whom the entire business of buying raw material creating the manufactured articles and selling the outcome of the mill is entrusted, together with the largest possible powers for the efficient discharge of those duties. Would it be possible to impose a heavier burden on a company of this character, than by compelling it to retain a firm in the exercise of such duties after it had forfeited the confidence of the directors and shareholders. I can come to no other conclusion than that this Court would not, either by decreeing specific performance or by injunction, compel a company to retain its agents in its employ, but would leave the latter to their action for damages.

"If this be so, ought the Court to restrain the company from doing that which is only a violation of what is ancillary to, or incidental to the principal part of the contract, viz. the agreement that the plaintiffs should be agents for twenty-five years. The case of *Brett* v. *East India and London Shipping Company*,[1] has, I think, a distinct bearing on this question. Here the exercise of the powers mentioned in Cl. 98 of the articles is but an adjunct to the agency, and if the Court could not compel the company to retain the plaintiffs as their agents, would it not be worse than futile to restrain them from doing acts which are equivalent to carrying on the business of the company, simply because thev are in violation of the agents' power. It is to be remarked that Wood, V. C., reserves his option as to what the Court would do if the term in the agreement, the violation of which sought to be restrained, were quite distinct from the rest by which I understand him as meaning if there had been no question of removing the agents."[2] In *N. C. Sircar and Sons* v. *Baraboni Coal Concern Ltd.*,[3] it was held that a limited liability company could not be restrained by injunction from dispensing with the services of the managing agents, though managing agents could be removed only in the specified manner after a specified period. The remedy of the managing agents in such a case lay in a suit for damages for wrongful dismissal. In *Ramkumar Potdar* v. *Sholapur Spinning & Weaving Co. Ltd.*,[4] the plaintiff claimed a declaration that certain resolutions passed by the directors dismissing the company's agents were in contravention of the memorandum and the articles of association of the company and were therefore not binding on the members and secondly for an injunction to restrain the defendants from acting upon the resolution. It was held that the Court did not generally interfere with the internal management of the affairs of the company, and if the majority of the shareholders considered that particular contract of employment should be terminated, the Court would not, as a rule, consider the matter at the instance of a minority of shareholders. In *Sardar Gulab Singh* v. *Punjab Zamindar Bank Ltd.*,[5] it was held that an injunction would not issue in the case of contract[6] which could not be specifically enforced, or where breach of the contract could be adequately compensated in damages. It was further held that the principles applicable to the issue of an injunction at the instance of dismissed servant ought also apply in the case of a dismissed agent, that is the managing director of a company. It would be contrary to public policy to impose upon an unwilling principal, an agent whom he did not wish to employ, especially when the agent could bring an action for damages.[7]

1. 2 H. & M. 404.
2. Nusserwanji Merwanji *v.* Gordon, I. L. R. 6 Bom. 266 at pp. 283-84.
3. 16 C. W. N. 289 : 13 I. C. 868.
4. A. I. R. 1934 Bom. 427.
5. A. I. R. 1942 Lah. 47.
6. *See* Padrauna Raj Krishna Sugar Works Ltd. *v.* Kunwar Laxmi Pratap Narain Singh, A. I. R. 1954 All, 74 at pp. 78, 79.
7. *Ibid.*

A contract dependent for its performance on the personal qualifications, technical knowledge, skill or volitions of a party cannot be specifically enforced. The principle underlying this rule of law is that if the relation of employer and employee is to be of value or profit to either it must be marked by some degree of mutual confidence and satisfaction, and when these are gone and their places usurped by dislike and distrust, it is to advantage of all concerned that their relation be severed.[1] To this may be added another equally cogent reason. "The right to dispose of one's labour as he will", observed Knowlton, C. J., "and to have the benefit of one's lawful contract, is incident to the freedom of the individual which lies at the foundation of the Government of all countries and maintains the principles of civil liberty."[2] To many persons, the right to labour is the most important and the most valuable right they possess. it is their fortune constituting the only means they have to obtain food, raiment and shelter and to acquire property. To such persons deprivation of this right is ruin and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked either to deprive a person of this right or to abridge it, it is its duty before it acts, to consider with utmost care whether, if it does what it is asked to do, it will not on a careful comparison of the consequences do more injustice than justice."[3] "The Court will not compel one man to continue to employ another in service of a personal nature, by which I understand, services of such a nature as to depend for their efficiency, upon the personal qualities, of those with whom the contract is entered into, and more especially when they are services of trust and confidence."[4] "The courts as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant or whether they are agreements for the purpose of pleasure or for the purpose of scientific pursuit or for the purpose of charity or philanthrophy."[5]

A contract for personal service cannot be specifically enforced nor is it open to the servant to refuse to accept repudiation of the contract of service by his master and insist upon sitting on the ground that his services had never been validly terminated. He cannot insist on the payment of wages for the remainder of the working days.[6]

19. Servants of the local bodies.—Where the petitioner who was an employee of the Life Insurance Corporation of India, was subsequently dismissed, it was held that the relationship of the petitioner was governed by the general principle of the master and servant and the proper relief in such a case that could be claimed by the dismissed servant was by way of a suit for wrongful dismissal and not injunction or mere declaration.

In *Ram Babu Rathaur* v. *Divisional Manager, Life Insurance Corporation of India Ltd.*,[7] which was a case under Art. 226 of the Constitution of India it was ruled that a writ of *mandamus*, claimed by the petitioner was not the proper

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1. Cossard & Co. *v.* Cassby, 132 Iowa 155.
2. Berry *v.* Donoven, (1905) 188 Mass. 353.
3. Sternbery *v.* O'Brien, (1891) 8 N. J. Eq. 370 ; Ames. 127, *per* Van Fleet, V. C.
4. Nusserwanji Merwanji *v.* Gordon, I. L. R. 6 Bom. 266, *per* Sargent, J. ; *see* also Ram Charan *v.* Kakhaldas, 41 I. C. 19 ; Johnson *v.* Shrewsbury & Birmingham Ry. Co., 3 De. G. M. & Co, 1914 ; Hansa of Bremen *v.* Firm of Pestonji Bhike, A. I. R. 1925 Sind 347 at p. 348 : 89 I. C. 321 ; De Franco *v.* Burnum, (1890) 45 Ch. D. 430 : 60 L. J. C. H. 63 ; Madan *v.* Kamladhari, A. I. R. 1930 Pat. 121 at p. 126.
5. Rigby *v.* Conol, (1880) 14 Ch. D. 482 ; 49 L. J. Ch. 328, *per* Jessel, M. R.
6. Barker *v.* Manchester Regional Hospital Board, (1958) 1 W. L. R. 181.
7. A. I. R. 1961 All. 502.

remedy. If such a writ was granted it would be in the teeth of the provisions of Sec. 21(*b*) of the Specific Relief Act, 1877. The learned Judges after reviewing the authorities cited before him, i. e. *Dr. S. Dutt* v. *University of Delhi*,[1] *Municipal Board, Shahjahanpur* v. *Sardar Sukha Singh*,[2] *Prabhu Lal Upadhya* v. *District Board, Agra*,[3] and *B. Roshan Lal Goswala* v. *District Board, Aligarh*,[4] summarizes his conclusion at page 505 of the report thus : "These cases would show that a servant is ordinarily at the pleasure of the master unless that pleasure is curtailed either by any contract or by statutory provisions and that the remedy of a servant who has been dismissed illegally lies in not filing a suit for re-instatement or for a declaration or for an injunction because such a relief cannot be granted to him because of the provisions of (old) Sec. 21 (*b*), (old) Sec. 42 and (old) Sec. 56 of the Specific Relief Act and his only remedy lies in filing a suit for damages."[5]

The learned Judge then goes on to say : "There are observations in the judgment of their Lordships of the Supreme Court in the case of *Parshotam Lal Dhingra* v. *Union of India*,[6] where their Lordships held that in a case where the provisions of Art. 311 of the Constitution did not apply the remedy of the dismissed servant was only by way of a suit for wrongful dismissal. The exact words in which their Lordships had expressed themselves are as follows :

> In other words and broadly speaking Art. 311 (2) will apply to those cases where the Government servant had he been employed by a private employer will be entitled to maintain an action for wrongful dismissal, removal or reduction in rank.

"The position might be different in a case where the dismissal order has been passed in violation of the constitutional provisions. The reason being that the Constitution is supreme and the other laws are subordinate to it. In a case where Art. 311 of the Constitution is infringed a dismissed servant may obtain relief of declaration that the dismissal is illegal and void, he still continues in service. The cases of the *High Commissioner of India* v. *I. M. Lall*,[7] and *North West Frontier Province* v. *Suraj Narain Anand*,[8] are illustrative of this principle, but it must be borne in mind that these cases proceed on the assumption that the right of the master to terminate the service of the servant at pleasure stands curtailed by *constitutional provisions.*

"Another example of cases where the general law of master and servant stand modified are those which are covered by the Industrial Disputes Act.[9] In that case it was held by the Federal Court that an industrial tribunal is not fettered like ordinary courts to enforce a contract and may create obligations or modify contracts in the interest of the workmen to protest and prevent the unfair practice of victimisation and those courts can direct re-instatement of dismissed employees because the discretion is not fettered in any way by the limitations which are placed on regular courts to direct the re-instatement of a dismissed employee.

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1. A. I. R. 1958 S. C. 1050.
2. A. I. R. 1937 All. 264.
3. A. I. R. 1938 All. 276.
4. A. I. R. 1945 All. 802.
5. Ram Babu *v.* Divisional Manager, Life Insurance Corporation of India, A. I. R. 1961 All. 502 at p. 505.
6. A. I. R. 1958 S. C. 36.
7. A. I. R. 1948 P. C. 121.
8. A. I. R. 1949 P. C. 112.
9. *See* Western India Automobile Association *v.* Industrial Tribunal, A. I. R. 1949 Bom. 111 (F. C.).

"In other words, the general law of master and servant to the effect that the servant is at the pleasure of the master will stand in every case except in those where the same has been abrogated either by a statutory provision or by special contract. In the case of Government servants to whom Art. 311 of the Constitution is applicable and in those cases where the provisions of the Industrial Disputes Act are applicable the general law that a servant is at the pleasure of the master stands abrogated to the extent to which the provisions of the Constitution or the Industrial Disputes Act provide."[1]

Therefore under Sec. 14 (*b*) of the Specific Relief Act, 1963, it is not permissible to order the re-instatement of an employee to specifically enforce the contract of employment and if this is not permissible under the general law, the same result should not be permitted to be achieved in a circuitous and by indirect means.

20. Contracts running into minute or numerous details.—Court will not pass a decree for specific performance of a contract which runs into minute or numerous details. Illustrations 5, 6, 7, 9 and 11 appended to the (old) Sec. 21 are instances in point. In such cases, the Court refuses to interfere, not because the Court cannot formulate a decree which shall order everything necessary for complete performance or which shall not be absolutely incapable of compulsory execution, but because "the enforcement of the decree would unnecessarily tax the time, attention and resources of the Court and thereby interfere too much with its public duties to other suitors, and in the general administration of justice".[2] The Court does not enforce the performance of contracts which involve continuous acts, and require the watching and supervision of the Court.[3] A continuing covenant will not be negatively enforced by an injunction restraining its breach, when the acts alleged to be in violation of it are numerous and each one of them would require a separate judicial examination—perhaps an action of law—in order to ascertain whether it constituted a breach or not, and where the same controversy should arise with respect to every violation of the injunction.[4]

21. Otherwise from its nature, etc.—Where the contract is from its nature such that the Court cannot enforce its performance, it is necessarily no subject of its jurisdiction in that respect.[5] An illustration on the point is a contract to form and carry on a partnership. The Court will not enforce such an agreement even though there is no particular objection on the ground of illegality, fraud or other impropriety.[6] On the same ground a contract in respect of sale or purchase of goodwill cannot be enforced.[7] But a suit to enforce a contract to form a partnership to purchase estate was enforced in America.[8]

22. Contingent contracts, which depend for their validity or enforceability on the happening of a contingency cannot, in their nature, be specifically enforced, fall under this clause. A contract for sale in respect of property

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1. Ram Babu *v.* Divisional Manager, Life Insurance Corporation of India, A. I. R. 1961 All. 502 at p. 505.
2. Pomeroy, S. P. C., Secs. 307, 398.
3. Halsbury's *Laws of England*, Vol. 27, p. 8.
4. Pomeroy, S. P. C., Sec. 308.
5. Fry, Sec. 91.
6. Scott *v.* Rayment, L. R. 7 Eq. 112; Sichel *v.* Mosimhel, 5 Beav. 371.
7. Smale *v.* Graves, 3 De G. & Sm. 706; Fry, *Specific Performance*.
8. Bakke *v.* Keller, 220 Minn. 383.

under attachment made "subject to Court's approval", is a contingent contract. If the approval is refused by the Court, the contract falls to the ground and cannot be made the basis for a decree for specific performance. The approval of the Court is a vital condition of the agreement intended not exclusively for the benefit of the purchaser and it is for the benefit of the vendor also. It follows that the purchaser cannot get rid of the necessity for the approval of the Court by his waiver.[1]

23. Wagering contracts.—A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree, that defendant upon the determination of that event, one shall win from the other and that other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose there being no other real consideration for the making of such contract by either of the parties.[2] The definition received final and qualified approval of the Court of Appeal in *Ellesmere* v. *Wallace*.[3] There are certain special features in wagering contracts which need be clearly understood. The first special feature is that it depends upon some uncertain future event. The second feature is that one party is to win and the other is to lose upon the determination of that uncertain future event.[4] In a wagering contract one party must either win or lose under the terms of the contract. It is not a wagering contract if one party may win but cannot lose, or if he may lose but cannot win, or if he can neither win nor lose. The third condition is that there must be two parties or groups of parties to a wager, but one of whom is capable of winning or losing. The fourth feature is that stake must be the only interest which the parties have in the contract.

The effect of a wagering contract is that it is void and is not legally enforceable. It confers no right and creates no obligations at law. If the loser fails to pay recovery can be enforced by action whether brought for the amount of the cash or on account stated.[5] In *Hill* v. *Hill* (*William*), *Park Lane Ltd.*,[6] the facts were these: On 22nd July, 1946, the Committee of Tattersall made an order that appellant, an owner of race horse, should discharge the amount of his unpaid cost of £ 3,635 12*s*. 6*d*., due to the respondents by paying £635 12*s*. 6*d*., within 14 days and thereafter by paying monthly instalments of £100. In August 1946, the appellant having failed to comply with the order, gave the respondents a cheque for £635 12*s*. 6*d*. post-dated to 10th October, and promised to begin the monthly instalment in November in consideration that respondents would refrain from enforcing that order. Enforcement of that order would involve his being posted as defaulter and warned off New Market Health. The appellant failed to pay the instalments and the respondents sued to recover their amount. The House of Lords by a majority of four to three held that this contract was void and hence unenforceable in law. This is a leading case which has set at rest the controversy which was raging for the last 40 years. (As regards the effect of the contract as between principal and agent, lender and borrower, *see* the *Law of Contracts*, 5th Ed., by Cheshire and Fifoot, pages 260 to 267, for detailed discussion.)

24. Principle of the clause.—The principle of this clause is that the courts should not decree suits for the enforcement of the specific performance of the contracts which in their very nature are determinable and the reason is

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1. Dalsukh M. Pancholi v. Guarantee Life and Employment Insurance Co. Ltd.. A. I. R. 1947 P. C. 182 : 1948 M.W.N. 107 : 52 C.W.N. 472.
2. *Per* Hawkins, J., Carlill v. Carbolic Small Ball Comp., (1892) 2 Q.B. 484 at p. 490.
3. (1929) 2 Ch. 1 at pp. 36, 48 and 49.
4. Thacker v. Hardy, (1878) 4 Q. B. D. 685; Lockwood v. Cooper, (1903) 2 K.B. 428.
5. Albert v. Chandler, (1948) 64 T. L. R. 394.
6. (1949) A.C. 350 : (1949) 2 All E.R. 452.

that even if the suit is decreed for the enforcement of such contract, party by merely terminating the contract can get rid of the legal effect of such decree. The refusal of the Court to decree specific enforcement of such contracts is based on the principles of propriety and not necessarily on the illegality, inequity or unfairness.

Where the terms of contract show that the partnership would be partnership at will, it should not be specifically enforced as it could be terminated immediately. Moreover as observed by Lindley on *Partnership* (11th Ed., p. 582) on principles also such contract should not be specifically enforced. "If two persons have agreed to enter into a partnership and one of them refuses to abide by the agreement, the remedy for the other party is an action for damages and not except in the cases to be presently noticed, for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, not more than to compel a man to marry a woman he did not like would be for the benefit of the lady."

"Moreover, to decree specific performance of an agreement for partnership at will would be nugatory inasmuch as it might be dissolved the moment after the decree was made and to decree specific performance of an agreement for a partnership for a term of years would involve the Court in the superintendence of the partnership throughout the whole continuance of the term. As a rule, therefore, the courts will not decree specific performance of an agreement for a partnership."[1]

25. Determinable deed.—Where a contract of sale is determinable at the option of the seller within a specified period, on repayment of the consideration, the other party cannot get a decree of specific performance of the agreement.[2]

26. Agreement to abide by the statement of referee whether enforceable specifically.—Where a party agrees to the appointment of a referee and gives his consent to the case being decided on the statement made by the referee, he is not debarred from resiling from the agreement before the statement is actually made. He can insist on the case being decided by the Court instead of in accordance with the statement of the referee. The statement of the referee in such a case, in view of the agreement between both the parties, would be binding upon them as admission under Sec. 20 of the Indian Evidence Act. But before the statement is made by the referee a party can resile from the agreement.[3] In *Saheb Ram* v. *Ram Newaz*,[4] the question referred to the Full Bench was "Whether a party who offers himself to be bound by the statement of any of the opposite parties or of a witness under Sec. 8, Oaths Act, Act X of 1873, can resile from such an offer after the other party or the witness has agreed to make such an oath or affirmation but before such oath or affirmation had been actually administered ?"

The Full Bench answered the question as follows :

(1) Where a party offers to be bound by the statement of any of the opposite parties under Sec. 9, Oaths Act, he cannot resile from such an offer

1. Pravu Dayal Aggarwala v. Ram Kumar Agarwal, A.I.R. 1956 Cal. 41 at p. 44.
2. Jawahir Sao v. Satrughna Sonar, A.I.R 1961 Pat. 482 at p. 484.
3. *See* the following observations of Kapur, J., in Moni Ram v. Harichand, (1955) 57 Punj. L. R. 327 ("A party agreeing to the appointment of a referee is not debarred from resiling from the agreement before the referee makes the statement"); Gian Chand Sharma v. Basi Lal, A.I.R. 1961 Punj. 31 at p. 33.
4. A.I.R. 1962 All. 882 at pp. 883, 889.

after the other party has agreed to make such oath, unless there be sufficient cause to the satisfaction of the Court for allowing the offerer to resile, and

(2) Where a party offers to be bound by the statement of a witness, he cannot resile from such offer if any of the opposite parties has accepted that offer or has made a similar counter-offer, unless there be sufficient cause to the satisfaction of the Court for allowing the offerer to resile, but he can resile from it if there has been no such acceptance or counter-offer by any other party to the judicial proceeding. In this connexion the following statement of Agarwala, J., deserves mention : "It appears to me that the agreement in the present case is of a binding character in spite of the fact that the specific relief cannot be given to the offerer as against the person agreeing to take the special oath. Section 12 provides that if oath is refused to be taken by the party or witness concerned, this fact will be recorded in the proceedings. Unless there be sufficient reasons for the refusal, refusal to take the oath after one has agreed to take it raises a presumption against him and in favour of the truth of the case of the other side." While referring to *Bishambhar* v. *Radha Kishan*,[1] the learned Judge Agarwala, J., observed :

> "With all respect, I see no reason why such an agreement between the parties should not be given effect to. The Civil Procedure Code is not exhaustive of the modes in which a proceeding may be decided. When two parties agree that the decision of a case may be reached in a particular manner, e. g., according to the statement of a particular person, commonsense and natural justice point to the conclusion that the case may be decided in that particular manner. There is nothing in the Code of Civil Procedure or any other law which prevents the Court from following the procedure suggested by the parties.
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> "This matter was dealt with by a Full Bench in *Mst. Akbari Begum* v. *Rahmat Hussain*[2] and it was held that an agreement like the one under discussion is binding on the parties, that the case can be decided according to it and that the Court has a power to follow the procedure indicated by the parties in deciding the case. It was further held that the agreement was not opposed to public policy nor repugnant to the provisions of the Contract Act or any other law and was binding on the parties.
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> "In my opinion where an agreement is made between the parties to abide by the statement of a person, it is a valid agreement enforceable by the Court except when there are sufficient reasons for resiling from it in which case the Court may allow one of the parties to resile from the agreement. In the absence of any such sufficient cause the Court is bound to enforce the agreement, to take down the statement of the party concerned and to decide the case accordingly. The true basis of the power of the Court to decide a case in accordance with the agreement between the parties is neither Sec. 20, Evidence Act, nor O. XXIII, R. 3, C. P. C., nor the Arbitration Act but the agreement of the parties themselves. If the agreement is valid, the Court has a power under its inherent jurisdiction to give effect to it."[3]

In *Gian Chand Sharma* v. *Bansi Lal*,[4] P. C. Pandit, J., the learned Judge, strikes a discordant note and expresses his dissent from the view expressed by

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1. 1931 A L. J. 393.
2. 1933 All. L. J. 1127.
3. Saheb Ram v. Ram Newaz, A. I. R. 1952 All. 882 at p. 886.
4. A. I. R. 1961 Punj. 31 at p. 33.

Agarwala, J., quoted above and says :

> "With great respect to the learned Judge, I cannot persuade myself to subscribe to the abovementioned proposition enunciated by him.
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> "Apart from the fact that the case dealt with by the Full Bench was one under the Indian Oaths Act, I am of the view that such an agreement cannot be enforced in the same suit, because the Court is not concerned with the enforcement of that agreement the suit having not been filed for that purpose. The Court can take cognizance of the adjustment of the suit, if in pursuance of that agreement the referee has made the statement and the agreement is perfected into an adjustment of the claim. For the breach of such an agreement the remedy of the aggrieved party may be by way of a separate suit for damages. There cannot be specific enforcement of such an agreement which is, by its nature, revocable, because a party cannot be bound to make an admission and can resile from making the same before it is actually made.[1]
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> "The inherent powers of the Court cannot be invoked for the enforcement of an agreement which, under the law, cannot be specifically enforced even in a separate suit. Besides, the enforcement of such an agreement is likely to lead to confusion, because the Court instead of determining the right, and liabilities of the parties in respect of the subject-matter of the suit, would be compelled to launch an enquiry into extraneous matters. It is also significant to mention that the Full Bench decision did not disagree with the Special Bench decision in *Mst. Akbari Begum* v. *Rahmat Hussain*,[2] wherein it was held by Sulaiman, C. J., that a party could resile from the agreement, before the referee made his statement."

27. Section 14 (d).—The principle behind this sub-clause is that the Court should not decree suits for specific performance of those contracts which are more or less permanent in nature and require its constant, continuous and perpetual supervision. Prior to the enactment of the present sub-clause of the new Sec. 14, the law contained in its corresponding counterpart, i. e. Sec. 21 (*g*) (old) of the repealed Act was that the Court was to refuse to decree specific performance of those contracts, the performance of which involved the performance for a period longer than three years which was considered a fair and reasonable time under the law. But now under the amended law the Court is bound to refuse specific performance of those contracts, which require continuous performance and which the Court finds it impossible to supervise and the discretion has no doubt been left with the Court to see whether it should with due regard to the nature and duration of the contract and its continuity and its capacity to enforce, direct or supervise the performance decree specific enforcement of such contracts and the reason is obvious. The Legislature in its wisdom has thought it fit to confer wide discretion on courts without any fetters leaving the Court to decide in the background of each case on the basis of the well-established principles of justice, equity and good conscience for the relief to be given in such case is without doubt to be equitable and according to the recognized principles. Mellish, L. J., in this connexion observed : "A court can only order the doing of something which has to be done once for all, so that the Court can see to its doing."[3] The

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1. *See* Sec. 21 (*d*) of the Specific Relief Act.
2. A. I. R. 1933 All. 861.
3. Powell v. Taff Vale Ry. Co., (1874) 9 Ch. 337.

present Cl. (*a*) of the new Sec. 14 of the Specific Relief Act enacts that where a contract involves the performance of a continuous duty which the Court cannot supervise, it should not be specifically enforced.

28. Sub-section (2) of the section.—The principle behind this sub-section is that except where the case is directly covered by the Arbitration Act, 1940, no other contract to refer future disputes, differences or controversies to arbitration shall be specifically enforced and the reason behind this rule is that under the law it is not open to the parties to create courts or tribunals of their own choice and to ignore courts of law for the purpose of settling their disputes and the exceptions to this rule are clearly recognized, namely the circumstances, which would attract the operation of the law of arbitration. Beyond the scope of that Arbitration Act there are no other provisions in law which would bring into operation private tribunals of the choice of the parties and for the enforcement of their decisions.

29. History of the law.—Under Sec. 28, Contract Act, it was not ordinarily open to parties to ignore the courts of the country and to set up a tribunal for decreeing their disputes. One exception was recognized to the effect that if the parties had agreed to refer their disputes to arbitration, the existence of the agreement shall be a bar to seeking redress in the ordinary courts. The section also recognized the right of one of the parties to sue for the specific performance of the agreement to refer. Then came the Specific Relief Act of 1877, which by Sec 21 (old) took away the right to sue for the specific enforcement of the contract, but preserved the right to the party who was willing to abide by the agreement, to object to the trial of the suit filed by the other party. This was followed by Sec. 22 of the Second Schedule to the Code of the Civil Procedure, Act V of 1908, which repealed that portion of Sec. 21 (old) of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit.[1] Now Second Schedule to the Code of Civil Procedure has been repealed by the Arbitration Act, X of 1940. The result of all these legislative changes is that para. 22 of Sch. II of the Code of Civil Procedure, 1908, having been repealed can no more have repealing effect on that portion of Sec. 14 (new), Specific Relief Act, which enables the defendant to plead the agreement to refer as a bar to the suit. However, Sec. 14 (2) of the Specific Relief Act, 1963, reads as hereunder : "Save as provided by the Arbitration Act, 1940, no contract to refer present or future difference to arbitration shall be specifically enforced ; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply), and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." The net result of all these legislative changes is much the same, while before the coming into force of Indian Arbitration Act, X of 1940, the plea of existence of contract to refer to arbitration could not be raised in cases governed by the provisions of Sch. II of the Code of Civil Procedure, 1908, now this plea is equally unavailable in cases governed by the provisions of Act X of 1940. As remarked by the Hon'ble Judges of the Madras High Court in *Appavu Rowther* v. *Seeni Rowther*,[2] the intent to be gathered from the Acts is that the right of a party to seek the assistance of the properly constituted courts of the realm are unrestricted. It is clear that the right of a suitor to seek assistance of the Court in spite of an

1. Appavu Rowther *v.* Seeni Rowther, A.I.R. 1918 Mad. 719 at p. 719 : I.L.R. 41 Mad. 115 : 42 I. C. 514 : 33 M. L. J. 177 : 6 L. W. 243.
2. *Ibid*, at pp. 719-20.

agreement to refer to arbitration has been preserved intact, but at the same time to check the recalcitrant party provision has been made, formerly in Sec. 18, Sch. II, C. P. C. and now in Sec. 34 of the Arbitration Act, 1940. Under this provision of law if the Court is apprised that an agreement to refer was entered into it may stay the trial of the suit. The Court may ask the arbitrator to give his decision. But the discretion is in the Court.

30. Scope of the sub-section.—Formerly there was a proviso to Sec. 21 of the repealed Specific Relief Act which covered the cases of arbitration which laid down an exception to the rule laid down in Sec. 21 of the repealed Act. Now sub-section (2) has been re-enacted in its place without any change. Where an agreement of reference to arbitration has been acted upon and determinated upon in an award, a suit for cancellation of the award on the ground of fraud and collusion is not against the tenor of Sec. 14 (2) of the Specific Relief Act, 1963. This section has no application except where a person having made a contract to refer a controversy to arbitration has refused to perform it and institute a suit in respect of subject-matter in defiance of the contract.[1] This right to refer the disputes to arbitration is a substantive right conferred by the statute. This sub-section bars a suit pending disposal of such reference, which bar can be removed only by the death of the arbitrator and restores the right of suit.

Sub-section (2) of this section has a restricted scope and application. Therefore, while interpreting and applying the provisions of this sub-section one has always to keep the cardinal principle in mind, namely that a party, when he submits his case to arbitration, deprives himself of the right granted to him under the general laws to have his case decided by a court of law, in accordance with the procedure prescribed under the law. Therefore from the terms of reference it must so clearly appear that the party submitting for a reference has unequivocally intended to do so. The question that the party has so intended or not so intended has to be decided by a court of law and not by the arbitrator. But when once the submission to arbitration has been made by a party it is not open to him to resile from that position, unless there is good and sufficient cause.

Where in the case of a building contract, there was a rescission clause, under which, if the building was not completed within the stipulated period, by the contractor, the other party could rescind the contract and get the unfinished part of the building completed through another agency and the agreement also contained an arbitration clause. It was held in an application filed by the contractor, for an injunction, as an interim relief restraining the defendant (the other party) from accepting fresh tenders and seeking reference to the arbitration of the dispute between him and the defendant. It was held (1) that it was not permissible to read the arbitration clause and the forfeiture clause together so as to imply a negative covenant so as to make the decision of the arbitrator a condition precedent to the right of forfeiture by the owner, (2) that the contractor was entitled to damages only and not to specific performance, (3) that no interlocutory application for injunction, where there was no application pending would be under Sec. 41, Arbitration Act, (4) that the grant or refusal of injunction was always in the discretion of the Court, though the discretion was to be judicially exercised.[2]

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1. Dwarka v. Ram Jatan, A. I. R. 1930 All. 877 at p. 879.
2. Ranjeet Chandra Mitter v. Union of India, A. I. R. 1963 Cal. 594 at pp. 595-97.

In Donald Keating's *Law and Practice of Building Contracts* (2nd Ed.), the equitable remedies open to a contractor on a wrongful termination of the contract is stated in the following terms :

> "In the ordinary case, the contractor cannot obtain an injunction restraining forfeiture by the employer because this would be equivalent to specific performance of the contract and the Court does not normally grant this remedy in the case of building contract. The contractor can be adequately compensated in damages for any wrongful forfeiture."

In case of an ordinary building contract and on a wrongful forfeiture of such a contract by the owner, the contractor is only entitled to damages and to no specific performance. Granting of an interim relief like the appointment of a receiver or an injunction, is always a matter of discretion. True, the discretion must be judicially exercised. In exercise of this discretion, the Court has to look to the balance of convenience. Where the granting of an injunction will further delay the construction work considered very urgent by the Government, the injunction should not be granted. Reversely, even if the contractor succeeds ultimately that he was not guilty of having committed any breach and the offending party is the Government, the contractor will be compensated in damages indeed. If further damage is suffered, it can also be quantified. Having regard to these facts, it must be held that the balance of convenience in the instant case lies in not granting an injunction. The discretionary relief prayed for must therefore be refused on this ground as well.

An agreement to do an act, in one sense, implies that it would not be done by any other. From that point of view in every suit for specific performance an application for an injunction can be successfully maintained. But as noted by the learned Judge himself that no such injunction should be issued because if the allegation of breach by the defendant is proved at the trial, the plaintiff will be compensated in damages. Negative covenant is enforced by the Court, if there is an express covenant and very rarely, if at all such a negative covenant is implied. The law of specific performance in India is regulated by statute and Secs. 12 and 21 (old) of the Specific Relief Act make it clear beyond doubt that a decree for specific performance would only be passed if the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief. Section 21(*a*) (old) expressly lays down that a contract cannot be specifically enforced, for the non-performance of which compensation in money is an adequate relief. So also Sec. 21 (*b*) (old) provides that there can be no such minute or numerous details or otherwise from its nature is such, that the Court cannot enforce its material terms.[1]

31. Doctrine of mutuality—What it is.—In cases of specific performance of contract, the underlying principle is that the contract for specific performance must be mutual. The doctrine of mutuality means that the contract must be mutually enforceable by each party against the other. It does not mean that there should be corresponding clauses to every corresponding right in the agreement. A contract may contain a series of clauses and covenants, which form the total bargain between the parties and each of them is the consideration for the other. Mutuality, in this context does

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1. Ranjit Chandra Mitter v. Union of India, A. I. R. 1963 Cal. 594 at pp. 596-97.

not mean equality and exact arithmetical correspondence. It means each party to the contract must have the freedom to enforce his rights under the contract against the other.[1]

The doctrine of mutuality which was one of the defences in English law to an action for specific performance has been deliberately left out from the Specific Relief Act by the Legislature and that it is not applicable to India.[2] There is nothing in the law of specific performance which has given rise to so much confusion as the rules requiring mutuality in order that the plaintiff shall be entitled to specific performance. The rule has been stated as follows :

> "A contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is generally incapable of enforcing it against the other though its execution in the latter way might in itself be free from the difficulty attending its execution in the former."[3]

Understanding the word "enforced" in this passage to mean specifically entered, it will be seen that thus stated the rule not only requires the existence of a valid contract but "mutuality" or remedy. Of the attempts to apply the rule it has been said :

> "The rule as to mutuality of remedy is obscure in principle and in extent, artificial and difficult to understand and remember."[4]

In an illuminating article on the subject,[5] Ames' object to the rule as generally stated for the reasons that the truth of the following eight propositions, each one of which is at variance with the statement just quoted, will be generally admitted :

(1) A bilateral contract between a fiduciary and his principal is often enforced in favour of the principal, although not enforceable against him.

(2) A similar contract procured by the fraud or misrepresentation of one of the parties may be enforced against him, although not by him.

(3) In England, one who, after making a voluntary settlement, has entered into a contract to sell the settled property, may be compelled to convey, although he cannot force the buyer to accept a conveyance.

(4) A vendor, whose inability to make a perfect title debars him from obtaining a decree against the buyer, may in many cases be forced by the buyer to convey with compensation.

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1. Dasrath *v.* Satya Narayan Ghosh, A. I. R. 1963 Cal. 325 at p. 327.
2. Chetoomal Bulchand *v.* Shanker Das Girdharilal, A. I. R. 1929 Sind 83 at pp. 83-84 : 118 I. C. 220 : *see* also Chinnakkal *v.* Chinathambi Goundan, A. I R. 1934 Mad. 703 : 152 I. C. 634 ; 67 M. L. J. 635.
3. Fry, *Specific Performance*, 6th Ed., Sec. 460.
4. Langdell Note, (1887) 1 Harv. L. Rev. 104. It is criticised with equal limits by Pomeroy's *Equity Jurisprudence*, 4th Ed., Sec. 2191 ; *Specific Performance*, 3rd Ed., Sec. 169, and McClintocks *Equity*, Sec. 66.
5. *Mutuality in Specific Performance*, (1903) 3 Col. L. Rev. 1 ; Ames' *Lecture on Legal History*, 370.

(5) Notwithstanding the opinion of Lord Redesdale and Chancellor Kent to the contrary a party to a bilateral contract, who has signed a memorandum of it, may be compelled to perform it specifically, although he could not maintain a bill against the other party who had not signed such a memorandum.

(6) A contract between an infant and an adult may be enforced against the adult after the infant comes of age, although no decree could be made against the plaintiff.

(7) A plaintiff who has performed his part of the contract, although he could not have been compelled in equity to do so, may enforce specific performance by the defendant.

(8) One who has contracted to sell land not owned by him, and who, therefore, could not be cast in a decree, may, in many cases, by acquiring title before the time fixed for conveyance, compel the execution of the contract by the buyer.[1]

The following observations in this connexion of Harold Greville Hanbury[1] are well worth reproduction.[2]

32. Ames' attack on the supposed rule.—"Legal science provides many illustrations of the commonplace, that a generality may be a good servant, but a bad master. In other words, it is one thing to refuse specific performance on the ground that the remedy is not, in the particular case, mutual, and quite another to lay down, as a universal principle, that without mutuality the remedy of specific performance will never be granted. Ames says that this supposed general principle of mutuality simply has not the capacity to contain the cases, and if applied with rigorous consistency, would lead to absurd results. Moreover, it would make nonsense of old authorities, whose correctness has never been questioned. Fry insists that the element of mutuality must have been present at the time at which the parties entered into the contract. *Flight* v. *Bolland*[3] bears out this view in that it decides that the infant cannot succeed if he files his bill before majority. But it was decided in *Clayton* v. *Ashdown*,[4] that if he files his bill after attainment of majority, he is entitled to succeed, though he would himself continue to have a defence for a reasonable time after the arrival of that period. Again, the rigid application of Fry's principle would have demanded a different decision in *Wilkinson* v. *Clements*,[5] from that at which the Lords Justices of Appeal in Chancery arrived. *A* had agreed to lease to *B* several plots of lands, on the terms that *B* should build houses on two of the plots, and demanded leases of these. Here we have a contract for a lease of land, which equity will enforce, set against a contract for personal services, which equity will not enforce. *A* sought to resist a decree for specific performance except on the terms that *C* would assume liability to build on the virgin plots, but it was held that *C*, having fulfilled the conditions of the contract as regards two plots at the time at which he filed his bill, was entitled to a lease of those two plots, without undertaking any liability as to the other plots. The most powerful weapon, however, in Ames' armoury is supplied by *Hoggart* v. *Scott*,[6] where Leach, M. R., the very Judge who decided *Flight* v. *Bolland*,[7] on which Fry's generality so largely rests, laid down that in a contract for the sale of land, the vendor is entitled to specific performance if, at the hearing he can show a good title, though he had not such a title at the time of the contract. All these cases go to swell the flood that well-nigh engulfs the supposed rule of mutuality. But Ames is far too learned,

1. See *Modern Equity*, (1946 Ed.), pp. 577-79.
2. Fry's *Specific Performance*, 6th Ed., Sec. 460.
3. 28 R. R. 101 Russ. 298.
4. 9 Ven. Abr. 393.
5. (1872) L. R. 8 Ch. 96 : 2 L. J. Ch. 38.
6. I. R. My. 293.
7. 28 R. R. 101.

penetrating and conscientious a critic to confine himself to mere iconoclasm. He has a very constructive suggestion, in the shape of a substituted formula, which will satisfactorily cover both *Flight* v. *Bolland*[1] and the numerous cases which are usually called exceptions to the principle applied in it. He works out the result that the crucial factor is not the availability of specific performance to the defendant at the time of the contract, but the assurance to the defendant, by some means other than the common law remedy of damages, that, after performance the plaintiff's side of the contract will be carried out. The assurance was present in *Hoggart* v. *Scott*,[2] absent in *Flight* v. *Bolland*.[3] The extent of the respect shown in America for Ames' view may be measured by the fact that what is, to all intents and purposes, his doctrine is incorporated into the Restatement of the Law of Contracts. But in England Fry's rule might say, with Lucio, 'I am a sort of burr ; I shall stick, for it is apt to make repeated appearances in the dicta of Judges.' But it is dangerous in that, though it will explain some cases, there are more which it cannot explain. Though there is hardly such a thing known to English law as a rule without exceptions, yet a rule which is overloaded with exceptions may perhaps be said to lose its claim to be a rule."

The doctrine of mutuality pre-supposes bilateral contract. What is, at the date of the contract it must be enforceable by other party against the other will not prevent a party to enforce a contract where the other party could not enforce it against him. The doctrine has no application to unilateral contracts. A party seeking to enforce such a contract has no outstanding obligation, therefore, no question of enforcing the contract against him can arise. Where the defendant gave an unilateral understanding to convey the certain properties conditionally to the plaintiff and the plaintiff was and is ready and willing to perform the condition it was held that there was no reason why the defendant should not be compelled to perform the contract specifically.[4]

The doctrine of mutuality has been accepted in India in some cases.[5]

The rule of English law on the point is that a contract can be specifically enforced only, if as a general rule there is mutuality between the parties thereto. In other words, it should be such as it might have been enforced by either of the parties against the other at the time it came into existence, but there are exceptions to this rule, one of which is that where the contract is conditional the mutuality must be at the time when the condition is fulfilled.[6]

In *Ramachandra Sarma* v. *Ayesha Begum*,[7] the agreement for reconveyance was in favour of the plaintiff's father. That contract was not hit by the doctrine of want of mutuality. The only question, therefore, was whether because the plaintiffs, who are the assignees of the contract in favour of their father, are all minors, they cannot enforce the contract for specific performance on the ground that the defendant would not be able to enforce contract for specific performance as against the plaintiffs. It would not be correct to say that the defendant would not be entitled to enforce the contract of specific performance as against the plaintiffs. A contract by a minor is void. The effect of the Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed*,[8] is that a contract on behalf of a minor for purchase of a property is not valid and binding on the minor. The case of

1. 28 R. R. 101.
2. I. R. My. 293.
3. 28 R. R. 101.
4. Fazaladdin Mondal *v.* Panchanan Das, A. I. R. 1957 Cal. 92 at p. 95.
5. *See* Zebunissa Begum v. Mr. H. B. Danagher, A. I. R. 1936 Mad. 564 at p. 567 and Jatadhari Prasad *v.* Kishunlal Darukar, A. I. R. 1950 Pat. 535 at p. 539.
6. Bibi Moliman Nissa *v.* Jabazul Karim, A. I. R. 1959 Pat. 132 at p. 133.
7. A. I. R. 1969 Mad. 470.
8. I. L. R.39 Cal. 232.

Ramachandra Sarma v. *Ayeesha Begum*[1] is not a case of a contract by a guardian of a minor on behalf of the minor to purchase the property for the minor. The original contract is between the two adults and the contract is certainly valid. The fact that the assignee happens to be a minor does not mean that the contract cannot be enforced by the assignee-minors or that it cannot be enforced as against the assignee-minors. The relevant date on which this test of mutuality is to be applied is the date of the contract itself and not the date on which it is sought to be enforced. In *Venkatachalam Pillai* v. *Sethuramarao*,[2] it was pointed out that want of mutuality must be judged as on the date of the contract. A contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might at the time it was entered into, have been enforced by either of the parties against the other of them. An infant cannot sue, because he could not be sued for a specific performance can only, therefore, refer to a case where the infant himself enters into a contract.[3] There being thus no mutuality, the plaintiffs were not entitled to sue.

In *Corpus Juris Secundum*, Vol. 81, the position regarding mutuality is stated thus :

> "Where an infant plaintiff claims under a party who himself could have obtained specific performance, such infancy is no ground for refusing specific performance. Likewise, specific performance has been allowed, for or on behalf of, an infant where the contract involved was made for him by one competent to do so. Where there has been complete performance by the infant, his infancy has been held to be no bar to specific performance."

There is, therefore, no valid legal objection to granting a decree for specific performance in favour of the plaintiffs in this case.[4]

33. Completeness of relief.—At least in the enforcement of affirmative promises a court of equity usually deems it neither wise nor just to enforce one or more of such promises in a contract unless it can enforce all of the contract outstanding at the time of the suit, including the promises of the plaintiff as well as those of the defendant.

"Courts of equity . . . make it a condition of given relief to the plaintiff that he shall submit to a decree made against him, also ; and, indeed, they treat a plaintiff as so submitting by implication. Accordingly, whenever a decree is made for the performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, the Court will, if necessary, appoint a time and place for performance, and will require both parties to perform at such time and place concurrently."[5]

The requirement that the relief given shall be complete, on the one hand prevents the Court from taking jurisdiction where a contract cannot be specifically enforced in its entirety, but on the other hand, in order that the exclusion of jurisdiction may be kept within as narrow limits as possible, leads the Court to take jurisdiction of portions of contracts, which if standing alone would not be the subject of equitable relief. If the whole outstanding

1. A. I. R. 1969 Mad. 470.
2. A. I. R. 1933 Mad. 322.
3. Flight *v.* Bolland, (1827-28) 4 Russ. 8 and 9 George IV, p. 298, and Lumley *v.* Revenscroft, (1895) 1 Q. B. 683, cases of contracts entered by minors. In both these cases, if the defendants had sued for specific performance, the minor plaintiff could have successfully urged that the contracts entered into by them could not be enforced against them as they were minors at the time the contracts were entered into.
4. Ramachandra Sarma *v.* Ayeesha Begum, A. I. R. 1969 Mad. 470 at p. 473.
5. Langdell, *A Brief Survey of Equity Jurisdiction*, (1888) 1 Harv. L. Rev. 355.

portion of a contract is of such a nature that equity can enforce it, and a part of it is of such a nature that equity ought to enforce it, then equity will enforce the whole, not only at the suit of the party who is entitled to come into equity from the nature of the thing for which he has contracted, but at the suit of the other party as well. Therefore, equity will give specific performance of a portion of a contract which provides for the sale of personalty of a kind for which damages are ordinarily regarded as a sufficient equivalent, when the remainder of a contract is of such a character as to give equitable jurisdiction.

It is this desire to give complete relief that leads equity to give specific performance with compensation where the defendant is unable to perform in full, instead of leaving the plaintiff to adjust his damages at law after equity has given him such specific relief as is possible. So, as an adjunct to specific performance the purchaser is ordinarily allowed the rents and profits of the land or its rental value, and the vendor, interest on the purchase money during the period between the day fixed by the contract and the day when conveyance is made ; but where interest exceeds the rents and profits and the delay was due to the vendor's fault, he will be allowed to retain the rents and profits, but allowed no interest. In addition to specific performance, damages caused by delay in performing are customarily allowed. For the same reason, if a loss has taken place during the pendency of a bill to enforce the issue of a policy of insurance, equity will decree that the plaintiff shall recover the amount of his loss, and will not merely order the issue of a policy on which the plaintiff might bring an action of law.

34. Exceptions to the rule of complete relief.—There are some exceptions to the general rule that the decree must completely dispose of the contract between the parties. Cases where specific performance of part of a contract is given with damages or abatement of the price, though opposed to the doctrine of mutuality, as it is often stated, are not at variance with the rule requiring a complete disposition of the controversy. Nor are cases where the parties have contracted with one another for the purchase of several lots. The question in that case is whether there is *one contract or several* and this problem is the same where specific performance is involved as in an action at law. The mere fact that a single contract is divisible into several performances with a price fixed for each affords in itself no grounds for a partial decree, for there is no reason to suppose contemporaneous performance if all the promises were not intended ; but if the contract originally contemplated piece-meal performance as if part of a lot was to be transferred for part of the total price at a time before the remainder of the lot was agreed to be conveyed, there is no reason for denying specific enforcement of the earlier portion of the contract if the remaining performance has not become impossible, and if it is not yet due. But the most frequent occasion for partial decrees is where the plaintiff has wholly or partly performed the consideration on his side and a decree of part of the performance promised by the defendant is necessary to protect the plaintiff's right to the performance promised in return for his own. In a strictly divisible contract if the plaintiff has performed a division of the contract, it is obvious that if the corresponding performance due from the defendant is land or some other matter of which equity takes jurisdiction, the plaintiff should have specific performance, whether the remaining performance under the contract is likely to be rendered or not. The defendant has come under an absolute and indefensible duty to give the return agreed upon, for what the plaintiff has already done. Courts have gone further than this, however, and with reason. In many cases of partly executed contracts, particular portions of the contract independent of their character have been specifically enforced, especially by injunction, though the whole contract could not be. This has been

done in case of particular covenant of a lease or of a partnership agreement.

35. Marriage or betrothal contracts.—As shown by the last Illustration to Cl. (*b*) a contract to marry cannot be specifically enforced, the reason being that the contract of marriage depends upon the volition of the parties. The ceremony of betrothal under the Hindu law does not amount to a binding contract of which specific performance may be enforced, the only remedy available being one for damages.[1] Nor will specific performance be granted of a Hindu parent's or guardian's contract to give a child in marriage.[2] As a general rule, a decree for a specific performance of a contract is given only when an award of damages would be an incomplete relief, and the breach of the promise to marry or to give in marriage is one to which a money penalty has in England at least always been considered adequate. And if the matter is to be settled on the principles of equity and good conscience it can hardly be said that the courts in this country should interfere to enforce a marriage between parties one of whom is unwilling whilst the other can obtain a money remedy for his disappointment.[3]

36. Volition of third party.—This principle is not varied where the performance of the contract depends upon the volition of a third party.[4]

37. Contracts to build and effect repairs.—The law in respect of contract to build and to effect repairs is stated in Illus. (*g*) which says that specific performance cannot be granted in respect of contracts to execute works which that Court cannot superintend. The Act, however, does not lay down any test for determining the capacity of the Court to superintend. As a general rule contracts for building and construction and to make repairs will not be enforced *in specie*.[5] Thus a contract to build a railway,[6] to remove a specified building,[7] to make good a gravel pit,[8] to work quarries and mines,[9] to bore oil wells,[10] to operate a saw mill,[11] to erect and maintain a telephonic apparatus,[12] or to maintain a park,[13] has not been specifically enforced. So also in *Ramchandra* v. *Ramchandra*,[14] where *X* agreed to sell a building and vacant land to *Y*, and *Y* agreed to build a temple on a portion of the land and to secure an annuity to *A* and his wife, the specific performance was refused. The reason for this rule of law is the practical incapacity of the Court to execute in such cases a decree for specific performance. Its machinery is necessarily limited and though it might possibly enforce its decree by attaching the person and property of the defendant, yet the cases covered by this clause are very varied and numerous and upon a balance of convenience, the remedy by damages is more appropriate and efficient relief.[15] It is clear that in most cases, the Court cannot look after the act and conduct

1. Umed *v.* Nagindas, 7 B. H. C. O. C. 122 ; Nowbat *v.* Lad Koer, 5 N. W. P. 402 ; Mayne's *Hindu Law*, Sec. 95.
2. *Ibid* ; *In re* Gunpat Narain Singh, I. L. R. 1 Cal. 74.
3. *In re* Gunpat Narain Singh, I. L. R. 1 Cal. 74, *per* Glover, J. ; *see* also Parshotam Das *v.* Parshotam Das, I. L. R. 21 Bom. 23 ; Asghar Ali v Mahabat, 13 B. L. R. at p. 31 ; Jogeswar *v.* Panch Khori, 5 B. L. R. 395.
4. *See* Sec. 12 (3) (new) and cases therein.
5. Lucas *v.* Cornerford, (1790) 1 Ves. 235; Kay *v.* Johnson, (1864) 2 H. K. M. 118
6. South Wales Railway Co. *v.* Wythers, (1854) 5 De. M. &. G. 880 ; Greenhill *v.* Isle of White Co.. (1871) 23 L. T. 887 ; Ross *v.* Union Pacific Rly. Co., (1863) 1 Wooler 26 : 2 Keener 145 ; *see* also 30 N. J. Eq. 12.
7. Armour v. Connolly, 40 Atl. 1117.
8. Flint *v.* Brandon, (1805) 8 Ves. 159 : 1 Ames 69.
9. Booth *v.* Poland, 4 T. K. C. Ex. 61 ; Polard *v.* Clayton, 1 K. & J. 462 ; Ruthland Marble Co. *v.* Ripley, (1870) 10 Wail. 339
10. Counal *v.* Yest, 62 W. Va 66.
11. T.V. Ry. Co. v. F L.Co , 155 Ala. 275.
12. Keith *v* National Telephone Co.. (1894) 2 Ch. 147 : 2 Keener 188.
13. Kidd *v.* McGinnis, 1 N. Dak 331.
14. I. L. R 22 Bom. 46.
15. Collett. *Specific Relief Act*, 5th Ed., p. 178.

of the plaintiff, nor say how far he does or does not depart from what is right in executing the works or professing to execute them. If he is or shall be wronged by his exclusion from the works by the act of the company that will be a case for damages but not a case for specific performance or relief analogous to specific performance.[1] The Court may, however, decree specific performance where the terms of the contract are clearly defined and detailed and where the following circumstances are established :

(1) The work to be done is defined.

(2) The plaintiff has a material interest in its execution which cannot adequately be compensated for by damages.

(3) The defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done.[2] Consequently we find that where a railway company had taken lands from the land owner stipulating to construct certain works, the contract was specifically enforced.[3]

38. **Enforceability of a bilateral contract—No question of enforceability arises in a unilateral contract.**—If the sale and the promise to resell were parts of a single transaction, no question of mutuality arises. The appellants promise to recover the land is based on consideration. This consideration may be a promise for a promise or an act already performed in return for a promise. In the latter case the promise is enforceable because the promisor has already received consideration for it.

It is true that to be specifically enforced a bilateral contract must be mutual, that is to say, at the date of the contract it must be enforceable by either party against the other. It is based on the principle of equity that the law will not permit a party to enforce a contract which the other party could not have enforced against him. But this doctrine has no application to unilateral promise for which the promisee has already received consideration. In such a case the party seeking to enforce the promise has already performed his obligations and no question of enforcing the contract against him can arise.[4]

The supplier of electrical energy, in the absence of a contract that it must supply the same to a certain consumer for a certain fixed period or till a certain date, is perfectly entitled to stop the supply, after giving due notice to the consumer.[5]

If person enters into a contract the performance of a part of which depends upon his volition and he performs this part and then refuses to perform the remaining part which does not depend upon his volition, he cannot resist a suit for specific performance of the remaining part on the ground that the agreement, on the date when it was made, depended partly on his volition. If he has already performed that part of the contract which depended upon his volition, he can be compelled to perform the remaining part which he did not perform.[6]

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1. Pato *v.* Brighton U. Ry. Co. (1863) 2 New Rep. 415 ; Munro *v.* W. K. B. Ry. Co., (1865) De G. J. & Sm. 723.
2. Fry on *Specific Performance* and Nelson's *Specific Relief Ac* , Sec. 21.
3. 1 Ch. 115.
4. Shree Ram *v.* Ratanlal, A.I.R. 1965 All. 83 at p. 86 : 1963 A.W.R. (H.C.) 811 ; Rakhama Sitaram Ghadge v. Laxman Sitaram Ghadge, A.I.R. 1960 Bom. 105 at p. 107 : 1959 Bom. L.R. 1170 : I L.R. (1959) Bom. 1705 ; Ramdas Rae *v.* Brindaban Ram, A.I.R. 1931 All. 113 at p. 120 ; Fazaladdin Mandal *v.* Panchanan Das, A. I. R. 1957 Cal. 92 at p. 95.
5. State of Bihar *v.* Inderchand Jain, A.I.R. 1968 Pat. 171 at p. 174.
6. Moti Ram *v.* Khyali Ram, A. I. R. 1967 All. 484 at p. 485.

Their Lordships were unable to agree that when a matter has got to be agreed to be decided by arbitrators, then the matter is depended upon the volition of such persons. There is a clear distribution between volition and decision. Arbitrators would be in a position of Judges and what the contract contemplates is the decision of arbitrators in the matter of price and it cannot be stated that such a decision is a matter of volition only with arbitrators. In such cases specific performance is refused by the Court.[1]

39 Termination of service without complying the principles of natural justice—Court is to look about the validity of such termination order.—In *Bhu'kun Jha* v. *Vice-Chancellor*,[2] the relief which the petitioners seek in this case is not based upon their contract of personal service under the university. What the petitioners complain is that their service under the university has been terminated without complying with the principles of natural justice. In other words, the case of the petitioners is that the Vice Chanceller's order, which is under challenge, is void and non-existent in the eye of law and, therefore, the petitioners seek a declaration to that effect. In giving to the petitioners the declaration which they seek, the Court is not called upon to examine the terms and conditions of the contract of service between the petitioners and the university. The Court is only concerned with the question, whether the order of dismissal is valid or invalid. If the Court finds that the order of dismissal is invalid, then it has only to make declaration to that effect. Such a declaration does not amount to passing a decree for specific performance of a contract of personal service. The question of specific performance of a contract of personal service would have arisen if it were found that there has been in fact an order of dismissal. But where the conclusion is that there has been no dismissal of the petitioners from service on account of the fact that the principles of natural justice had not been complied with, and as a consequence the impugned order is void, and therefore non-existent in the eye of law. In such cases, a distinction must be drawn between a dismissal which is wrongful and a purported dismissal which is void. Where the dismissal is alleged to be wrongful, the Court has to examine the terms and conditions of the contract of service entered into between the master and the servant. In such a case, the question of specific performance of the contract of personal service might be involved. But a case of an order of dismissal, which is void stands on a different footing and the Court has to make a declaration to that effect without reference to the terms and conditions of the contract of personal service entered into between the parties.

40. When performance of a contract becomes impossible due to operation of law, no question of granting decree for specific performance.—In *Shiyam Sunder Lal* v. *Durga*,[3] it was held where the property for which a contract of sale has been entered having vested in the State under Sec. 10 of the U.P. Urban Area Zamindari Abolition Act, 1957, the defendant cannot be possibly asked to execute a sale deed in respect of property of which he has ceased to be the owner by operation of law.

41. Termination of service—Injunction for declaring invalidity of such action taken by a statutory body.—The question whether the Court would be justified in granting a declaration about the invalidity of the action

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1. Bai Mangu *v.* Bai Vijli, A.I.R. 1967 Guj. 81 at p. 81.
2. A.I.R. 1965 Pat. 417 at p. 423.
3. A. I. R. 1966 All. 185 at pp. 187-8 : 1965 A. W. R. (H. C.) 29 : (1965) A.L.J. 890.

of a statutory body terminating the employment of a servant was raised before the House of Lords in *Vine* v. *National Dock Labour Board*.[1] *Prima facie*, jurisdiction of the Court in an appropriate case to declare an order passed by a statutory body, even if the order relates to the termination of the employment of a servant of the body, may not be denied.

The jurisdiction to declare the decision of the statutory body as *ultra vires* exists, though it may be exercised only when the Court is satisfied that departure is called for from the rule that contract of service will not ordinarily be specifically enforced.[2]

A contract of personal service cannot ordinarily be specifically enforced and a court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer. This rule, however, is subject to three well recognized exceptions: (*i*) where a public servant is sought to be removed from service in contravention of the provisions of Art. 311 of the Constitution of India; (*ii*) where a worker is sought to be re-instated on being dismissed under the Industrial law; and (*iii*) where a statutory body acts in breach or violation of mandatory provisions of the statute. Where the relationship between the employer and the employee is governed by statute or subordinate legislation. The terminasion, which is the same thing as repudiation, may, in a given situation, be null and void and in that event it would not have the effect of putting an end to the contract and the employee would be entitled to a declaration that his service is continuing. The doctrine that a contract of personal service cannot be specifically enforced would not stand in the way of the employee.[3]

42. **A minor cannot be compelled to perform the contract.**—For the same reason he cannot take advantage of the contract and ask for specific performance. There is another aspect to the question : Can the purchaser recover compensation from the minor for a breach of contract by the guardian ? In every case when there is refusal to implement the contract of sale by the guardian the breach is committed by the guardian and never by the minor. The purchaser therefore can only claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not therefore entitled to claim compensation from him.[4]

43. **Distinction between breach of a contractual obligation and breach of a statutory obligation; contract between master and servant; when relief under the Act is available.**—In cases of termination of a contract of master and servant, a distinction must be made between a

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1. (1957) A. C. 488.
2. S. R. Tiwari *v.* District Board, Agra, A. I. R. 1964 S. C. 1680 at p. 1683 : 1963 A. L. J. 944 : 1964 S. C. D. 314 : I. L. R. (1963) 2 All. 883 : (1964) 1 Jab. L. J. 1.
3. Executive Committee of Vaish Degree College *v.* Lakshmi Narain, A. I. R. 1976 S. C. 888 at pp. 897, 903, 904.
4. Ramchandra *v.* Manikchand. A. I. R. 1968 M. P. 150 at p. 151.

breach of a contractual obligation and a breach of a statutory obligation. This distinction is one of principle and has general application in respect of all contracts, but it assumes particular significance in its application to contracts of master and servant for it is in this latter class of cases that the occasion for its recognition and application arises most often. If there is a breach of a contractual obligation committed by a party to a contract, the other party has ordinarily two remedies available to him. He may either treat the contract as broken and sue for damages or he may refuse to accept the repudiation of the contractual obligation as a breach discharging the contract and keeping the contract alive for performance; he may sue for specific enforcement of the contract provided specific enforcement of the contract is permissible under the Specific Relief Act. If the contract is a contract of master and servant, his latter remedy would obviously not be available for there can be no specific enforcement of a contract of personal service under Sec. 14 (1) (*b*) (old) of the Specific Relief Act and the only remedy available would be the remedy by way of damages. Where, on the other hand, an obligation is imposed by a statute which provides that the contract shall be terminable only in the manner provided by the statute, there can be no valid or effective termination of the contract unless the procedure prescribed by the statute is complied with by the party intending to terminate the contract. In such a case, if the procedure prescribed by the statute is not complied with, there would be no valid and effective termination of the contract. The contract would continue to subsist between the parties for the action of terminating the contract being in violation of the statutory obligation would be null and void. When a suit is filed by the aggrieved party contending that the termination of the contract is a nullity since it has not been effected in the manner required by the statute, the relief sought by the aggrieved party would not be a relief for specific performance of the contract but would be a right merely for a declaration of the statutory invalidity of the act of termination. There being no breach of a contractual obligation, no question would arise of claiming damages for breach of contract or of enforcing specific performance of the contract. Specific performance of the contract would be necessary only if some contractual obligation is required to be enforced and that in its turn would be necessary only if the contractual obligation is broken but where the complaint is not regarding the breach of any contractual obligation but only regarding the breach of a statutory obligation on the fulfilment of which alone the termination of the contract can take place, there would be no occasion or need to ask for specific enforcement of the contract but what the aggrieved party would be required to claim would be a declaration that the termination of the contract is null and void and that the contract continues to subsist between the parties. Applying this proposition to a contract of master and servant which is sought to be terminated by the master in breach of a statutory obligation which declares that the contract shall not be terminable except in a particular manner, the relief claimable by the aggrieved servant would be a declaration that this dismissal is null and void and that he continues in the employment of the master. In such a case Sec. 14 (1) (*b*) (old) of the Specific Relief Act would not apply and the bar contained in that section would not be attracted.

Where there is a mere breach of a contractual obligation in terminating a contract of master and servant, the dismissal being in breach of contract would only sound in damages and the servant would not be entitled to a declaration that the dismissal is invalid and that he continues in the employment of the master since that would amount to enforcement of a contract of personal service. But where there is a breach of a statutory obligation which

prevents the termination of the contract except in the manner prescribed by the statute, the dismissal being in breach of the statute, is null and void and the servant is entitled to a declaration that the dismissal is null and void and that he continues in the employment of the master. There is in such a case no enforcement of the contract of personal service.[1]

Lord Reid in the recent House of Lords' decision in *Ridge* v. *Baldwin*,[2] observed at page 65 as follows :

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence ; it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with i s servants or the ground on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of any one else."[3]

44. Enforcement of contract to build on land.—The Court's power is a matter of procedure and it can take note of subsequent events pending the appeal and give relief in the light of them. *Held* that the Court below was in error in appreciating its powers to enforce specific performance of a contract to build on land.[4]

45. Other illustrative cases.—(1) An affirmative contract to carry on a trade is not enforceable,[5] but a negative contract not to carry on a trade can be enforced by injunction.[6]

(2) An agreement to submit a matter to arbitration or to sell at a price to be fixed by valuers, if the mode of fixing the price is an essential part of the contract will not be specifically enforced, since it is beyond the power of the Court to compel arbitrators to agree ; nor will the Court fix the price since that would be to make a new contract for the parties.[7]

(3) Whether the executants of the deed of a conveyance omit to have it registered and the property is sold to a third party who takes it *bona fide* for a valuable consideration, the party in whose favour the conveyance was executed cannot have it enforced specifically.[8]

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1. Tata Chemical Ltd. *v.* Kailash C. Adhvaryu, A. I. R. 1964 Guj. 265 at pp. 268-70 : I. L. R. (1964) Guj. 622 : (1964) 5 Guj. L. R. 649.
2. (1964) A. C. 40.
3. Surendra Nath Shukla *v.* Indian Airlines Corporation, A.I.R. 1966 Cal. 272 at pp. 280-81 : (1965) 11 Fac. L. R. 263 : (1966) 1 Lab. L. J. 201 ; *see* also Vidyodaya University of Ceylon *v.* Silve, (1964) 3 All E. R. 865 at pp. 867-68.
4. K. M. Jaina Devi v. M. K. Govindaswami, A.I.R. 1967 Mad. 369 at p. 371.
5. Hooper *v.* Brodrick, 11 Sim. 47.
6. *See* proviso to Sec. 14 (new) and notes thereunder ; Milnes *v.* Grey, (1807) 14 Ves. 100 : 6 R. C. 684 ; Agar *v.* Mocklew, (1828) 2 Sim. & St. 416 : 1 Ames. 67 : Vickers *v.* Vickers, 4 Eq. 529 : 2 Keen-er 132 ; Darbey *v.* Whitaker, (1857) 4 Drew. 134 : 2 Keener 129 ; Firth *v.* Midland Ry. Co., (1857) 20 Eq. 100.
7. *Ibid.*
8. Nund Kishore v. Mohun Lal, 22 W.R. 164.

(4) A contract to cultivate a certain crop in a particular manner and deliver it when cut and ready to a particular creditor is enforceable specifically.[1]

(5) An agreement to compose and write reports of cases decided by courts to be printed and published for a stipulated remuneration was not enforced.[2]

(6) Plaintiff, a *patnidar* sued the defendant, *darpatnidar*, for recovery of *thoka*, *sheha*, *jamawasil* and *hastabud* papers of the *darpatni mahal* for certain years on the basis of the contract, contained in a *kabuliyat*. In the alternative plaintiff sued for recovery of Rs. 100 as compensation. *Held* that the claim for recovery of papers could not be decreed.[3]

(7) Specific performance was not granted of a contract by a lessee for the preparation of a set of *jamawasul baqi* and *jumuf sil* papers and filing with the lessor at the close of every year.[4]

(8) A contract for the sale of land which legally cannot be sold without the sanction of the revenue authorities cannot be enforced *in specie*.[5]

(9) A contract to keep a servant on hire falls under this clause.[6]

(10) Similarly, a promise contained in a power-of-attorney that it will not be revoked except on specific grounds tantamounts to a contract to keep a servant on hire and is therefore within the ambit of the clause and not enforceable *in specie*.[7]

(11) First defendant entered into a contract with the plaintiff to sell certain property to him who agreed to build a temple and to secure annuity to the vendor and his wife. The first defendant sold the same property to defendant No. 2. On a suit by the plaintiff it was held that the specific performance of the contract could not be granted.[8]

(12) A provision in a deed of trust by a donor transferring certain property to trustees for religious and charitable purposes that there should be a superintendent of the trust property cannot be specifically enforced.[9]

(13) A contract between two persons to become partners in a certain business, where the duration of the proposed partnership is not specified will not be enforced *in specie* as such partnership can be dissolved at the will of either party.[10] A distinction, however, must be drawn between a company and a partnership, a shareholder not being at liberty to withdraw without procuring another to take his shares; he may, therefore, be compelled to take the shares allotted to him.[11] But a contract to take certain number of shares where, by the rules of the company, a shareholder might cease to be a party within 14 days after becoming such was not specifically enforced.[12]

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1. Starens *v.* Newsome, 1 Ten. Ch. 289; Rayner *v* Stone, (1762) 2 Eden 128; Phipps *v.* Jackson, (1887) 96 L. J. Ch, 550; *see* Illus. 7.
2. Clake *v.* Price, (1810) 2 W. Ch. 157.
3. Najibullah Sardar *v.* Hari Mohan Mitra, A. I. R. 1932 Cal. 481 at pp. 481-82: I. L. R. 59 Cal. 352 : 138 I. C. 64.
4. Bhagwan Das *v.* Surendra, 42 I. C. 521.
5. 8 I.C. 1185; *see* also Rudra Das Chakarvarti *v.* Kamakshya Narain Singh, A.I.R. 1925 Pat. 259 at p. 272 (case of lease).
6. 1900 A. C. 254.
7. Govindoss *v.* Gopeswar Lalji Maharaj, 121 I. C. 598 : A. I. R. 1930 Mad. 231.
8. Ram Chandra Ganesh *v.* Ram Chandra Khoda, I. L. R. 22 Bom. 46 (I.L.R. 10 Cal. 710 foll.).
9. Ram Charan *v.* Rakhal Das, I. L. R. 41 Cal. 19 : 20 I. C. 157 : 17 C.W.N. 1045.
10. Scott *v.* Rayment, (1869) 7 Eq. 112; Herry *v.* Birch, (1804) 9 Ves. 357.
11. New Brunswick Railway *v.* Muggridge, (1859) 4 Drew. 686.
12. Sheffield Gas Consumers Company *v.* Harrison, (1853) 17 Beav. 294.

(14) A contract of apprenticeship is within the ambit of this clause and hence unenforceable *in specie*.[1]

(15) Similar is the case with an agreement to appoint the plaintiff as an agent to recover rents [2]

(16) A limited company cannot be restrained by injunction from dispensing with the services of managing agents even when the contract of service provides that the managing agents are only to be removed in a specified manner and after a specified time.[3]

(17) The Court will not direct the execution of a lease after the expiry of its term, unless the execution is still necessary to secure some right to the plaintiff.[4]

(18) A contract to sell land in lieu of the departmental enquiry against a public servant being hushed up cannot be enforced specifically.[5]

(19) An agreement in a compromise to grant a lease.[6]

(20) A great deal of case-law was cited in course of the argument, Lord Esher, M. R., in *Pearce* v. *Foster*,[7] observed that :

> "The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty fully and faithfully . . . what circumstances will put a servant into the position of not being able to perform in a due manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances, which never have yet occurred, will occur which also will fall within that proposition."

Lindley, L. J., who delivered a separate judgment in the same case indicated that though a servant may have been employed for a fixed number of years he can be dismissed during the term if his connexion with the employer raises a reasonable apprehension of injury to his reputation. Moral delinquency in the servant is not the only justification. Whatever may be the cause which so alters the position of the servant as to render his retention harmful to the master would justify his removal within the term agreed on under different circumstances. For obvious reasons a contract of service of this kind cannot be specifically enforced.[8]

(21) The Calcutta High Court in *Habibur Rahman* v. *Ali Azhar*,[9] held that it was inequitable for the Lower Appellate Court to decree specific performance of an agreement for sale of land against a subsequent purchaser where the latter was entitled to a right of pre-emption against a person seeking to enforce the agreement for sale; and the decree was set aside on second appeal.[10]

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1. Pollard *v.* Rouse, I.L.R. 35 Mad. 288 : 6 I. C. 754 : 1910 M. W. N. 187.
2. Jyotirupa Devi *v.* Satish Kantha Roy, A. I. R. 1929 Cal. 561 at p. 562.
3. N. C. Sarkar & Sons *v* Baraboni Coal Concern Ltd., 10 C. W. N. 289 ; Sardar Gulab Singh *v.* Punjab Zamindari Bank, A.I.R. 1940 Lah. 243 : 190 I. C. 819.
4. Nesbitt *v.* Neyer, (1881) 1 S. W. 203.
5. Govind *v.* Nadda, 18 C. W. N. 689.
6. Jiban Krishna Chakravarty v. Ramesh Chandra Das, A. I. R. 1918 Cal. 108 at p. 108 : 44 I. C. 225.
7. (1886) 17 Q. B. D. 536 : 55 L. J. Q. B. 306 : 34 W. R. 602 : 51 J. P. 213 : 54 L. T. 664.
8. Boulton Bros. & Co. Ltd. (India), Delhi *v.* New Victoria Mills Co. Ltd., Cawnpore, A. I. R. 1929 All. 87 at p. 96.
9. A. I. R. 1926 Cal. 1237.
10. Dayal Singh *v.* Mahabir Singh, A.I.R. 1930 All. 166 at p. 167.

New

PERSONS FOR OR AGAINST WHOM CONTRACTS MAY BE SPECIFICALLY ENFORCED

15. Who may obtain specific performance.—Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(*a*) any party thereto ;

(*b*) the representative-in-interest or the principal, of any party thereto :

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative-in-interest, or his principal, has been accepted by the other party ;

(*c*) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

(*d*) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman ;

Old

(*d*) *For whom contracts may be specifically enforced*

23. Who may obtain specific performance.—Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

(*a*) any party thereto ;

(*b*) the representative-in-interest, or the principal of any party thereto :

Provided that, where the learning, skill, solvency, or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ;

(*c*) where the contract is a settlement on marriage, or compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

(*d*) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman ;

New	Old
(*e*) a reversioner-in-possession, where the agreement is a covenant, entered into with his predecessor-in-title, and the reversioner is entitled to the benefit of such covenant ;	(*e*) a reversioner-in-possession, where the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant ;
(*f*) a reversioner-in-remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ;	(*f*) a reversioner-in-remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ;
(*g*) when a company has entered into a contract, and subsequently becomes amalgamated with another public company, the new company, which arises out of the amalgamation ;	(*g*) when a public company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation ;
(*h*) when the promoters of a company have before its incorporation, entered into a contract for the purposes of the company, and such a contract is warranted by the terms of incorporation, the company :	(*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.
Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.	

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1. Legislative changes.—The section corresponds to Sec. 23 of the repealed Specific Relief Act, 1877. There have been incorporated suitable verbal amendments in the new section in order to carry out the recommendations of the Law Commission of India, as contained in their Report on the Specific Relief Act, 1877.

Sub-clauses (*a*) and (*b*) of the repealed Sec. 23 have been verbatim reproduced in the present sub-sections (*a*) and (*b*) of the new section with the modification that in sub-clause (*b*) of the old section the proviso has been separated from the enacted Cl. (*b*) and has been separately put as a proviso in the new sub-section (*b*). Secondly, the words "unless such party has already performed his part of the contract or the performance thereof by his representative-in-interest or his principal has been accepted by the other party." Sub-clauses (*c*), (*d*), (*e*), (*f*), (*g*) and (*h*) of the old Sec. 23 have been reproduced verbatim in the new sub-clauses (*b*), (*c*), (*d*), (*e*), (*f*), (*g*) and (*h*) of the present Sec. 15 with this modification that the word "public" has been deleted from the word "company" in the new sub-clauses (*g*) and (*h*) of the new Sec. 15. The proviso to the section has been incorporated at the end of the sub-clause (*h*) of the new section.

2. Reasons for the change.—The Law Commission of India while dealing with the provisions of Sec. 23 of the Specific Relief Act, 1877, and suggesting amendments therein says : "The words 'his part' in the concluding portion of Cl. (*b*) of Sec. 23 (old) are ambiguous and have led to a difference of opinion amongst commentators. While according to Banerji,[1] the

1. *Law of Specific Relief*, 2nd Ed., p. 399. The same view appears to have been taken in Mohendra *v.* Samu, 7 C. W. N. 299.

representative or principal of the contracting party can, in the case of a contract personal in nature, sue only if the party had himself performed his part of the contract. Nelson's view[1] is that the representative or principal could sue after performing what was to be performed by the party. But in a contract of a personal nature it would be unfair to impose on the other party a performance by a third party except where he has accepted such substituted performance. We have suggested shat suitable changes should be made in the clause to make this clear.

"In our coming report on the Contract Act, we intend to recommend a general rule that a third party to contract who is entitled to a benefit thereunder or has an interest therein is entitled to sue upon the contract, subject to certain limitations. Once such a general provision is made, it will be unnecessary to retain the provisions contained in Cls. (*c*) to (*f*) of Sec. 23 (old) of the Specific Relief Act. We suggest that these clauses be replaced by one clause,—referring to the relevant provisions of the Contract Act.

"In Cl. (*g*) we suggest the omission of the word 'public' since the nature of the provision is such that it should be made applicable to all companies governed by the Companies Act.

"A similar change should also be made in Cl. (*d*) of Sec. 27 (old).

"Clause (*h*) of Sec. 23 (old) and Cl. (*e*) of Sec. 27 (old) deal with the pre-incorporation contracts of competitors.

"Clause (*h*) of Sec. 23 (old) says that a company may, after its incorporation, enforce contracts made by the promoters of the company with third parties, provided such contracts were within the purposes of the company and the terms of its incorporation. Section 27 (*e*) (old) lays down the converse rule of liability of the company in respect of similar contracts made by the promoters. These two provisions of our Act are founded on the English law as it stood at the time when the Act was passed.[2]

"Later English decisions have taken the view that a company is neither bound by[3], nor entitled to take the benefit of[4] the pre-formation contracts made by its promoters.[4]

"The provisions of the Specific Relief Act have, however, been applied in India even recently,[5] without referring to the change in judicial opinion in England. Though a company cannot technically ratify a contract made before its incorpopation, there would appear to be no reason why the company should not be entitled to choose to take the benefit or the burden of a contract made on its behalf by its promoters, by communicating its acceptance of the benefit or the burden to the other party to the contract. There is no provision in the Companies Act, 1956, which prevents a company from accepting the benefit or burden of a pre incorporation contract.

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1. *Specific Relief Act*, p. 203.
2. Earl of Shrewsbury v. North Staffordshire Ry. Co., (1865-66) 1 Eq. 593.
3. *In re* English & Colonial Produce Co. Ltd., (1906) 2 Ch. 435 (C. A.).
4. Natal Land Co. *v.* Pauline Colliery Syndicate Ltd., (1904) A. C. 120; Newborne v. Sensolid Ltd., (1953) 1 All E. R. 708 (C. A.).
5. Commissioner of Income-tax, Bihar and Orissa v. Bhurangiya Coal Co., A. I. R. 1953 Pat. 298 at p. 300.

"We, therefore, recommend that Cl. (*h*) of Sec. 23 (old) and Cl. (*e*) of Sec. 27 (old) be retained, with suitable verbal changes indicating that the contract would be enforceable by or against a company if the company accepts the contracts and signifies its acceptance to the other party to the contract.[1] And on the Notes on Clause 14 which deals with the old Sec. 23 and the new Sec. 15 of the Specific Relief Act, it has been stated: This clause reproduces Sec. 23 (old) with the following modification:

> (*i*) in sub-clause (*b*) (old Sec. 23) it is made clear that, in a contract of a personal nature, performance by a third party is not to be imposed on the other party to the contract except where he has accepted such subsisted performance;
>
> (*ii*) sub-clauses (*c*), (*d*), (*e*) and (*f*) of old Sec. 23 could be substituted by a simple provision providing that a third party to a contract who is entitled to a benefit thereunder or has an interest therein may sue on the contract subject to certain limitations. This substitution would, however, have to await a suitable amendment being made in this behalf in the Contract Act, and the clauses have been reproduced as they stand for the time being;
>
> (*iii*) in sub-clauses (*g*) and (*h*) of old Sec. 23 the word 'public' has been omitted since the nature of these provisions is such that they should apply to all companies. Further, in sub-clause (*h*) of old Sec. 23 it is provided that the contract would be enforceable by or against a company only if it has accepted the contract and has signified its acceptance to the other party to the contract."

3. Scope.—This section deals with the question as to who are the persons who are entitled to obtain specific performance of a contract. It details the cases and circumstances in Cls. (*a*) to (*h*) of this section when a person may obtain specific performance of a contract. Their Lordships have dealt with the cases elsewhere as to when a contract may be enforced specifically or may not be specifically enforced and whether the alternative relief of awarding compensation or any other adequate relief can be ordered by the Court. Pollock and Mulla in their valuable treatise on *Specific Relief Act*, 7th Ed., while dealing with the scope of Sec. 23 of the repealed Specific Relief Act, 1877, at pages 704 and 705 say: "This section is really an enumeration of the kinds of parties besides the actual contractors, who are entitled to sue on a contract. In involves no principles peculiar to the remedy of specific performance. On one or two points it is more definite than the corresponding English authorities and therefore it seems to us that citation of those authorities would not be useful. We agree with Whitley-Stokes that no reason appears why sub-section (*c*) of old Sec. 23 should not have extended to all compromises of doubtful claims. As to the validity of compromises in general, *see* under Sec. 25 of the Contract Act. It may be observed by way of of caution that the enforcement of restrictive covenants by way of injunction does not come within the section."[2]

A decree for specific performance of a contract enures for the benefit of both the parties, i. e. the plaintiff as well as the defendant: Macleod,

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1. Law Commission Report on Specific Relief Act, 1877, pp. 27, 28.
2. Pollock and Mulla, 7th Ed., pp. 704, 705.

C. J., in *Bai Karimabibi* v. *Abderehman Syed Banu*[1] says : 'Now it seems to me on general principles, leaving aside altogether the dealings between the defendant and other parties that the decree for specific performance was capable of being executed by the defendants as well as by the plaintiff. If this were not so, it would follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration-money, the defendant is left with no remedy whatever, while, owing to the decree passed against him, he would still be debarred from dealing in any way with the suit property. We think it is clear in such a case that a defendant would be entitled to come to court and ask for the payment to him of the consideration-money for the purpose of his tendering a sale-deed."

A suit for specific performance *qua* contract cannot bind a person unless he was a party to the contract as well as a party to the suit. Thus such a suit cannot be decreed and the contract cannot be specifically enforced against a person who is a third party or a total stranger to the contract. The general law regarding the specific performance of a contract is that specific performance of a contract cannot be enforced against persons who are not before the Court. In *Aziz Khan* v. *Bhola Nath Srivastava*,[2] it was said, "It seems obvious to us that the specific performance of the contract to sell could not be decreed in the absence of the parties to the contract." In the same way, where a suit for specific performance has been dismissed against some persons, it was not open to only some of the plaintiff to appeal against the said decree for specific performance against others."

A decree for specific performance is an equitable remedy to be granted to the judicial discretion of the Court, and the Court may, for sufficient reasons, refuse to order specific performance even if the plaintiff has proved the contract.[3]

Except in some special circumstances a contract to sell a property is not dependent upon any personal qualifications of the individual who agrees to purchase and it is a matter of no consequcnce to the vendor that the person who is going to be the vendee is not the same person with whom he had entered into a contract for sale. Such a contract is, therefore, enforceable not only by the person to whom the property was agreed to be sold but also by his representative-in-interest and assigns, unless of course the contract itself prohibits assignment either expressly or by clear implication. Section 23 (old) of the Specific Relief Act provides as to who may obtain specific performance of a contract. Clause (*b*) makes it clear that the contract to sell was enforceable even by the plaintiff's representative and was assignable. In *Munuswami Nayudu* v. *Sagalaguna Nayudu*,[4] where an assignee of a contract for reconveyance of an immoveable property had sued for the specific performance of the contract it was held that a right under an executory contract to exercise an option at a certain future date to obtain a reconveyance of immoveable property is assignable. This decision was affirmed by their

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1. A.I.R. 1923 Bom. 26 at p. 27.
2. A.I.R. 1945 All. 21 : 1945 A. L. J. 26 at p. 27 : I.L.R. (1945) All. 1.
3. Sugna *v.* Kali Ram, 1966 A. W. R. 641 at p. 645.
4. A.I.R. 1926 Mad. 699.

Lordships of the Privy Council in *Sakalaguna Nayudu* v. *Chinna Munnuswami Nayudu*,[1] and the view that the benefit of the contract could be assigned was upheld. In *Bipin Behari Deb* v. *Masrab Ali*,[2] where Mehrotra, J., observed that it cannot be disputed that a transferee of a contract for reconveyance can enforce the contract in the absence of any contract to the contrary.[3]

A person not being a party to the deed is not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot, subject to certain well-recognized exceptions, enforce the terms of the contract : the recognized exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant. In *Krishna Lal Sadhu* v. *Pramila Bala Dasi*,[4] Rankin, C. J., observed :

> "Clause (*d*) of Sec. 2 of the Contract Act widens the definition of 'consideration' so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of *nudum pactum*. Not only, however, is there nothing in Sec. 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of 'promisor' and 'promisee'."

Under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract.[5] It has, however, been recognized that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of that rule is that though he is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied that rule to an Indian case of *Khwaja Mohammed Khan* v. *Hussaini Begam*.[6] In a later case of *Jamna Das* v. *Ram Autar*,[7] the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract. Even if it be granted that there was an intention to create a charge, the Kottayam Bank not being a party to the deed, enforce the charge only if it was a beneficiary under the terms of the contract, and it is not claimed that the bank was a beneficiary under the deed.[8]

It is true that the land being "protected" the permission of the Assistant Collector is required for selling it. The Lower Court has passed a decree for a specific performance on the condition that such a permission is obtained.[9]

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1. A. I. R. 1928 P. C. 174.
2. A. I. R. 1961 Assam 173.
3. Umar Noor Mohammed *v.* Dayal Saran Darbari, A. I. R. 1967 All. 253 at p. 255.
4. I. L. R. 55 Cal. 1315 : A. I. R. 1928 Cal. 518.
5. Dunlop Pneumatic Tyre Co. *v.* Selfridge & Co., (1915) A. C. 847.
6. 37 Ind. App. 152.
7. 39 Ind. App. 7.
8. M. C. Chacko *v.* The State Bank of Travancore, A. I. R. 1970 S. C. 504 at pp. 507-8.
9. Mathura Datt *v.* Teg Singh, A. I. R. 1967 All. 541 at pp. 542-43.

4. "Any party thereto".—Section 15(*a*) of this Act provides that a su can be filed by any party to the contract for its specific performance. The same is the English law on the subject. In a suit to enforce specific performance of a contract a person who is a party to the contract is also a necessary party to the suit also for the contract itself forms the basis of the rights and liabilities, duties and obligations of the parties to it. This is the general rule. The exceptions in *Mannath Veettil Itti Panku Menon* v. *Thazheth Meladam Dharman Achan Avergal*[1] to this rule have been specifically laid down in Cls. (*g*) and (*h*) of the section. The applicability of this common law rule was recognized by Wallis, C. J. This also is the rule in equity except in so far as equity made exception as explained in *Gandy* v. *Gandy*,[2] in cases where the contract was made for the benefit of the third party and in such circumstances as to give rise to a trust in his favour. In *Gandy* v. *Gandy*,[3] Cotton, L.J., observed as follows : "Now, of course, as a general rule a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of, or does not perform the obligation of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception, if the contract, although in form it is with *A*, is intended to secure a benefit to *B*, so that *B* is entitled to say that he has a beneficial right as *cestui que trust* under that contract, then *B* would in a court of equity be allowed to insist upon and enforce the contract." In *Mitar Sain* v. *Data Ram*,[4] Lindsay, J., said : "There can be no right of suit by a stranger to the agreement unless it can be shown that there has been a charge in his favour or that under the agreement he is entitled to some beneficial interest as a *cestui que trust*."

The question of enforceability of a contract by a third party was elaborately considered by Page, J., in *Jiban Krishna Mullick* v. *Nirupama Gupta*,[5] where his Lordship after a review of the relevant cases, both English and Indian, on the point, expressed the law thus : "As a general rule a contract cannot be enforced except by a party to the contract. That rule, however, is subject to this exception: if the contract, although in form it is with *A*, is intended to secure a benefit to *B*, so that *B* is entitled to say that he has a beneficial right as *cestui que trust* under that contract, then *B* is entitled to enforce the contract in a court of equity. A mere contract, however, between two parties that one of them shall pay a certain sum to a third party, not a party to the contract, will not make that person a *cestui que trust*. The whole law on the subject was discussed at length by Tyabji, J., in *Iswaran Pillai* v. *S. Taragan*,[6] where the learned Judge recorded a similar opinion.

"The rule relating to the impleadment of parties in a suit for specific performance of a contract—has been stated by Fry, J., thus: 'The general rule with regard to suit to enforce contracts was that the parties to the contract or their representatives were the necessary and sufficient parties to the suit—that all the parties to the contract should be parties to the suit and no one else'.[7]

"A stranger to the contract cannot according to the general rule either sue or be sued upon it. This general rule is, however, subject to certain modifications. Thus where a party to the contract is a trustee for a third party,[8]

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1. A.I.R. 1918 Mad. 288 at p. 289 : I.L.R. 41 Mad. 488 : 22 M. L. T. 543 : 43 I. C. 625.
2. (1885) L. R. 30 Ch. D. 57.
3. (1885) L. R. 30 Ch. D. 57.
4. A. I. R. 1926 All. 7 at p. 13 : 87 I. C. 724 : 24 A. L. J. 1857.
5. A. I. R. 1926 Cal. 1009 at p. 1010 : 30 C. W. N. 812 : 96 I. C. 846.
6. I. L. R. 38 Mad. 753 : 26 M. L. J. 127 : 23 A. C. 961.
7. Fry, *Specific Performance of Contract*, Sec. 166.
8. *Cf.* Sec. 23 (3).

specific performance of the contract may be obtained at the instance of the third party.[1] Similarly, in certain cases of agency[2] and of marriage settlement[3] or where the contract has been so far acted upon as to give a stranger to the contract reasonable expectation founded upon the contract,[4] then the stranger to the contract may enforce specific performance. Again, a stranger to the contract may be made a defendant to an action for specific performance where he is in possession of the subject-matter of the contract,[5] or where he claims to be interested in purchase money under an agreement antecedent to the contract,[6] or where he is in actual possession of the property[7] and might be affected by part of the relief claimed."[8]

5. **Liability of lessee to the lessor.**—In *Saradindu Mukherjee* v. *Smt. Kunja Kamini Roy*,[9] it was held that an express or implied recognition by the lessor of a transferee from the original tenant would be effective to discharge the liability of the tenant.

In *Parkash Chand Khurana* v. *Harnam Singh*,[10] a plot was allotted to the respondents by the Board. By an agreement respondents sold their rights in the plot to the appellants.

Disputes arose between the parties on certain matters relating to the agreement, which the parties referred to an arbitrator. The arbitrator gave his award and the award became a rule of the Court. One of the principal terms of the award, broadly, was that the appellants were to pay a certain sum of money to the Board in discharge of the liability of the respondents and on their failure to make the payment, they were to give back the possession of the plot to the respondents.

The Board was interested in recovering its dues and the part-payment made by the appellants was accepted by it. However, the Board did not accept the appellants as their debtors in substitution of the respondents.

It was held that the failure of the appellants to discharge the liability of the respondents to the Board in the stated period entitled respondents to take back the possession of the property from the appellants according to the award.

6. **Right to re-sell—Who can enforce.**—It has been held by Mr. Justice Bhargava in *Sk. Gaffar* v. *Kasturbai*,[11] that an agreement to resell can be enforced against the vendee by the assignee of the vendor unless the agreement prohibits such assignment.

7. **Stipulations for a third party.**—The following is a critical review of the Indian law relating to stipulations for a third party.[12] Gilbert W. F. Dold begins by defining "stipulation for third party" so as to limit the

1. Touche *v.* Metropolitan Ry. Warehousing Co., (1871) 6 Ch. App. 671; Royal Pneumatic Tyre Co. *v.* Clipper Pneumatic Tyre Co., (1901) 1 Ch 196.
2. Nook *v.* Kinner, (1743) 3 Swan. 417 n.
3. *Cf.* Sec. 23 (*c*); *Re* D. Angiban Andrews *v.* Andrews, (1880) 15 Ch. D. 228 C. A., followed in *Re* Price, Neville *v.* Pryce, (1917) 86 L. J. (Ch.) 383 ; *see* Messrs. Gorakhram Sadhuram *v.* Laxmibai, A. I. R. 1953 S.C. 443 at p. 446.
4. Hill *v.* Gomme, (1839) 1 Beav. 540.
5. Potter *v.* Saunders, (1146) 6 Hare. 1.
6. West Midland Rail Co. *v.* Mixon, 1 H. & M. 176.
7. Winchester (Bishop) *v.* Mid-Hants Rail Co., (1867) L. R. 5 Ep. 17.
8. Halsbury, Sec. 497, pp. 417-18 (Hailsham Ed.).
9. A. I. R. 1942 Cal. 514.
10. A. I. R. 1973 S. C. 2065 at pp. 2065, 2069.
11. 1961 M. P. L. J. 1298.
12. *See* Gilbert W. F. Dold, on *Stipulation for a Third Party* (1948 Ed.), pp. 107-9.

discussion to genuine "stipulations for a third party" and to exclude from it cases of agency and trust:

"A stipulation for a third party is an agreement entered into between two persons, whereby one of them (the promisor) undertakes an obligation in favour of a third, for the fulfilment of which the promisor binds himself towards the other (the stipulator or promisee), such stipulator or promisee contracting in his own name, and not in the name nor as the agent or trustee of the third party, provided that it is the intention of the contracting parties (i. e. the stipulator and promisor) that the third party shall acquire an independent right enforceable by him against the promisor. Which right flows directly from the agreement entered into between promisor and the stipulator."

Until the passing of the Indian Contract Act (IX of 1872) there was no specific Code in force governing contracts, and though the Moghul Emperors and before them, the Hindu rulers, certainly applied some positive rules, they are not very helpful. In the absence of any such rules, the courts in British India were directed to apply the rules of equity and good conscience, which were generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances.

The relevant section of the Indian Contract Act is 2 (*d*) which reads as follows: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

This differs from modern English law, in which it is well settled that consideration must proceed from the promisee, in other words, in the English law of contracts, as distinct from trusts, the only person who can sue the promisor for performance is the stipulator. The language of Sec. 2 (*d*) of the Indian Contract Act provides, therefore, a useful departure from English law. In fact, in the very first reported case, *Chinayya* v. *Ramayya*,[1] after the passing of the Indian Contract Act, though Innes, J., based his judgment mainly on *Dutton* v. *Poole*,[2] Kindersley, J., expressly relied on the wide terms of Sec. 2 (*d*) in support of his judgment. The idea that this section was sufficient to give the third party an independent enforceable right without anything more, received a set-back in the judgment of Sir George Rankin in *Krishna Lal Sadhu* v. *Parmila Bala Dasi*,[3] in which his Lordship expressed the view that though Cl. (*d*) of Sec. 2 of the Indian Contract Act widened the definition of "consideration" so as to enable a party to a contract to enforce the same in India in certain cases in which English law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of *nudum pactum*, there was nothing in the section to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but that this notion is rigidly excluded by the definition of "promisor" and "promisee" and that it was erroneous to suppose that in India persons who are not parties to a contract can be entitled to sue thereon, except where there is an obligation in equity amounting to a trust arising out of the contract. The only reported case where the third party forthwith adhered to the contract appears to be that of *Torabaz Khan* v. *Nanak Chand*,[4] though it must be admitted that his

1. I. L. R. 4 Mad. 137.
2. (1677) 2 Lev. 210: 1 Ventro 318.
3. I. L. R. (1928) 55 Cal. 1315.
4. A. I. R. 1932 Lah. 566.

adhesion consisted mainly in his signing as a witness to the contract between the main contracting parties.

A Full Bench decision of the Madras High Court in *Subba Chetti* v. *Arunachalam Chetti*[1] has summarized the categories of third party contracts enforceable by the third party as follows, viz : (*a*) where there is the creation of a trust in favour of the plaintiff in respect of the amount sued for ; (*b*) where there is the creation of a charge of immoveable property by the promisor of the specific money in suit in favour of the plaintiff ; (*c*) where there is the creation of a settlement on marriage in which the plaintiff may be beneficially entitled as provided by Sec. 23 of the Indian Specific Relief Act, 1877 ; and (*d*) where there is an estoppel as against the promisor owing to transactions between the plaintiff and the promisor.

See in this connexion, notes under the heading "When stranger can sue" under the major heading "Stranger", *infra*.

It is clear that none of the foregoing categories would cover the case visualised by Sir George Rankin in *Krishna Lal Sadhu's* case.[2] His Lordship is obviously expressing in English terms the doctrine of the personality of contracts stereotyped in Art. 1165 of the French Code Civil. It will be seen that the French Code in express terms exempts stipulation for a third party from the effect of Art. 1165. The French term *personnalite des contracts* is virtually the same thing as "privity of contract", the use of which term appears to begin with Lord Ellenborough in a case in *Rogers* v. *Kelly*,[3] and in *De Bernales* v. *Fuller*.[4] The meaning of the word "privity" as used by Lord Ellenborough is hard to find. In the extract from his judgement in *Williams* v. *Everett*,[5] it appears to mean either a statement by the defendant that he holds, for the plaintiff or else an "engagement between defendant and plaintiff the latter perhaps meaning a contract". The word "privity" is used by Little, J., in *Price* v. *Easton*[6] is apparently equivalent to a *ligamen juris*. However, it now appears to have acquired the same meaning as being "party to a contract" in the sense of Art. 1165 of the Code Civil. According to Corbin,[7] in order that privity of contract may exist, it seems to be necessary for *A* to say to *B*, "I promise you". In the Sixth Interim Report of the Law Revision Committee it is recommended that the third party should become "privy" to the contract ; but as the third party's rights can be acquired by his express or implied adoption of the agreement, it is obvious that (if the recommendations are made law) he can become "privy" to it without ever having been a "party" to it. Whatever the true meaning may be, there can be no ambiguity about Sir George Rankin's view that Sec. 2 (*d*) of the Indian Contract Act will not avail to give the third party a legal right unless he was also a contracting party and a subsequent "adhesion" expressly or by conduct will not cure the defect. If this is the true view, then, apart from the categories summarized in *Subba Chetti* v. *Arunachallam Chetti*,[8] no stipulation for a third party can be enforced by the latter, unless he was present and accepted the benefits verbally or by

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1. I. L. R. 53 Mad. 270 ; Munisami Naicken *v.* Vedachala Naicken, A.I.R. 1928 Mad. 23 at p. 23; Touche *v.* Metropolitan Ry. Warehousing Co., (1871) 6 Ch. App. 671.
2. I. L. R. 55 Cal. 1315,
3. (1809) 2 Camp. 123.
4. (1810) 14 East at p. 590.
5. (1811) 14 East 583.
6. (1833) 4 B. & Ad. 433.
7. American edition of Anson on *Contract*, (1924), p. 351.
8. I. L. R. 53 Mad. 270.

an immediate signature of the written contract between the main contracting parties.

The following analysis by the learned author of the legal relations between the stipulator, promisor and the promisee will repay perusal.

The legal relations between the stipulator and the promisor.—The rights of the stipulator vary according as to whether the benefit of the third party is the sole aim of the contract or not. If the sole aim is to benefit the third party, i. e. in a life insurance or the purchase of an annuity for the benefit of a third party, the only right which the stipulator generally possesses is to sue for performance of the contract. It may be doubted whether Sec. 335 of the German Code is intended to cover such a case, though the language is certainly wide enough but it is interesting to note that some American courts have held that where the stipulator has no pecuniary interest in the performance, he cannot maintain any action at all. On the other hand, if the contract is both for his benefit and for that of the third party, e. g. where the promisor undertakes as a term of the contract between himself and the stipulator to extinguish a debt which the latter owes to a third party, the stipulator can use all his rights of action arising out of the contract, and may even sue for rescission of the contract on the ground that the promisor has failed or delayed to carry out the promise in favour of the third party.[1] If the stipulator chooses to sue for damages, it seems that he will only be entitled to succeed if he can prove that partial or total failure by the promisor to carry out his promise has resulted in damage to him.

All the rights of the stipulator are transmissible to his heirs, administrators and assigns, in which are naturally included his assigns by operation of law, such as, a trustee in bankruptcy, curator or committee in lunacy, etc., except such rights as are purely personal.

The obligations of the stipulator are as various as the contracts to which they are attached. In a contract of sale he guarantees the purchaser (promisor) against eviction and defects in the article sold. In a contract of life insurance, in the absence of any contrary agreement, he undertakes to pay the premiums and all renewals, and in a contract of deposit the charges of the depository. It should, however, be borne in mind that the vendor, lessor, etc. is not always the stipulator. For instance, the purchaser of a property may stipulate with the vendor that the latter is to convey or transfer the property to a third party, to whom the purchaser may be making a gift of it. Here the purchaser is supplying the purchase price, and it is he who is stipulating in favour of the third party.

As to the rights of the creditors and heirs of the stipulator generally speaking the creditors will have no right to challenge the transaction unless it is a gratuitous one made at the time when the stipulator was insolvent or the effect of which was to bring about his insolvency. In countries where the *droit de legitim* still persists, the heirs will have the right to challenge it or to have the benefit reduced. If the third party is himself an heir, he will have to bring such benefit into hotchpot or collation. Where the transaction is not gratuitous, it would seem that neither the creditors nor the heirs have any right to challenge it, though a supervening bankruptcy might possibly give the trustee in bankruptcy power to avoid the transaction on the ground that it is an undue preference.

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1. Code Civil, Arts. 953, 1166, 1184, 1754, and 1961

What is the position if the third party declines the benefit. He either declines before notification of acceptance or subsequently refuses to accept performance from the promisor. In the former case the stipulation for his benefit never comes into operation and in the latter case he voluntarily withdraws himself from its operation. The natural inference would be that the benefit stipulated for in his favour would revert to the stipulator. It may, however, be urged that the promisor has undertaken to give or do something for the benefit of the third party, and not for the benefit of the stipulator, and that he cannot be compelled to render a different performance from that undertaken by him. It seems nevertheless to be generally recognized by both text-book writers and courts that, with some natural exceptions, a refusal by the third party enures to the advantage of the stipulator and not for the promisor. The case of a donation *sub modo* seems to be an exception, because in the absence of a contrary intention the refusal by the second donee enures for the benefit of the first donee.

In the event of the third party subsequently refusing to accept performance from the promisor, effect must, of course, be given to the express terms of the contract, and if, therefore, the contract provides for the stipulators being solely entitled on the third party's waiver of the benefits, clearly the contract is automatically converted from a third party stipulation into an ordinary contract. The same reasoning applies where the stipulator has reserved the right to revoke the benefit in favour of the third party even after the latter's acceptance and the conditional rights of such third party will be completely extinguished by such revocation. Apart from such express rights of revocation, the law may imply such powers in certain cases, though it must be remembered that there is a strong presumption that the rights of the third party are irrevocable once he has notified his acceptance of the benefits. On the other hand, this power of revocation by the stipulator may be subject to the consent of the promisor, and such consent will certainly be necessary if the latter had a special interest that the benefit of the contract should accrue to the third party in question. This will be the case where the promisor has only agreed to be bound to the third person by reason of his personal relations with the latter ; but in any case where the law permits a revocation by the stipulator alone, and the substitution of the latter himself or some new third party as the beneficiary, this cannot prejudice the promisor, e.g. where a life-rent has been created this will come to an end with the death of the first beneficiary (third party) nominated in the contract.

Where the stipulator has a right of revocation, unless this amounts to a mere power to change one beneficiary for another named beneficiary, he can, in fact, nominate himself as the beneficiary.

The legal relations between the stipulator and the third party.—The validity of the contract between the stipulator and the promisor is as a matter of principle independent of the relations which may exist between the stipulator and the third party. It is nevertheless necessary that those relations should be discussed in so far as they exist within the frame-work of a valid stipulation for a third party for the solution of many important questions depends on those relations, e. g. the effect of the contract, the rights and obligations of the stipulator and third party *inter se* and the rights of creditors and heirs who may be affected.

The legal relations between the stipulator and the third party are of two kinds : (*a*) those existing before the contract, (*b*) those coming into existence simultaneously or afterwards.

As to the relations existing before the contract, these may again be divided into two classes : (1) either the third party is a creditor of the stipulator and the contract has been entered into *solvendi causa* ; or (2) the stipulator, not being a debtor, enters into the contract *obligandi causa*, e.g. his promised performance constitutes the condition upon which the third party incurs a liability to him, e.g. the stipulator wishes to procure a loan from the promisor for the benefit of the third party.

In these two cases, the contract is entered into by the stipulator *titulo oneroso* : Let us consider the case of a stipulation for a third party *solvendi causa*. This conclusion of the contract neither modifies nor extinguishes for the moment the antecedent obligation between the stipulator and the third party but the performance of the contract by the promisor destroys definitely the debt of the stipulator to the third party. Should the debt for which the stipulator has entered into a stipulation for a third party be invalid, the stipulator can recover from the third party the money received by him from the promisor, unless the payment cannot be recovered on the ground that obligation was a natural one.

Where the obligation of the stipulator towards the third party had as its object the procuring of a promise by another in favour of the latter, then when the promise has been given and the stipulation for third party has been entered into, the stipulator may no longer revoke the right acquired by the third party.

In the case of a stipulation for a third party *obligandi causa*, the stipulator has the following right : (*a*) to demand from the third party, in return for the payment or performance carried out by the promisor for his benefit, the performance of the obligations depending, e.g. on the loan made indirectly by the stipulator in accordance with the antecedent agreement reached between him and the third party ; (*b*) in case of failure to do so by the third party, to claim the restitution of whatever the latter may have received from the promisor, which may be recovered either as damages or by way of *condictio indebiti*.

With regard to transactions *titulo lucrativo*, one must distinguish between those where both stipulator and third party acquire their rights without giving the promisor anything in return and those where only the stipulator does so. In the former case the gift must be considered as a gift of the promisor to the third party through the intervention of the stipulator. If the gift is carried out, a discussion of the relation between the various parties becomes unnecessary, except in those countries where a gift can subsequently be revoked. If the gift is not carried out, then a question at once arises as to whether the stipulator of the third party can sue for performance. In those countries where a promise to give can be enforced, it would seem that both stipulator and third party can sue for performance.

Normally, however, the relations come into existence simultaneously with or subsequent to the date of the contract as the result of a desire by the stipulator to make a gift to the third party through the contract with the promisor, the stipulator furnishing the *quid pro quo* for the promise, and there then arise *donandi causa* so far as the third party is concerned. On this hypothesis no legal relations between the stipulator and the promisor existed at the date of the contract; neither did the former wish to pay a debt nor to acquire a claim against the third party, whom he intended to benefit quite

gratuitously. Such a contract is, of course, subject to avoidance by creditors (and heirs of the deceased stipulator) on grounds which must be determined by the law of the particular country governing the rights of the parties under the contract.

By the Code Civil a distinction must be made between third parties in existence at the date of the contract who are not yet determined, but who can be ascertained, and those not yet in existence at the date of the contract. The latter class could not take any benefit, but now, under the *Loi relative an contract d'assurance* of 13th July, 1930, an exception has been made in contracts of life insurance. It is interesting to note that French law is so tenacious of its tradition that proceeds by way of fiction to include among "beneficiaries determines" children who are still to be born, whether conceived or not. This section of the law only applies to life insurance and, therefore, Sec. 63 has not affected marine or other insurance, nor the general provisions of the Code Civil, so that in general, the French concept remains unchanged. The German Code and Roman-Dutch law have never experienced any difficulty in according a right to undetermined future persons, though obviously the question as to how long the inchoate right of the unborn child or unregistered company can remain unrevoked may raise some interesting problems for solution in the future.

In a stipulation for a third party where the third party has acquired an irrevocable right, the stipulator incurs no other liability towards him than that of not preventing the promisor from carrying out his contract. Further, he assumes no guarantee that the promisor will carry out his promise in accordance with the contract, in the absence of any express provision to that effect. Such a provision is naturally conceivable, but it pre-supposes an acceptance by the third party, which, according to one school of German writers would destroy the very concept of a stipulation for a third party. Where the stipulator is stipulating for the third party *lucrative causa,* it is extremely unlikely that such a guarantee would ever be in contemplation.

The legal relation between the promisor and the third party.—Whatever may have been the position in Roman law, practically every known system of law today admits the validity of a stipulation for a third party so far as the principal contract in parties are concerned, and most systems based on the Roman law and some based on English law admit the validity of an independent enforceable right in the third party. Generally speaking, the reason for its validity is the fact that the promisor has willed it and manifested his intention clearly to bind himself to the third party.

The nature of the claim of the stipulator necessarily differs from that of the third party against the promisor. So far as the latter is concerned, he need only make performance of one act or payment, and this single performance will extinguish the rights of both stipulator and third party against him, but his obligation to the former consist of doing or refraining from doing something whereas his obligation to the latter may also consist of an act of giving. The third party may, therefore, always sue for performance, whereas the stipulator can generally only sue for rescission of the contract, provided the third party has not yet accepted, or for damages, but in the latter case he must prove special damage. If the contract itself provides that the stipulator may even after acceptance by the third party revoke his right and substitute himself or some other third party as the beneficiary, then the contract will be transformed from a stipulation for a third party into an ordinary contract for the benefit of the stipulator alone or into another stipulation for a third party,

as the case may be. In the former case the three-fold relations between the parties will cease and ordinary contractual principles will apply.

The third party acquires his right direct from the contract but, as already indicated, such right is inchoate in French law during the period between the date of the contract and the communication of acceptance by such third party, and it is only when the latter has notified his acceptance of the benefits of the contract that he acquires an irrevocable, independent and enforceable right.

The right of the third party may consist of (1) the extinction of a debt; (2) the acquisition of a real right ; (3) the acquisition of a contractual claim.

With regard to the extinction of a debt which the third party owes the promisor, the extinction operates *ipso jure* by the mere fact of the contract which the third party can set up as a defence against any subsequent claim by the promisor (creditor).

The stipulation for a third party may create a real right in the third party, e.g. where positive law vests the ownership or goods sold in the purchaser as soon as the parties are agreed, it is submitted that in a contract where a stipulator buys goods from a vendor (promisor) for the benefit of a third party, the latter becomes the owner of the goods as soon as he has notified the vendor of his acceptance of the benefit under the contract, but if the vendor's title to the goods is defective the third party will acquire no greater rights thereto than the vendor himself had, except in those jurisdictions where sales in market-overt are recognized. With regard to immoveable property, it would seem that in most jurisdictions an antecedent agreement between the stipulator and the third party is necessary to vest the acquired property in the latter, subject, of course, to any special provisions of positive law which require a formal divesting by the vendor.

The most usual case of a stipulation for a third party is that where the promisor undertakes to give, do or pay something for or to the third party, in which case the latter has merely a personal claim against him to compel performance.

It is most important to know the cause of the promise of the promisor in favour of the third party. Did he wish to make a gift, a loan or a payment to the stipulator ? Upon this answer will depend the further question as to what defences are open to the promisor when sued by the third party. It cannot be too often stressed that the third party is not the assign or cessionary of the stipulator but his right has its origin in the relations of the stipulator and the promisor and to that extent is governed by them. One can at any rate postulate the two following principles : (1) The promisor cannot raise any defences against the third party which are personal to the stipulator. (2) He can raise any which arise out of the contracts itself. The promisor can, therefore, plead :

(*a*) All defences of nullity, either due to the incapacity of the promisor himself or to mutual mistake. He can also raise the defence of fraud, misrepresentation, etc. on the part of the stipulator.

(*b*) All defects of form in so far as they vitiate the main contract.

(*c*) That the contract is contrary to public policy.

(*d*) The exception *non adimpleti contractus*, e.g. that the stipulator has not paid the agreed premiums to the insurance company for a policy taken out by him in favour of a third party.

(*e*) That the conditions, to which the right of the third party is subject, have not eventuated, e.g. that the third party has not survived the stipulator in a policy taken out for his benefit, where such survival is essential.

On the other hand, the promisor cannot set off against the third party any claim which the former may have acquired against the stipulator before or after the conclusion of the contract. The German Code, Art. 334, provides that defences arising out of the contract and open to the promisor are also available as against the third party. Although that Code does not expressly deal with rights of set-off as between the promisor and the third party, Helwig considers that an express provision was not necessary, as set-off, with certain well-known and natural exceptions, can only take place between two persons, of whom each owes the other something of the same nature, and this cannot be predicated where a promisor seeks to set-off against the third party a debt which the stipulator owes him, unless it is a debt which arises out of the failure of the creditor to perform his obligations under the stipulation for a third party, in which case such failure would at least operate by way of set-off: if it did not extinguish the right of the third party by reason of the exception *non adimpleti contractus*. The old Swiss Code, on the other hand, expressly provided Sec. 135 that the promisor could not set-off against the third party any debt which the stipulator owed him (the promisor). The true reason for the rule is, of course, that a debt must be due to the person himself who claims the set-off and from the person himself against whom it is set-off. The claim of the stipulator against the promisor being totally distinct from the claim of the third party against the promisor, the latter cannot set-off against the third party what the stipulator may owe him (the promisor) independently of the stipulator for a third party. It may be noted that the Sixth Interim Report of the Law Revision Committee does not deal with set-off in that party which concerns the *jus quaesitum tertio*, and it would seem, therefore, that if English law is amended in the manner recommended, a third party's claim against the promisor will not be affected by any claim that the promisor has against the stipulator, unless it is a claim "arising out of the contract".

8. Legal representative may obtain specific performance.—Under Sec. 15 of the Specific Relief Act, 1963, specific performance of a contract may be obtained by any party thereto or by the representative-in-interest or the principal of any party thereto except where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned. There could be no dispute that in a contract of reconveyance of immoveable property no learning, skill, or solvency or any personal quality of such party is a material ingredient. The legal representatives of the person in whose favour the agreement of reconveyance was executed, they are entitled to specific performance of the contract under Sec. 15 (*b*) unless there is anything in the contract itself against the legal representatives claiming the specific performance.[1]

In this connection it is useful to refer to the decision of the Supreme Court in *Hazari* v. *Neki*.[2] It was held in that case that the right of pre-emption was not a personal right on the part of the pre-emptor to get the re-transfer of the property from the vendee who has already become the owner of the same. In *Ram Baran* v. *Ram Mohit*,[3] the Supreme Court held that normally, a contract, in the absence of a contrary intention, express or implied, is

1. T. M. Doraiswami *v.* Kanniappa Reddi, A.I.R. 1972 Mad. 460 at p. 461.
2. A. I. R. 1968 S. C. 1205.
3. A. I. R. 1967 S. C. 744.

enforceable by and against parties thereto and their legal heirs and legal representatives including assignees and transferees.[1]

9. Whether some of the co-contractors can sue for specific performance.—Where there is a joint contract all must join in the suit on the basis of the contract. Specific performance cannot be granted to some only of several co-contractors if others refuse to join in the suit.[2] In a recent Nagpur case, however, a different view has been adopted. It has been held that the word "any" in the section indicates one out of a number of persons more than two. When one or more co-contractors want to enforce specific performance of the contract against the will of the others, they can do so under this section. It is not necessary, therefore, that all the co-contractors should be arrayed on the same side for obtaining specific performance of contract. It is enough if all persons who are parties to the contract are before the Court. Where one of the co-contracting vendees refuse to join in the sale to be executed in their favour jointly, and the other contracting vendees bring a suit for specific performance of the contract, the suit being one to enforce the original contract as a whole, there is no variation in the contract and the suit is not one to enforce a contract piecemeal. The other willing co-contracting vendees have a right to sue for specific performance of the contract, even though some of the co-contractors refuse to join them in the sale.[3]

10. Stranger.—Where there was an agreement between the sons of a deceased Mohammedan that one of them should take the whole property of their father and also they pay his debts, such brother does not become personally liable for the debts of the father since the creditor cannot enforce the agreement between the brothers, and therefore, cannot apply to adjudicate him an insolvent.[4]

Stranger to a contract which reserves a benefit for him cannot sue upon it.

11. Exceptions to the rule.—A stranger to contract which serves a benefit for him cannot sue upon it, either in English or in Indian law even though in India the consideration need not move from the promisee.[5] There are two well-recognized exceptions to this doctrine. The first is where a contract between two parties is so framed as to make one of them a trustee for a third ; in such cases the latter may sue to enforce the trust in his favour and no objection can be taken to his being a stranger to the contract.[6] The other exception covers those cases where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgement or otherwise constitutes himself an agent of the third party.[7]

Vendor sold his property for a consideration that the vendee would pay the creditors of the vendor. The property was not sold for a fixed consideration and the vendee did not retain out of it a certain sum of money which he undertook to pay to the creditors. The consideration for the transfer was

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1. T. M. Doraiswami *v.* Kanniappa Reddi, A.I.R. 1972 Mad. 460 at p. 461.
2. Safiur Rahman *v.* Mahramunnissa Bibi, I.L.R. 24 Cal. 832; Koripalli *v.* Sajja, 13 I. C. 315; Krishnamachari *v.* Ganganarain, I. L. R. 5 Mad. 29.
3. Jagdeo Singh *v.* Bishambhar, I. L. R. (1938) Nag. 41 : 171 I. C. 654 : A. I. R. 1937 Nag. 186.
4. Rijhu Mal Nandi Ram *v.* Jan Mahomed, A. I. R. 1943 Sind 190 : I. L. R. (1943) Ker. 238: 210 I. C. 25.
5. *Ibid.*; Tara Chand *v.* Syed Abdul Razzak, A. I. R. 1939 Sind 125 at p. 127; I. L. R. (1939) Ker. 422 : 185 I. C. 226; National Petroleum Co. Ltd. *v.* Popatlal Mulji, A. I. R. 1936 Bom. 344 at p. 346 : I. L. R. 60 Bom. 954 ; but *see contra* Khirodi Behari *v.* Man Gobinda, A. I. R. 1934 Cal. 682 at p. 690.
6. Jiban Krishna *v.* Nirupama, A. I. R. 1926 Cal. 1009 at pp. 1009-10 : 30 C. W. N. 812.
7. National Petroleum Co. Ltd. *v.* Popat Lal Mulji, *supra.*

that the vendee would satisfy the creditors of the vendor and release the latter from his liability in respect of two debts. The amount which the vendee was to pay to the creditors would depend upon the arrangement which he might be able to make with them. He took the chance of his being able to induce the creditors to give up their claim for interest either in whole or in part. It was for the benefit of the vendor himself and not for the benefit of the creditors that this bargain was entered into. It was held that the vendee was not in any way a trustee for the creditors in respect of the money due to them. Consequently, the creditors could not enforce the contract.[1] Similarly, a mortgagee cannot seek to recover the mortgage money from a subsequent vendee who was asked by the mortgagor to pay the same to the mortgagee.[2] Nor can a zamindar ask for the *kist* from the *darpatnidar* on the ground that he agreed with his immediate landlord to do so.[3]

12. When stranger can sue.—The general rule of law that a stranger to a contract cannot sue on it is not absolute but is subject to some exceptions which are definite and well recognized.

These exceptions are as follows :

I. Where a trust is created; or

II. where provision is made in a marriage settlement ; or

III. where provision is made in a partition or family arrangement for maintenance or marriage expenses of a female member or minor ; or

IV. where a charge is created in favour of a stranger ; or

V. where there is a direct agreement to pay to or the defendant constitutes himself as the agent of the third party.

13. Where trust is alleged.—A third party who is to be benefited under a contract between *A* and *B* acquires equitable rights *ex contractu* if the agreement between the parties is so framed as to make one of them a trustee for the third party. In *Gandy* v. *Gandy*,[4] Cotton, L. J., put the matter thus : "If the contract although in form it is with *A*, is intended to secure a benefit to *B*, so that *B* is entitled to say he has beneficial interest as *cestui que trust* under that contract, then *B* would, in a court of equity, be allowed to insist upon and enforce the contract." In *In re Empress Engineering Co.*,[5] Jessel, M. R., after holding that in the case there was no trust, said : "I am far from saying that there may not be agreements which make *C* (third party) a *cestui que trust*. . . . One of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party. So again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third party." Whether in fact a trust is created or not is a matter of the contract.[6]

1. Jnan Chandra Mukherjee *v.* Manoranjan Mitra, A. I. R. 1942 Cal. 251 : 74 C. L. J. 327 : I.L.R. (1941) 2 Cal. 576 : 201 I. C. 138.
2. Jamnadas *v.* Ramautar Pande, 13 I. C. 304 at p. 304 (P.C.) : 37 I. A. 7 : I.L.R. 34 All. 63, affirming I. L. R. 31 All. 352.
3. Adhar Chandra *v.* Dolgobinda Das, A. I. R. 1936 Cal. 663 at p. 667 : 40 C. W. N. 1037 : I. L. R. 63 Cal. 1172 : 63 C. L. J. 287.
4. (1885) 30 Ch. D. 57 at p. 67 : 54 L. J. Ch. 1154 : 53 L. T. 306 : 57 W. R. 803 (deed of separation between husband and wife).
5. (1880) 16 Ch. D. 125 at p. 129: 29 W.R. 342 : 43 L.T. 742 [observations in Touche *v.* M.R.W. Co., (1871) 6 Ch. App. 671 not approved]; Dunlop Pneumatic Tyre Co. *v.* Selfridge & Co., (1915) A. C. 847 at p. 853.
6. *Per* Jassel, M. R., in *In re* Empress Engineering Co., 16 Ch. D. at p. 129.

14. Indian law.—Following the above English decisions the courts in India have uniformly held that where a trust, express or implied, is created in favour of a third party, the latter can sue on the contract for the benefit so reserved for him.[1] It is obvious that the same principle applies where from the fact, the circumstances and construction of the contract a trust arises under statute, e. g. Trust Act.[2]

15. Trust created.—For a good example of a creation of a trust, see *Ramdhan* v. *L. Chauthmal*.[3] In this case the plaintiffs were the members of a working committee of a registered society known as Dharam Sabha, and the defendants were persons forming a firm of grain dealers. The practice existing in the *bazaar* admittedly was that each cartman should give 2 annas in cash and one seer of grain per cart of grain to the shop-keepers of the *bazaar* for charitable purposes payable to the plaintiffs. The defendants realized both cash and grain in this manner but failed to pay the same to the plaintiffs. It was held that the defendants when realizing these levies constituted themselves trustees for the Sabha and that the Sabha as the *cestui que trust* could maintain the suit. The rule of equity deducible from case is that where a person incurs an obligation to pay a certain sum of money to another and holds it for his benefit, such other person can claim it under the contract as if it had been made with himself. Another example is afforded by *Rana Uma Nath Bakhsh* v. *Jang Bahadur*.[4] In this case, *S*, a Hindu *talukdar*, executed two instruments. One was a deed of relinquishment whereby he relinquished all his rights and property to his eldest son *V* (the defendant). The second was an agreement by *V* whereby, *inter alia*, he arranged, in Cl. (4) to pay Rs. 30,000 in cash and a village called *N* to *J*, the eldest son of a concubine of his father. On a suit by *J*, on attaining majority, for the benefit reserved for him in the agreement by *V* to his father it was held that reading the agreements together and having regard to Cl. (4), a trust was created in favour of the plaintiff.

16. Where provision is made for marriage settlement.—The leading case on the point is *Khwaja Mohd. Khan* v. *Hussaini Bibi*.[5] In this case there was an ante-marriage agreement between the fathers of the couple whereby the bride-groom's father agreed that, on the marriage of the plaintiff (the minor) with the defendant's son the plaintiff would be entitled to Rs. 500 per month as *kharch-i-pandan*, from the date of

Khwaja Mohd. Khan v. *Hussaini Bibi*.

1. Subba Chetti *v.* Arunachalam Chetti, 31 L. W. 371 at p. 376 (F. B.), Jnan Chandra Mukherjee *v.* Manoranjan Mitra, A.I.R. 1942 Cal. 251 at p. 252 : I.L.R. 60 Cal. 751; Jagadambya Debya *v.* Bibhuti Bhusan Sarkar, A.I.R. 1933 Cal. 407-8 : I. L. R. 53 Cal. 922, A.I.R. 1926 Cal. 1009 at pp. 1009-10 ; A. I. R. 1937 Cal. 625 at 630, Adhar Chandra *v.* Dolgovinda Das, A. I. R. 1936 Cal. 663 at pp. 665-6 ; Ramdhan *v.* L. Chauthmal, A. I. R. 1935 Oudh 496 at p. 496: I.L.R. 11 Luck. 428 : 158 I.C. 461 ; Mst. Hussain Bandi *v.* Gauhar Begam, A.I.R. 1932 Oudh 82 at p. 84 : I.L.R. 7 Luck. 232 : 134 I. C. 1011 ; A. I. R. 1943 Nag. 266 at at p. 268; Motilal *v.* Abbasbhai, A.I.R. 1939 Bom. 309 at p. 311 : 41 Bom. L.R. 538 : 183 I.C. 785; Mehatunnissa *v.* Nalimannissa, A. I. R. 1930 Pat. 194 at p. 196 ; Pandurang Ganpatrao Jidke *v.* Viswanath Pandurang, A. I. R. 1939 Nag. 20 at p. 21 : 1939 N. L. J. 33 ; National Petroleum Co. Ltd. *v.* Popatlal, A.I.R. 1936 Bom. 344 at p. 346 : I. L. R. 60 Bom. 954.
2. Abdul Gafur Butt *v.* Mohd. Salim, 52 P.L.R. 117 (Sec. 94, Trusts Act applied).
3. A.I.R. 1935 Oudh 496 at p. 496.
4. A. I. R. 1938 P. C. 245 at p. 247 : 43 C.W.N. 1 : 48 L.W. 371 : 1939 M.W.N. 923 : 176 I. C. 883 : 1938 A. L. R. 744, affirming A. I. R. 1937 Oudh 99 ; *see* 11 M. I. N. 517 at p. 519 : I. L. R. 16 Mad. 268 (P. C.), I. L. R. 32 All. 410 (P. C.) : S. R. A. 42 Mad. 581 (P. C.), I. L. R. 49 Cal. 820 (P. C.).
5. I.L.R. 32 All. 410 at p. 413 : 7 I.C. 237: 37 I. A. 152 (affirming I.L.R. 31 All. 352) ; N. Saiyed Sajjad Ali Khan *v.* Mst. Badshah Begum, A. I. R. 1936 Oudh 385 at p. 387 : I. L. R. 12 Luck. 345 : 164 I. C. 823.

the marriage with a charge on immoveable properties. Some years after she attained majority and brought a suit for arrears of maintenance. Repelling the plea that the plaintiff was a third party to the agreement sued upon, their Lordships held that the plaintiff could maintain the suit as the agreement specifically charged immoveable property for the payment of the allowance and as the plaintiff was the only beneficiary entitled under it. In this it was pointed out that in India where marriages are arranged during minority and contracts for the benefit of the minors were entered into by parents and guardians, it would cause serious injustice if the strict rule of English law were applied.

Charge created.

17. Provision made for maintenance.—These cases frequently arise where a partition deed or settlement deed is executed among the family members and a provision is made in favour of the female members of minors or other members.

On this point Mr. M. R. Jayakar of the Judicial Committee has observed that "this ruling in *Khwaja Mohd. Khan* v. *Hussaini Bibi*,[1] has since been followed in India in many cases where a provision is made for the maintenance of the female members of a Hindu joint family on a partition of the joint-family property between the male members."[2] So, where in a partition between the family members a provision is made for the mother with a charge on immoveable property in her favour the Madras High Court permitted her to enforce the same as a beneficiary or charge-holder.[3] The next step was to allow such a claim without a charge being created. Thus in *Sundararaja Iyangar* v. *Lakshmi Ammal*,[4] Oldfield, J., decreed the claim of a sister of the family under a provision in a partition among the brothers and their father whereby they agreed to pay the same at the time of her nuptials, even though no charge was created in her favour. Then, in a recent Privy Council case, *Dan Kuer* v. *Mst. Saraladevi*,[5] their Lordships had to consider the same question. In this case, *N*, one of four brothers, improperly contracted such heavy debts that his wife, through an award, secured an arrangement for a partition between her husband and her two minor sons and also a maintenance allowance of Rs. 75 to herself with a charge for maintenance. There was an award. On the following day *N* mortgaged the properties with possession stating that the properties were free from all liabilities. The arbitration award was mentioned. Later he sold the properties to the mortgagees. In a suit by the wife against the L. R.'s of the vendees for the enforcement of her maintenance claim it was said that "it is too late to doubt the rule which has prevailed in India that where contract is intended to secure a benefit to a third party as a beneficiary under a family arrangement he (or she) may sue in his (or her) own right to enforce it". That this has been a long-established rule is clear from the undermentioned cases.[6]

Relief without charge.

1. I. L. R. 32 All. 410 at p. 413 : 37 I. A. 152 : 7 I. C. 237 (affirming I. L. R. 31 All. 352) ; N. Saiyed Sajjad Ali Khan *v.* Mst. Badshah Begum, A. I. R. 1936 Oudh 385 at p. 387 : I. L. R. 12 Luck. 345 : 164 I. C. 823.
2. Dan Kuer *v.* Mst. Saraladevi, A. I. R. 1947 P. C. 8 at p. 15 : 73 I. A. 208 : I.L.R. (1946) All. 756 : 1947 M. W. N. 4.
3. Suppu Ammal *v.* Subramanyam, I.L.R. 33 Mad. 238 at p. 240.
4. I.L.R. (1914) 38 Mad. 788 at p. 790.
5. I.L.R. (1914) 38 Mad. 788 at p. 790.
6. *See* cases under para. 13, "Where trust is alleged", *supra* ; also Sudali Ammal *v.* Gouthomi Ammal, (1912) M. W. N. 908 at p. 910 ; Arumuga *v.* Chinnammal, 1911 M.W.N. 524-6 ; Rajagopalaraja *v.* Datla Radhaya, (1912) M.W.N. 39 at pp. 40-1.

18. Where charge created in favour of stranger.—Another exception to the general rule is "where the contract charges the money to be paid out of some immoveable properties".[1] Thus, where *A* and *B* enter into a contract under which *A* confers upon *B* the status of a subrogated mortgagee and *B* agrees to pay to *A*'s brother a monthly sum out of the income of the mortgaged property to serve as maintenance to the latter, it was held that *A*'s brother could successfully sue *B* as if he had a beneficial interest within the rule embodied under Trusts Act.[2] *See* also cases under the above heading.

19. Where the promisor agrees to pay directly.—*See* note below.[3]

20. Receiver.—A receiver may sue for specific performance of a contract with the permission of the Court.[4] A purchaser's trustee in bankruptcy may adopt or reject a land contract made by the bankrupt and, upon adoption, he may have specific performance,[5] but the contract cannot be specifically enforced against the trustee, if he rejects it.

21. Agent.—An agent, as a general rule, cannot personally enforce contracts entered into by him on behalf of his principal, unless where (*i*) the contract is for the sale or purchase of goods for a merchant resident abroad, or (*ii*) the principal is undisclosed, or (*iii*) though disclosed he cannot be sued.[6] A principal ratifying a contract made by the unauthorized act of his agent may have specific performance, though at the outset he had privilege of rejecting the contract if he so desired.[7]

22. Benamidar.—It is now settled law that a *benamidar* can maintain a suit in respect of property standing in his name although the beneficial owner is not party to it.[8] It is common practice in India that people while paying money from their own pockets, purchase property for various reasons in the name of the members of their families. Such transactions are well known as *benami* transactions and their validity has been recognized by the highest courts of justice. A husband is, therefore, competent to sue for specific performance of a contract of sale in favour of his wife.[9]

In the *Punjab Province* v. *Daulat Singh*,[10] it was held by Sir Maurice Gwyer, C. J., and Varadachariar, J., agreeing that *benami* transactions are "quite unobjectionable" and have their analogies in the English law. There is nothing inherently wrong in them and they accord within their legitimate scope with the ideas and habits of the people. All *benami* transactions cannot be regarded as reprehensible and improper. But they are clearly not meant to countenance transaction entered into for fraudulent or illegal purposes.[11]

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1. Mst. Saraswatibai *v.* Haibatrao Ramji Patil, I.L.R. 60 Cal. 751 : A.I.R. 1945 Nag. 261.
2. Abdul Gafur Butt *v.* Mohd. Salim, 52 P. L. R. 117.
3. This point relates purely to contracts. *See* Sanjiva Row's *Contract Act* (4th Ed.) of 1955 by Mantha Ramamurthi, under Sec. 2.
4. Wilkinson *v.* Gangadhar, 6 Bom. L. R. 486; *see* also I.L.R. 35 Mad. 578 ; I.L. R. 30 Cal. 690 ; *see* in this connexion Mohamed Kasim *v.* Panchapakesa Chetti, 17 I. C. 233 at p. 235 : I. L. R. 35 Bom. 578.
5. Wilson *v.* Holub, 202 Ia. 549.
6. Section 230, Contract Act.
7. Rank *v.* Gravey, 66 Neb. 767; Catholic Foreign Mission Soc. *v.* Gussani, 215 N. Y. 1.
8. Gurnarain Singh *v.* Sheolal Singh, I.L.R. 46 Cal. 566 (P. C.) : 46 I. A. 1 : 49 I. C. 1 : 30 M. L. J. 86 : 17 A. L. J. 66 : 23 C.W.N. 521 : 9 L.W. 335.
9. Radha Kishan Kaul *v.* Shankar Das, A. I. R. 1927 Lah. 252 at p. 253 : 100 I. C. 422 : 28 P.L.R. 620 : 9 Lah. L. J. 199.
10. A.I.R. 1942 F. C. 38 at p. 40 : I. L. R. (1942) Lah. 643 : (1942) K.F.C. 86 : 45 P. L. R. 1 : 200 I. C. 563.
11. *Ibid.* (A.I.R. 1915 P. C. 96 and A.I.R. 1918 P. C. 40, relied on).

23. Contract for property to be purchased at auction.—Where *A* contracts to sell to *B* certain property which *A* intends to purchase at a court auction, specific performance of the contract can be maintained by *B* against *C* on the allegation that *C* is a *benamidar* for *A* at the court auction.[1] But where the alleged *benamidar* appears and contends that he is not a *benamidar* for the vendor the proper procedure would be to discharge him from the suit, leaving it to the parties to agitate the same in a separate suit for the obvious reason that a trial on the issue would enlarge the scope of the suit for specific performance which is prohibited.[2]

Procedure where *benamidar* denies his character as such

24. Whether a wife, not being a party to the contract but a mere nominee of the husband is entitled to enforce her claim under the nomination.—This question came up for consideration in *Krishnalal Sadhu* v. *Mst. Promila Bala Dasi*.[3] The facts of the case, in brief, were these: One Beharilal Sircar insured his wife on 29th March, 1910, for a sum of Rs. 500. The material words of the policy are as follows : "The society hereby guarantees to insure that if the insured pays to the society at their office in Calcutta on the 5th day of March, 1910, each succeeding year up to and including the year of his death the sum of Rs. 21 and 11 annas only or in lieu of any such annual premium the full number of instalments thereof as may be agreed upon (of which agreement the receipt granted by the society shall be full and sufficient evidence) then upon proof to the satisfaction of the office committee of the society of the death of the insured and the title to the policy, the society will pay to Shrimati Promila Bala Dasi, wife of the insured (hereinafter called the nominee) at the head of the office of the society, in Calcutta or at the permanent residence of the nominee, whichever may be preferred, the sum of Rs. 500 only together with such additional sum or sums by way of profits as according to the Society's regulations may accrue and become payable in respect of the policy after deducting therefrom : (1) the balance of the premium, if any, payable in respect of the year of the insured death ; and (2) also other sum or sums, if any, due from him to the Society. The assured paid all the premiums due on the policy till his death took place on 1324 B. S. He died leaving behind three sons and his widow, the plaintiff. On the death of the assured his widow, the plaintiff, claimed the amount of the said policy. Krishnalal and another, the defendant Nos. 1 and 2, had obtained a decree against the sons of the assured and another, decree-holder-of the sons of the deceased assured, got the amount payable under the policy, in execution of their decrees. The widow, the plaintiff referred her claim to the amount under the provision of the Code of Civil Procedure, but her claim was disallowed and the money under policy was rateably distributed among all the execution-creditors. The plaintiff, the widow of the assured brought the suit for declaration of her title to the amount and for the recovery from the creditors. The Trial Court after contest held that the money due under the policy became the property of the deceased and did not form part of the assets of the estate left by him. The decree was accordingly passed by the Trial Court : separately against the defendant Nos. 1 and 2, and defendant No. 3, in the light of his findings. The Lower Appellate Court, in appeal, confirmed the findings of the Trial Court. Only the defendant Nos. 1 and 2 challenged the decree of the Court below in the second appeal. The contention raised on their behalf was that on the basis of the cases reported in *Jiban Krishna Mullick* v. *Nirupama Gupta*,[4] *Shanker Vishwanath* v. *Umabai*

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1. Prem Sukh Gulgulia *v.* Habibullah, A. I. R. 1945 Cal. 355 at p. 369 : 49 C. W. N. 371.
2. *Ibid.*
3. A. I. R. 1928 Cal. 518 at pp. 519, 520 and 521.
4. A. I. R. 1926 Cal. 1009 : I. L. R. 53 Cal. 922.

was for and intended to be for the benefit of the creditor and the creditor was entitled to sue the transferee on the registered instrument. The facts in *Deb Narain Dutt's* case[1] were somewhat peculiar and at first sight it may seem that the decision proceeded on the difference between 'consideration' as defined in English law and as defined in the Contract Act. But a closer examination of the case justifies, in my opinion, the criticism passed on it by Page, J., in the case of *Jiban Krishna Mullick* v. *Nirupama Gupta*,[2] and the judgment, when properly analysed, does not really go beyond the terms of the actual decision of their Lordships of the Judicial Committee in the case of *Khwaja Mohd. Khan* v. *Hussaini Begum*.[3] The same remarks apply to the case of *Dwarika Nath* v. *Priyanath*.[4] In this connexion reference may be made to an English case where the facts were as follows : A tradesman made a will bequeathing an interest to *M*, his wife's sister. *M* married. Her husband and the testator entered into partnership articles with a proviso that, if the testator should die during the partnership, his widow should be entitled to his interest. It was held by Turner, V. C.,[5] that the effect of the agreement between *M*'s husband and the testator was to create an obligation in equity upon the surviving partner and in that respect it did not differ from a trust, i.e. that the partnership articles created a trust in favour of the widow. He further held that a trust could not be the less capable of being enforced because it was founded on contract.

"The point now before us for determination is, in my opinion, covered by authority.[6] There the money due under a life assurance policy was payable to a wife, if living, otherwise to the legal personal representative of the assured. Lord Esher, M.R., observed as follows:

'The contract is with the husband and with nobody else. The wife is no party to it. The promise is one which could only take effect upon the husband's death and therefore it must be meant to be enforced then. Apart from any statute the right to sue on a contract would clearly pass to the legal personal representatives of the deceased. It does not seem to me that apart from any statute such a altered the create any trust in his wife. The husband might have with it by destination of the money at any time and might have dealt policy would will or settlement. I think, that, apart from any statute, no interest would have passed to the wife by reason merely of her being named in the policy.'

"This case has been followed in Bombay in the case of *Shanker Viswanath* v. *Uma Bai Sadashiv*[7] and in Calcutta in the case of *Eshani Dasi* v. *Gopal Chandra Dey*.[8] In my opinion I can see nothing in the present case which would justify me to distinguish it from the cases referred to above. The result is that the first contention on behalf of the respondent must be negatived."

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1. I. L. R. 41 Cal. 137 : 18 C. L. J. 603 : 20 I. C. 630 : 17 C. W. N. 1143.
2. A. I. R. 1926 Cal. 1009 : I. L. R. 53 Cal. 922.
3. I. L. R. 32 All. 410 : 7 I. C. 237 : 37 I. A. 152 (P. C.).
4. (1918) 22 C. W. N. 279 : 36 I. C. 792 : 27 C. L. J. 483.
5. Page *v.* Cox, 10 Hare 163 : 68 E. R. 882.
6. *See* Cleaver *v.* Mutual Reserve Fund Life Association, (1892) 1 Q. B. 147 : 61 L. J. Q. B. 128 : 56 J. P. 180 : 40 W. R. 230 : 66 L. T. 220.
7. I. L. R. 37 Bom. 471 : 91 I. C. 736 : 15 Bom. L. R. 320.
8. (1914) 20 C. L. J. 44 : 25 I. C. 236 : 18 C. W. N. 1335.

This question, in another form, came up for discussion before the Patna High Court in *Achuta Ram* v. *Jainandan Tewary*.[1] The facts were that the plaintiff-appellants were the mortgagees of certain properties from the defendants. These mortgages were covered up by means of five deeds. The plaintiff-appellants brought their suit to enforce the mortgages and they besides making the mortgagees party, also impleaded other persons who were the purchasers of equities of redemption from the mortgagors referred to above. In the Trial Court the plaintiffs obtained a personal decree not only against the mortgagors but also against the purchasers of the equities of redemption. But on appeal the Appellate Court came to the conclusion that the decree so far as it related to the purchasers of equities of redemption could not be upheld. He therefore set aside the decree of the Trial Court which was passed against the purchasers of the equities of redemption and confirmed the rest. The plaintiffs thereupon appealed from that part of the decree of the Lower Appellate Court which dismissed the suit in second appeal before the High Court, so far as it related to the purchasers of the equity of redemption. In the second appeal the question that was argued at the Bar was whether the plaintiffs could obtain a money decree against the purchasers of the equities of redemption. It must be noted here, while passing that in the instruments the purchasers of the equities of redemption expressly agreed that they would pay off the debt due under the mortgagees and this they did not do. It should also be stated at this stage that the plaintiffs were neither parties, nor privies to the contracts between the mortgagors and the purchasers of the equities of redemption, nor did they have any knowledge or notice of these transactions. Bucknill, J., who delivered the judgment of the Division Bench of the Court said: "It is important to observe that some support was lent to the argument which was put forward before us by the learned advocate who has appeared for the plaintiffs by the rulings in the case of *Dwarka Nath Ash* v. *Priya Nath Malki*.[2] In that case the facts were certainly very similar to those which obtained in this appeal now before us. The defendants had borrowed a sum of money from the plaintiff for which they had given a promissory note; they subsequently transferred their property to another party who executed an agreement in their favour expressly undertaking to pay to the lender of the money under the promissory note his dues thereunder. The lender of the money under the promissory note was no party to this contract and had no notice thereof; but, having ascertained the circumstances, he proceeded to sue the borrowers as well as the individual who had purchased the borrowers' property. He claimed that, in view of the agreement entered into between the borrowers' property, he (the lender) was entitled to take advantage of that agreement. Mookerjee and Cuming, JJ., of the Calcutta High Court held that the plaintiff was entitled to enforce his claim against the purchaser of the borrowers' property.

"Had the matter rested there, one might have thought that this case would constitute an authority in favour of the proposition argued in the present instance. There are also other cases which have been quoted by the learned advocate for the appellant which certainly at first sight appear to support to some extent the learned advocate's argument. In the case of *Khwaja Mohd. Khan* v. *Hussaini Begum*,[3] their Lordships of the Privy Council held that under certain circumstances (to which I shall refer presently) it was possible for a person who was no party to an agreement to take advantage of the provisions of such an agreement which were in fact beneficial to herself. Their Lordships' decision (which was given by the Right Hon'ble Mr. Ameer

1. A. I. R. 1926 Pat. 474 at p. 475.
2. (1916) 22 C. W. N. 279 : 36 I. C. 792 : 27 C. L. J. 483.
3. I. L. R. 32 All. 410 : 7 I. C. 237 : 37 I. A. 152 (P. C.).

Ali) relates the facts at some length. Put very shortly, they were as follows : A minor Mohammedan lady, prior to and in consideration of her marriage with the son of the defendant in the suit. was promised by the defendant under an agreement executed between the defendant and the lady's father to be paid by the defendant the sum of Rs. 500 per mensem from the date of her reception in marriage ; the defendant also charged certain specified properties for the purpose of producing the requisite funds. The lady, as I have stated, was a minor ; but, eventually, after the marriage, lived with her husband for some time ; during, however, to disagreement she, at the end of some 12 or 13 years, ceased so to do. The defendant then refused to continue to pay the allowance and the lady accordingly brought the suit against him basing her claim upon the document of agreement which had been entered into between the defendant and her (the plaintiff's) father. It was maintained on behalf of the defence on the line of reasoning adopted in the well-known English case, *Tweddle* v. *Atkinson*[1] that as the plaintiff was in no way an actual party to the agreement, made between her father and the defendant, she had no *locus standi* and was unable to sue thereunder. Mr. Ameer Ali, however, pointed out that the case of *Tweddle* v. *Atkinson*[2] was one decided under the Common Law of England and was not in their Lordships' opinion applicable to the facts which were disclosed in the case before their Lordships. Their Lordships were of opinion that although no party to the agreement (and it must be remembered that the lady was then a minor and the document was executed by her father) she was clearly in equity entitled to enforce her claim against the defendant. The case, however, appears to me to be distinguishable from the present case in view of the fact that the benefit which was to accrue to the plaintiff was one for which the consideration was the marriage to take place between herself and the defendant's son. Then there is another case which was cited on behalf of the plaintiffs.[3] In that case Jenkins, C. J., and Mookerjee, J., held that where the transferee of a debtor's liability acknowledged in the provisions of the registered instrument which conveyed to him all the original debtor's properties, his obligation to the creditor for the debt to be paid by him, and where the acknowledgment was communicated to the creditor and accepted by him, the creditor could sue the transferee on the registered instrument. Here again their Lordships based their decision upon the equitable principle which had operated upon the minds of their Lordships of the Privy Council in the case which I have just quoted. Here in this case of *Deb Narain Dutt* v. *Chuni Lal Ghose*,[4] it may indeed be said that the facts disclosed that the creditor was actually privy to and concerned in the transaction which took place between the transferee and the debtor. In fact in the judgment of Jenkins, C. J., it is expressly stated that there was an arrangement between the plaintiff and defendant No. 5 by which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and it may also be observed that (although under the mistaken idea of their true legal effect) certain title-deeds were actually handed over at that time by the purchaser to the plaintiff. Although, therefore, the last two cases quoted seem to be based upon considerations somewhat different from those which have to be regarded in the present appeal, there is no doubt, as I have said before, that the case reported as *Dwarka Nath Ash* v. *Priya Nath Malki*[5] does constitute some authority to support agreement which had been addressed to us by the learned advocate who has appeared for the appellants. There are, however, on the other hand two cases which appear to be conclusive authority upon the

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1. (1861) 1 B. & S. 393 : 30 L. J. Q. B. 265 : 4 L. T. 468 : 8 Jur. (N. S.) 332 : 9 W. R. 781.
2. *Ibid.*
3. Deb Narain Dutt *v.* Chuni Lal Ghose, I. L. R. 41 Cal. 137 : 17 C. W. N. 1143 : 20 I. C. 630 : 18 C. L. J. 603.
4. *Ibid.*
5. (1916) 22 C. W. N. 279 : 36 I. C. 792 : 27 C. L. J. 483.

point which has been argued in this appeal. The first of these is *Jamna Das* v. *Ram Autar Pande*.[1] It is a decision of their Lordships of the Privy Council, and although the facts are not set out at any great length in the report they can by found fully reported as *Jamna Das* v. *Ram Autar Pande*.[2] It will be seen, from a perusal of the facts as given in that report, that the circumstances were almost the same as those which obtain in the present appeal. The judgment of their Lordships of the Privy Council delivered by Lord Macnaghten is very short and very much in point here. His Lordship observes :

> 'This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor.'

"I may pause here to observe that the undertaking referred to was to the effect that the purchaser would pay off the debt due to the mortgagee by the person from whom the purchaser had purchased the property. His Lordship continues :

> 'The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay his mortgage debt.'

"There is still a later case in which the same proposition has been similarly set forth in another decision of their Lordships of the Privy Council. In that case, *Nanku Prasad Singh* v. *Kamta Prasad Singh*,[3] the facts again are in that report, but very shortly set out. We have had the advantage, however, of seeing that what the facts were from the record of this Court, the case having been tried on appeal on 7th June, 1918, before Roe and Coutts, JJ. The facts were substantially identical with those which exist in the present appeal. A mortgagor having executed a mortgage in favour of the plaintiff sold the property to a third party who, in the recitals of his sale-deed agreed to pay off the mortgage with a portion of the purchase-money which was for that purpose left in this hands. The mortgagee sued upon his mortgage, not only the mortgagor but also the purchaser; but this Court refused to grant any personal decree against the purchaser, holding that he (the mortgagee) could not avail himself of the stipulation made in the contract between the purchaser and the mortgagor."[4]

In *Mitar Sain* v. *Data Ram*,[5] Mookerji, J., pointed out the circumstances which the strangers to contracts could sue and one circumstance he mentioned was that when the charge in the immoveable property was created in favour of the strangers, he could sue to enforce it. He says : "The argument on this point is that if there was an agreement it was between Mst. Manohri and Data Ram, that the plaintiffs were no parties to the argument and that, therefore, they were not entitled to sue for the specific performance of the same. If we regard the case as a family arrangement, as the transactions before their Lordships in the Bombay case[6] were regarded, the case would come directly within Sec. 23 (now Sec. 15) of the Specific Relief Act and the plaintiffs would be entitled to sue as being beneficially entitled under the arrangement. If, however, the case cannot be brought within Cl. (*c*) of Sec. 23 (old) of the Specific Relief Act it appears to me that Sec. 23 (old) of the Specific Relief Act

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1. I. L. R. 34 All. 63 : 13 I. C. 304 : 39 I. A. 7.
2. I. L. R. 31 All. 352 : 2 I. C. 460 : 6 A. L. J. 427.
3. A. I. R. 1923 P. C. 54.
4. Achuta Ram *v.* Jainandan Tewary, A. I. R. 1926 Pat. 474 at pp. 475-77.
5. A. I. R. 1926 All. 7 at pp. 10-11.
6. Kashibai Ramchandra *v.* Tatya Genu, I. L. R. 40 Bom. 668 : 36 I. C, 546 : 18 Bom. L. R. 740.

does not purport to be and is not exhaustive of the cases in which specific performance of a contract may be granted in favour of a person. The section itself simply says that specific performance of a contract may be obtained by the persons mentioned therein. It does not say that specific performance of a contract cannot be obtained by any person other than those mentioned in the section. The law laid down in *Tweddle* v. *Atkinson*[1] has not been followed as lawfully applicable to India, in the case of *Khwaja Mohd. Khan* v. *Hussaini Begum*.[2] The case before their Lordships of the Privy Council might possibly be brought within Cl. (*c*) of Sec. 23 (old) of the Specific Relief Act as being the case of a contract in settlement of marriage. But it is significant that their Lordships did not refer to this provision of the Indian law. The lead of the Privy Council which established in effect that the list of parties who are entitled to sue for a specific performance of a contract as given in (old) Sec. 23 of the Specific Relief Act was not exhaustive, was followed in Calcutta in the case of *Deb Narain Dutt* v. *Ram Sadhan Mandal*,[3] which again was followed in this High Court in *Nehal Singh v. Fateh Chand*.[4] In the two last mentioned cases the persons who sued to enforce the contract were no parties to them. The case of *Shuppa Ammal* v. *Subramaniam*[5] may also be cited. No doubt a contrary opinion was expressed in *Iswaran Pillai* v. *Taregan*,[6] but there it was laid down (at page 761) that in certain cases a stranger could sue. Some of these cases were enumerated as creation of a trust in favour of the plaintiff, the creation of a charge on immoveable property in favour of the plaintiff, where the promisor is estopped owing to transactions between the plaintiff and the promisor and where there is a settlement on marriage in which the plaintiff is beneficially entitled.

Lindsay, J., who took a contrary view to that taken by Mookerji, J., at pages 12 and 13 stated. "It is to be observed here that the plaintiffs were no parties to the agreement just mentioned nor is it pleaded, nor could it be pleaded that any consideration for the agreement moved from them. They are strangers alike to the consideration and the contract and have no right of suit unless they can establish that there was over and above a mere contract a conveyance of some interest in their favour which they are entitled to enforce either in law or in equity.

While it is true that the doctrine in *Tweddle* v. *Atkinson*[7] has been held not to apply in India, it is not to be inferred from the judgment in which this principle was laid down that there is any rule of general application in India which enables persons to bring suits upon contracts to which they are no parties. That this is so is apparent from the judgment of Lord Macnaghten in the case of *Jamna Das* v. *Ram Autar*.[8] The earlier case decided by their Lordships of the Privy Council in which the dictum regarding the rule in *Tweddle* v *Atkinson*[9] occurs in *Khwaja Mohd. Khan* v. *Hussaini Begum*[10]

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1. (1861) 1 B. & S. 393 : 30 L. J. Q. B. 265 : 4 L. T. 468 : 9 W. R. 781 : 8 Jur. (N. S.) 332.
2. I. L. R. 32 All. 410 : 37 I. A. 152 : 14 C. W. N. 865 : 7 A. L. J. 871 : (1910) M. W. N. 313 : 8 M. L. T. 147 : 12 C. L. J. 205 : 12 Bom. L. R. 638 : 7 I. C. 237 : 20 M. L. J. 614 (P. C.).
3. I. L. R. 41 Cal. 137 : 17 C. W. N. 1143 : 20 I. C. 630 : 18 C. L. J. 603.
4. A. I. R. 1922 All. 426 : I. L. R. 44 All. 702 : 20 A. L. J. 708.
5. I.L.R. 33 Mad. 238 : 19 M. L. J. 739 : 3 I. C. 1083 : 8 M. L. T. 249.
6. I. L. R. 38 Mad. 753 : 23 I. C. 961 : 26 M. L. J. 127.
7. (1861) 1 B. & S. 393 : 30 L. J. Q. B. 265 : 4 L. T. 468 : 9 W. R. 781 : 8 Jur. (N. S.) 332.
8. I. L. R. 34 All. 63 : 39 I. A. 7 : 16 C. W. N. 97 : 11 M. L. T. 6 : 13 I. C. 304 : 9 A.L.J. 37 : (1912) M.W.N. 32 : 15 C. L. J. 68 : 14 Bom. L. R. 1 : 21 M. L. J. 1158 (P. C.).
9. (1861) 1 B. & S. 393 : 30 L. J. Q. B. 265 : 4 L. L. 468 : 9 W. R. 781 : 8 Jur. (N. S.) 332.
10. I. L. R. 32 All. 410 : 37 I. A. 152 : 14 C. W. N. 865 : 7 A. L. J. 871 : (1910) M. W. N. 313 : 8 M. L. T. 147 : 12 C. L. J. 205 : 12 Bom. L. R. 638 : 7 I. C. 237 : 20 M. L. J. 614 (P. C.).

and a reference to the judgment shows that the right of suit accorded to a third party in that case was granted on the ground that a charge upon specific immoveable property had been by the agreement created in her favour. It was held in the circumstances that the plaintiff was entitled to proceed in equity to enforce her claim.

"The whole law on this subject has been discussed by a Bench of the Madras High Court in *Iswaran Pillai* v. *Taregan*,[1] and I agree with the view which is there taken.

"There can, in my opinion, be no right of suit by a stranger to the agreement unless it can be shown that there has been a charge created in his favour or that under the agreement he is entitled to some beneficial interest as a *cestui que trust*."

In (*Thirumulu*) *Subbu Chetti* v. *Arunachalam Chettiar*,[2] the question has been exhaustively dealt with by Kumaraswami, J., who gave the opinion of the Full Bench of the Court and reviewed case-law on the subject. He said, "The law in England is that the mere payment of money by *A* to *B* with a direction to pay it to *C* in cases where *B* is not *C*'s agent is revocable and confers no right of action. A distinction has been drawn between cases where the defendant has constituted himself the agent of plaintiff to pay him a particular sum of money received from a third person and cases where there is no such agency or trust express or implied.

"A similar view has been taken in India in *Raghunathchariar* v. *Shadagopachariar*.[3] There it was held that where *A* transferred his property to *B* in consideration of *B* agreeing to pay certain sums to third persons, *A* was himself entitled to sue *B* for the recovery of those sums if they were due to him in case of *B*'s failure to pay the creditors within a reasonable time. The learned Judges have referred to all the cases bearing on the point. We may also refer to *Komu Kutt* v. *Kumara Menon*."[4] Then again the learned Judge says: "The rule of common law laid down on *Tweedle* v. *Atkinson*[5] is that a stranger to the consideration cannot sustain an action on the promise made between two persons unless he has in some way intervened in the agreement.

"As regards relief given by courts of equity, *Gandy* v. *Gandy*[6] gives a right of action to the third person only when the person with whom the contract is made is a trustee express or implied for the third person for whom the benefit is intended. The conditions necessary to be fulfilled before a person, not a party to a contract, can enforce any claim under it in Court of Equity are laid down in *Gandy* v. *Gandy*,[7] in *In re Empress Engineering Co.*,[8] and in *In re Rotharham Alum and Chemical Co.*[9] The observations of Lord Hatherley in *Touche* v. *Metropolitan Railway Warehousing Co.*[10] have been dissented from as stating the rule too widely."

The learned Judge then noted the great divergence of judicial opinion prevailing in India, reviewed the entire case-law on the point and then

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1. I. L. R. (1915) 38 Mad. 753 : 23 I. C. 961 : 26 M. L. J. 127.
2. A. I. R. 1930 Mad. 382 at pp. 383, 384, 389.
3. I. L. R. 36 Mad. 348 : 2 M. L. J. 983 : 12 I. C. 353 : (1911) 2 M. W. N. 227.
4. (1918) 35 M. L. J. 692 : 49 I. C. 313 : 24 M. L. T. 260.
5. (1861) 1 B. & S. 393.
6. (1885) 30 Ch. D. 57 : 54 L. J. Ch. 1154 : 53 L. T. 306 : 33 W. R. 803.
7. *Ibid*.
8. (1880) 16 Ch. D. 125 : 29 W. R. 342 : 43 L. T. 742.
9. (1884) 25 Ch. D. 103 : 53 L. J. Ch. 290: 32 W. R. 131 : 50 L. T. 219.
10. (1871) 6 Ch. A. 671.

concluded : "We are of opinion that where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person a suit to enforce that stipulation by the third party will not lie".

25. Persons beneficially entitled.—Persons beneficially interested mean persons entitled to the benefit of the settlement or compromise though otherwise a stranger to the contract.[1] This clause confers a right to sue for specific performance of contract on a person who is beneficially entitled thereunder even though he be not a party to it provided it is a settlement on marriage or compromise of doubtful rights between members of the same family. "It is a general principle both at common law and in equity, that a stranger to the contract cannot sue on it and this is not varied by the mere fact that stranger takes a benefit under it. This clause cites one exception to this rule, inasmuch as under it persons may claim benefits under deeds and may sue for the execution of trusts of marriage settlements and for the performance of contracts antecedent to marriage (of which they are the issue) to none of which transaction were they parties."[2] A good example of this class of cases is afforded by *Hill* v. *Gomme*.[3] In this case a rich man agreed to bring up a poor man's son as a gentleman and to leave him some of his property. There was part-performance of the agreement : the poor man's son came to live with the rich man and the latter brought him up. But the agreement was not fully acted upon. In a suit by the adopted son the Court directed the agreement to be acted upon in whole having regard to the conduct of the promisor and the loss that the boy would otherwise sustain. So also *Van Dyne* v. *Vreeland*[4] is to the same effect. In this case a rich man brought up his nephew (brother's son) as his own son under an agreement with his brother to so bring him up. The boy lived with the rich man for 25 years. The boy's father did not give him any share in his own property under the belief that the adoptive father would do so. It was held by the Court that the boy could maintain a suit for the fulfilment of the agreement on the part of the uncle. The American law is also to the same effect. Thus in a recent case, *Matheson* v. *Gullickson*,[5] a farmer and his wife agreed to leave all their properties to the plaintiff if he agreed to live with them unmarried, as long as either lived. The plaintiff acted upon the agreement ; he came to the farmer's house, remained unmarried and worked for the farmer and his wife for 25 years, i. e. until the farmer died leaving the properties to third persons. It was held that plaintiff was entitled to an equitable decree assuring him the properties, if he faithfully performed during the lifetime of the wife of the farmer.

Effect of part-performance.

American law.

26. Marriage settlement.—Settlement has been defined by Sec. 2 of the present Act as any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interest in moveable or immoveable property is disposed of or is agreed to be disposed of.[6] In case of marriage settlements the reasonable rule is that all beneficially entitled under the contract of settlement are within the valuable consideration of the marriage, and so competent to enforce stipulation in their own favour.[7] When the father of a minor boy in anticipation of his marriage with a minor girl stipulated with her to pay her Rs. 500 per mensem,

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1. Avadh *v.* Sita, I. L. R. 29 All. 37 : 1 A. L. J. 329.
2. Nelson's *Special Relief Act*.
3. (1839) 1 Beav. 540, affd. 5 My. & G. 250.
4. 11 N. J. Eq. 370 ; also Anderson *v.* Anderson, (1907) 9 L. R. A. (N.S.) 229.
5. 24 N. W. (2d) 704, Minn. 369.
6. Section 3, Specific Relief Act.
7. Collett, *Specific Relief Act*, Sec. 23.

it was held by the Privy Council that the girl though not a party to the contract was entitled to enforce the contract, she being beneficially entitled.[1] "In India and among communities", observed Ameer Ali J., in the above-noted case, "circumstanced, as the Mohammedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreement or agreements entered into in connexion with such contracts."

In *Ma E Tin* v. *Ma Byaw*,[2] the plaintiff-appellant filed a suit for specific performance of an ante-nuptial contract by which the parents of her husband agreed to give her 10 acres of land. The defence was that there was no such agreement. But the Lower Courts have held that there was such an agreement, and the Trial Court gave a decree in favour of the plaintiff, but the Lower Appellate Court held that an agreement regarding five acres only had been proved and dismissed the plaintiff's suit regarding the other five acres. The plaintiff filed this appeal and the defendants also filed cross-objections to the decree of the Lower Appellate Court.

The first objection taken by the defendants is that as the contract was made between the parents, the plaintiff could not file this suit. But this point of the right to file this suit was taken in a previous appeal filed in the Rangoon High Court and in *Ma E Tin* v. *Ma Byaw*,[3] it was held that the plaintiff could file this suit. However, this point may be considered to be settled by the Privy Council's decision in the case of *Khwaja Mohammad Khan* v. *Husaini Begum*,[4] where their Lordships held that the common law doctrine embodied in the case of *Tweedle* v. *Atkinson*,[5] did not apply to India, and that in India and among communities circumstanced as the Mohammedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts.

There can therefore be no doubt that the plaintiff is entitled to file this suit, and the only question that now remains to be decided is whether the plaintiff has proved that defendant 1 and her husband had agreed to give her 10 acres of land or not.[6] When a widow on her second marriage enters into an agreement with her intended husband wherein there is a covenant to convey the property for the benefit of her children by a former husband, such a covenant is enforceable in a suit by those children and is an exception to the general rule that the performance of a contract cannot be enforced by volunteers.[7] The presumption in case of marriage settlement in favour of the children of a previous marriage is that the contract is voluntary but is otherwise in case of a widow.[8]

27. Compromise of doubtful rights, etc.—An agreement entered into upon a supposition of a doubtful right, though it afterwards comes out that the right was on the other side shall be binding and the right shall not prevail against the agreement of the parties, for the right must always be on one side or the other and, therefore, the compromise of a doubtful right is a

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1. Mohammad Khan *v.* Husaini Begum, I.L.R. 32 All. 410 (P. C.) : 37 I. A. 152 : 7 A. L. J. 871 : 14 C. W. N. 860 : 12 C. L. J. 205.
2. A. I. R. 1930 Rang. 172.
3. A. I. R. 1928 Rang. 286.
4. I. L. R. (1910) 32 All. 410 : 7 I. C. 237 : 97 I. A. 152.
5. (1861) 1 B. & S. 393.
6. Ma E Tin *v.* Ma Ryaw. A. I. R. 1930 Rang. 172 at pp. 172-73.
7. Gale *v.* Gale, L. R. 6 Ch. D. 114.
8. 37 Ch. D. 32.

sufficient foundation of an agreement. Where agreements are entered in to save the honour of a family, and reasonable ones, a court of equity will if possible decree a performance of them.[1] Thus where an agreement had been entered into by a father with his eldest son treated as legitimate (who was subsequently found to be illegitimate) and the second son (legitimate) the Court decreed the specific performance at the instance of the son of the illegitimate son chiefly, as the agreement established the peace of the family.[2]

28. Compromise of doubtful rights is binding except in case of mistake, equality of position, undue influence, coercion, fraud, etc.— In the absence of proof of mistake in equality of position, undue influence, coercion, fraud or any similar ground a partition or family agreement made in a settlement of doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from. If the parties have settled a dispute, such settlement is not to be set aside simply because it gave to one of the parties more than what he might possibly have recovered if he had taken the judgment of the Court. The courts will not scan with much nicety the quantum of consideration. There is nothing in the doctrine of family arrangement opposed to the general principle that when it is sought to bind a minor on agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage has been taken of the minor's position, a family arrangement can be set aside on the ground of undue influence, or inequality of position or one of the other grounds which would vitiate such an arrangement in the case of adults. But where there is no defect of this nature, the settlement of a doubtful claim is of as much advantage to a minor as to an adult and where offensive dispute has been fairly settled the dispute cannot by re-opened on the sole ground that one of the party to the family arrangement was a minor.[3] Equity always leans towards the maintenance of family arrangement.[4] A court of equity will be glad to lay hold of any just ground to carry it into execution and to establish the peace of the family.[5] In fact the compromise of the doubtful claims, whatever may be the actual rights of the parties with a view to prevent litigation, has been generally upheld in all enlightened system of jurisprudence.[6] Where parties to a deed whereby a suit for partition was compromised, agreed to pay Rs. 500 to the plaintiff, who was not a party to the suit for compromise, it was held that he could claim the amount being a person beneficially entitled to recover the amount by a suit.[7] Similarly, where a member of a joint Hindu family agreed that a particular share of the estate should be allotted to a minor member, the latter though not a party to the contract can maintain an action for specific performance.[8] The principle on which the doctrine is based is stated by Fry thus: "Where parties, whose rights are questionable, have equal

Arrangement must be for the benefit of the minor.

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1. Stapilton *v.* Stapilton, 1 Wh. & T. 223; Ram swar *v.* Rambahadur, I. L. R. 31 Cal. 111 : 7 C. W. N. 688 upheld by Privy Council in I. L. R. 34 Cal. 70 (P. C.) : 5 C.L.J. 175 : 11 C.W.N. 178, *see* also 4 C.L.J. 323 : 13 C.W.N. 501 ; 9 C.L.J. 19 , I.L.R. 13 Mad. 474.
2. Stapilton *v.* Stapilton, *supra*.
3. Keramatullah *v.* Keramatullah, 49 I. C. 886 : 23 C. W. N. 118.
4. *Ibid* , Kamla Kumari *v.* Narendra, 9 C.L.J. 19 , Avadh *v.* Sita Ram, I.L.R. 29 All. 37 : 1 A. L. J. 329 ; Ganesh *v.* Tuljaram, 19 M. L. J. 4 ; Sarkar *v.* Bejoy, 13 C. W. N. 501 ; Chabli *v.* Parmal, 51 I. C. 919 at p. 920 : I.L.R. 41 All. 611.
5. Ganesh *v.* Tuljaram, *supra*.
6. 1 Wh. & T., 8th Ed., 234.
7. Protap *v.* Sarat, 5 C. W. N. 386 ; *see* Fry, Sec. 391 at p. 186.
8. Avadh *v.* Sita Ram, *supra*.

Settlement to be respected.

knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective rights amongst themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time[1] and that notwithstanding the subsequent discovery of some common error[2] or a subsequent judicial decision showing the rights of the parties to have been different from what they supposed, or that one party had nothing to give up."[3]

29. Transactions between parent and child.—Transactions between parent and child may proceed upon arrangement between them for the settlement of property, or of their rights in property in which they are interested. In such cases the Court regards the transactions with favour. It does not minutely weigh the consideration on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction.[4]

30. Compromise of doubtful rights may be inferred from the conduct of the parties.—There may be an express formal agreement of a family settlement or there may only be the evidence of a family compromise deducible from the conduct of the parties. The principles of this clause apply to the family agreements made not only ro cases, in which the parties came to an understanding to save the peace, but also to those, in which the compromise was effected to preserve the property. Thus where a person dies leaving behind him a widow and two sons and property which had been managed for 20 years in equal shares, the Court will uphold the arrangement as a family compromise.[5]

31. Duty of parties to make full disclosure of all the circumstances.—Before a court can uphold a family arrangement, there must be evidence of full disclosure of all the circumstances known to the parties and if one of the parties has withheld any of these, whether by design or by accident, the agreement cannot be enforced.[6] In the negotiations for family settlements and compromise it is the duty of the parties and their professional agents not only to abstain from misrepresentations but to communicate to the other parties all material facts within their knowledge affecting the rights to be dealt with. The omission to make such communication, even without any wrong motive, is a ground for setting aside the transaction. "Full and complete communication of all material circumstances is what the Court must insist on."[7] "Without full disclosure honest intention is not sufficient" and it makes no difference if the non-disclosure is due to an honest but mistaken opinion as to the materiality or accuracy of the information withheld.[8] The operation of this rule is not affected by the

Without full disclosure honest intention is not sufficient.

1. Williams *v.* Williams, L. R. 2 Ch. 294 at p. 304 (Turner, L.J.).
2. Pickering *v.* Pickering, 2 Beav. 56 ; Frank *v.* Frank, 1 Cas. In. Ch. 84.
3. Lawton *v.* Campion, 18 Beav. 87 ; Fry, p. 186, Sec. 391.
4. Pollock on *Contracts*, p. 490 (1951 Winfield Ed., 304).
5. Williams *v.* Williams, *supra* ; Bucknell *v.* Bucknell, 7 Ir. Ch. R. 130 ; Halsbury, p. 366.
6. Groves *v.* Perkins, 6 Sim. 576 ; Harvey *v.* Coole, 4 Russ. 34.
7. Gordon *v.* Gordon, (1816-19) 3 Sw. 400, 473 : 19 R.R. 230, 241, 242.
8. Gordon *v.* Gordon, *supra*. How far does this go ? It can hardly be a duty to communicate mere gossip on the chance of there being something in it. Probably the test is whether the judgement of a reasonable man would be affected ; *cf.* Heywood *v.* Mallalieu, (1183) 25 Ch. D. 357 : 53 L.J. Ch. 492 ; Halsbury, p. 446 (Hailsham Ed.).

leaning of equity, as it is called, towards supporting re-settlements and similar arrangements for the sake of peace and quietness in families.[1] A distinction should be drawn between doubt and mistake. Where an agreement is arrived at in family matter where there is dispute as to the rights of the parties, the agreement will be upheld by the Court, but if there be a supposition of right without a doubt upon it the Court will not enforce the agreement if the supposition is found to be mistaken.[2] Where parties whose rights are questionable have equal knowledge of facts and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective rights amongst themselves, the Court will uphold the agreement in spite of discovery of some common error.[3] If the error relied on, be in a matter of fact, and the fact be one, not included in the compromise, and of such a character that it must be considered as the determining motive, its existence is regarded as a condition implied, though not expressed, and then, if the fact fails, the fountain of agreement fails. Thus if a compromise assumes the genuineness of a deed or will and it turns out to be forged or revoked, the agreement founded upon this assumed fact fails. But when the compromise is to settle dispute about a right, its object is to avoid litigation as to the validity of that right, and the right is not assumed as a fact but the giving up of the claim to the right, is the fact, in which the compromise is founded and though it turns out that the right claimed was unfounded, there is then no failure of the consideration for the agreement.[4] So also, the circumstance that the rights of parties supposed to be existing at the time of the settlement turn out to be subsequently either to be different or not existing at all by reason of a later judicial decision would not render the settlement bad.[5] There can be no doubt that the real dispute which led to the institution of that suit was whether the two brothers were joint or separate. If they were joint, the defendant would be entitled by survivorship to the entire joint-family properties. On the other hand, if they were separate, Bidyadhar's widow would be entitled to separate possession of the properties left by him. Even if the brothers were joint, Bidyadhar's widow and daughter-in-law would be entitled to maintenance out of the properties left by Bidyadhar. The effect of the compromise was to settle the dispute between the members of the family. The compromise was obviously 'a compromise of doubtful rights between members of the same family" as contemplated by Sec. 23 (*c*), Specific Relief Act. Mr. B. N. Mitter on behalf of the respondent suggests that all the members of the family, that is to say, the sons of the defendant and the present plaintiff not being parties to the compromise, it cannot be regarded as a family settlement within the meaning of Sec. 23 (*c*). He has not been able to support this contention by any authority. Here the position is quite clear. There were two branches of the family. One branch was represented by the defendant and the other branch (assuming that it was separate) by the widow Sakuntala. Having regard to the nature of that suit, it cannot possibly be suggested that the other members of the family were necessary parties to it. Section 23 (*c*) speaks of "members of the same family". The compromise was arrived at between parties who for the purpose of the suit represented the two branches of the family. It is difficult to see why such a compromise will not be a family settlement within the meaning of Sec. 23 (*c*). Under the terms of the compromise the defendant clearly agreed to give the plaintiff maintenance at the rate claimed by her. In view

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1. Gordon *v.* Gordon, (1816-19) 3 Sw. 400 at p. 473 : 19 R. R. 232 at p. 241, 242.
2. Cooper *v.* Phips, 2 H. L. 170, Collet, *Specific Relief Act.*
3. Fry, *Specific Performance,* at p. 304, Bucknell *v.* Bucknell, 7 Ir. Ch. R. 130.
4. Trigge *v.* Lovellee, 9 Jur. N. S. 261.
5. Fry, Sec. 301, Lawton *v.* Campion, 18 Beav. 87.

of the provisions of Sec. 23 (*c*) the plaintiff is entitled to enforce the terms of compromise decree against the defendant.

In their Lordships' view "the general rule is that only those persons can sue upon a contract who are parties to it. This rule is subject to certain well-recognized exceptions, e.g., where a person has been allowed to sue on a contract to which he is not a party on the ground that he claims through a party to the contract, or that he is in the position of a *cestui que trust* or that he is principal suing through an agent or that he claims under a family settlement."

A family settlement is thus one of the exceptions, and the present case falls within that exception.

Reference may also be made to the case in *Jahandar Baksh* v. *Ram Lal*,[1] in which Mookerjee and Tennon, JJ., observed :

> "In England, the rule is well settled that, subject to certain exceptions which may briefly be described as cases of trust.....quasi-contract.....or near relationship.....where two persons make a contract in which one of them promises to confer benefits upon a third party, the latter cannot enforce performance thereof.
>
> "Upon the authorities it may be taken to be well settled that the rule in *Tweedle* v. *Atkinson*,[2] is subject to certain exceptions. Whether the present case falls within those exceptions or not, though I think it does, is quite immaterial, because it clearly comes under Sec. 23 (*c*), Specific Relief Act."

Therefore, in *Smt. Janaki Bala Debya* v. *Maheswar Das*,[3] it was held that the plaintiff, though not a party to the compromise decree, is entitled to enforce its terms against the defendant.[4]

The person who seeks rescission and therefore restitution to his estate before the contract must do the like on his part and make restitution : "*Restitutio in integrum*," said Lord Cranworth, in *Western Bank of Scotland* v. *Addio*,[5] "can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into." "If by any act on his part, done even in ignorance of the fraud, the defrauded party has made this impossible he cannot obtain rescission."[6] So, no fraud in bringing about a marriage settlement will enable the frauded party after marriage to rescind it.[7]

32. Assignments of contract.—As a general rule the benefit of a contract cannot in equity be assigned so as to enable the assignee to enforce the specific performance of the assignment. But there are certain exceptions to the rule.

Where there is an out and out sale with a covenant of repurchase by a vendor, it is assignable, unless it has been expressly prohibited in the deed

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1. I. L. R. 37 Cal. 449 : 5 I. C. 565 : 11 C. L. J. 364 : 14 C. W. N. 470.
2. (1861) 1 B. & S. 393 : 30 L. J. Q. B. 265 : 9 W. R. 781.
3. A.I.R. 1942 Pat. 160 : I. L. R. 21 Pat. 377.
4. *Ibid.* at pp. 461-62, 464-65.
5. L. R. 1 H. L. Sc. at p. 164.
6. *Ibid.* at p. 165.
7. Johnston *v.* Johnston, 32 W. R. 1016 : 31 W. R. 30.

itself. In a case of this nature it was argued on behalf of the defendant that the plaintiff could not compel specific performance of the condition of reconveyance for two reasons, namely, (1) that the covenant of repurchase was personal to the vendor and could not be therefore assigned, and (2) that in any case, the plaintiff or his assignor having not offered to repurchase within the specified time, the covenant for repurchase was no longer enforceable. Rejecting both of the above contentions of the defendant's counsel, Veeraswami, J., in *N. Pattay Gounder* v. *P. L. Bapuswami*[1] observes: "There is nothing in the covenant for repurchase embodied in Ex. B-1 to suggest that it was personal to the vendor. It is true that the language which I already extracted above in Tamil is that the vendor would tender the price within the stipulated time and thereupon the vendee should reconvey the property to the vendor. But that does not mean that there was any personal element in the covenant. There is no condition in Ex. B-1 that the covenant for repurchase was not assignable. *Prima facie* the rights and liabilities under a contract like an agreement for repurchase are, in my opinion, assignable. It is this principle that has been embodied in Sec. 21 (*b*) [Sec. 14(*b*) (new)] and Sec. 23 (*b*) [Sec. 15 (*b*) (new)] of the Specific Relief Act. Under the former provision a contract dependent upon the personal qualification or volition of the parties cannot specifically be enforced." After quoting Sec. 23 (*b*) (old) the learned Judge proceeds "unless the contract involves a personal quality of a party as a material ingredient or there is an express stipulation in the contract forbidding assignment of the rights or obligations thereunder, specific performance of the contract has to be directed." The learned Judge then quotes the following passage from Fry on *Specific Performance of Contract*, 6th Ed., Sec. 222: "As a general rule, the benefit of a contract may be assigned in equity, and the assignee can enforce specific performance of it, making his assignor a party." Again in Sec. 225, Fry states: "It is an obvious principle, that where the learning, skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient to it, then the contract can be performed by him alone. It may be a matter of indifference to *A*, whether *B* or *C* be the purchaser of the stock or paid-up shares he is selling; but it is a matter of great moment whether a distinguished artist or his nominee is to paint picture for which *A* may have agreed to pay a certain sum." He then holds that the covenant for repurchase was assignable.

In *Sakalaguna Nayudu* v. *Chinna Munuswami Nayakar*,[2] the Privy Council observed: "A document executed by the parties to, and on the date of, a sale of immoveable property providing that the purchaser shall reconvey the property to the vendor after a period of 30 years on the vendor paying the purchase price, constitutes a contract enforceable by the assignee of the vendor against the sons of the purchaser; it is not merely an offer incapable of assignment until accepted by the tender of the price."

In *Mohammad Yamin* v. *Abdul Majid*,[3] as a result of the fact that a part of the right to enforce the contract of re-sale got vested by process of law in the defendant No. 1 both the right to enforce the contract and the liability to have the contract enforced against him became vested in the defendant No. 1. To the extent therefore the right and the liability got merged in each other and the liability of re-selling the share which thus got vested in the defendant No. 1 has come to an end and here can be no question of

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1. A. I. R. 1961 Mad. 276 at p. 280.
2. A. I. R. 1928 P. C. 174 : I. L. R. 51 Mad. 533; *see* N. Pattay Gounder *v.* P. L. Bapuswami, *supra*.
3. A. I. R. 1962 All. 476.

that part of the liability being enforced by the plaintiff. So far as the defendants Nos. 8 to 13 are concerned, being the heirs of the daughter of Ali Bux they have also inherited a part of the right which Ali Bux had to get back property. They are, however, not inclined to enforce that right against their own father and are objecting to the specific performance of the contract. They are naturally siding their father and as they are not anxious to enforce their right against their father it is neither proper nor desirable to direct that a sale must be executed in respect of their share of the property also.

Under Sec. 23 (*b*) (old) of the Specific Relief Act, specific performance of a contract may be obtained by the representative-in-interest of any party thereto. The plaintiffs being representatives-in-interest of Ali Bux can therefore enforce the contract. They wanted to enforce the whole contract and they are prepared to pay the whole price but as shown in the present case it is not possible to enforce the whole contract. Under Sec. 17 (old) of the Specific Relief Act a part of the contract can be directed to be enforced only if the case is covered by one of the three Secs. 14, 15 and 16.

Analysing the provisions of Sec. 16 (old) the Privy Council observed in *William Graham* v. *Krishna Chandra Dey*[1] :

> "To make this section applicable it had to be shown that there was a part of the contract which (*a*) 'taken by itself could and ought to be specifically performed' and (*b*) 'stood on a separate and independent footing' from the other part of the contract, which admittedly could not be performed."

In that case it was noted by their Lordships that materials before the Court were not sufficient to enable it to record a definite finding in respect of either of the two ingredients.

Where in a case in which the contract has by the death of Ali Bux and his daughter got split in two portions which can be independently and separately performed and stand on different footings. In respect of one portion it is not possible or desirable to direct specific performance but as the other portion stands on a separate and independent footing there is no reason why it should not be directed to be specifically enforced. The case thus appears to be clearly covered by Sec. 16 and the plaintiffs can therefore enforce the contract in part. The plaintiffs cannot, therefore, be non-suited simply because some of the other heirs and legal representatives of Ali Bux are not prepared to join them in enforcing the contract of re-sale. In equity as well as in law, they are entitled to get back their share of the property on payment of the proportionate consideration.[2]

And then, "Under (old) Sec. 23 (*b*) of the Specific Relief Act, specific performance for a contract may be obtained by the representative-in-interest of any party thereto. The plaintiffs being representatives-in-interest of Ali Bux can therefore enforce the contract."

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1. A. I. R. 1925 P. C. 45.
2. Mohammad Yamin *v.* Abdul Majid, A. I. R. 1962 All. 476 at pp. 479-80.

"The plaintiffs cannot therefore be non-suited simply because some of the other heirs and legal representatives of Ali Bux are not prepared to join them in enforcing the contract of re-sale. In equity as well as in law, in our opinion, they are entitled to get back their share of the property on payment of the proportionate consideration."

A transferee of a contract for reconveyance can enforce the contract in the absence of any contract to the contrary.[1]

33. "**Representative-in-interest**".—In sub-section (*b*) of this section these words have been used "to connote a person, who, in law" represents the interest of the property to a contract. Such a representative-in-interest may be his legal representative, his transferee, executor, administrator or assignee and the like. But the matter of enforcement of specific performance of the contract, where the subject-matter of the contract relates to personal service, solvency or learning, skill or other volition of the party and the contract insists upon performance by the party concerned the contract shall be specifically enforced and the performance of the contract is not referable to any other person.

34. "**Remainderman**" "**Remainder estates**".—A remainderman is a person who takes remainder estate, after the prior estate has been determined. In other words, a remainderman's interest in the estate is limited to take effect to be enjoyed after the termination of a prior man's interest in the estate both estates being created at the same time in favour of a third party by the original owner.[2] For the better management and enjoyment of the estate, a tenant for life is empowered to enter into contracts regarding the same, e. g. to grant a lease which may extend beyond his own lifetime, and the remainderman after determination of the life-estate, succeeds to the title, or enters into possession. If, say, the lease was made in the due exercise of a power vested in the intermediate holder, the remainderman is within the scope of the benefit of such power, and he may sue to enforce the covenants in the lease, though strictly speaking, he is neither the assignee nor the successor-in-title of the holder.[3] In cases of contract under powers, the question sometimes arose, whether a contract entered into by the donee of the power could be enforced by or against the remainderman, the cases in which he could sue or be sued being, of course, co-extensive. The rule by which this question was decided was that the contract was binding in those cases, and those cases only, in which it might have been enforced against the donee of the power himself, independently of any conduct on his part.[4]

In *Ingle* v. *Vagham Jenkins*,[5] approved in *C. A. Capital and Counties Bank* v. *Rhodes*,[6] specific performance of such a contract was enforced against a remainderman at the suit of the executor of the person who had contracted with the tenant for life. The case is interesting because of a curious question of merger which arose in it. The first tenant for life under a settlement having power to grant ninety-nine years' building leases, agreed to grant such a lease of a portion of the settled estate to the second tenant for life, at a small ground rent, upon latter building a house on the property to be

1. Ali Mistri *v.* Kayam Ali, A. I. R. 1955 Cal. 621 ; Rashid Ali *v.* Darparam Namasudra, A. I. R. 1954 Assam 95; Sakalaguna Nayudu *v.* Chinna Munu Swami Nayakar, A. I. R. 1928 P. C. 174, Visheshwar Vana Bhatta *v.* Dorgappa Irappa, A. I. R. 1940 Bom. 359; Bipin Behari Deb *v.* Masrab Ali, A. I. R. 1961 Assam 173 at p. 175.
2. Blackstone, Com. 164.
3. Rogers *v.* Humphry, (1835) 4 A. & E. 299; Shannon *v.* Bradstreet, 9 R.R. 11.
4. Morgan *v.* Millman. 10 Ha. 279 S. C. : 3 De. G. M. & G. 24, Lowe *v.* Swift, 2 Ball. & B 529.
5. (1900) 2 Ch. 368.
6. (1903) 1 Ch. 631 at p. 633.

leased. After the house had been built, at a cost of Rs. 1,500, the first tenant for life died, and the second became legal life-tenant in possession ; but the lease was not granted in the latter's lifetime. The remainderman resisted the executor's claim, on the ground that the equitable interest created by the agreement had become merged, or extinguished in the legal life estate of the termor. It was held, however, that that was not so and that the principle being that a court of equity looks to the benefit of the person in whom two interests coalesce, and it being clearly for the termor's benefit that his equitable interest should not merge, there was no merger in equity.

35. "Reversioner."—The word "reversioner" has been used in this section in a wider sense and not in the technical sense as used and understood in Hindu law. The term means not only reversion as used and understood in the strict technical sense but also includes not only remainderman ; but also an assignee. A reversion in the strict sense is the residue on an estate left in the grantor to commence in possession after the determination of some particular estate granted only by him.[1] A reversioner in possession is distinguishable from reversioner in remainder. The case is one of the reversioner in possession where the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant, and it is that of a reversioner in remainder where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain injury by reason of its breach.[2] Clauses (*e*) and (*f*) of Sec. 15 of the present Specific Relief Act classifies reversioners under two heads, (1) those that are reversioners in actual possession of the estate and the period of the expectancy has ended and (2) those reversioners who are not in possession of the estate and are still living in a state of expectancy. The reversioners of class one as mentioned in Cl. (*e*) of this section are no longer reversioners, but are real owners, actually enjoying the fruits of the estate. They have been so described in Cl. (*e*) of the present section as to distinguish them from other real owners and have been so described because at one stage they were labouring under conditions of expectancy which stage has terminated. The reversioners in remainder are those whose stage of expectancy is still continuing and who are not in possession of that estate. Under Cls. (*e*) and (*f*) of the section both the clauses of the reversioners have certain legal rights in the estate which they may enforce on the fulfilment of the conditions prescribed in Cls. (*e*) and (*f*) of this section.

36. Suit by a stranger for specific performance of a contract when can be decreed.—A stranger to the consideration cannot sustain an action on the promise made between two persons unless he has in some way intervened in the agreement. But even in England, that rule of law has been made subject to the rule of equity, as given in *Gandy* v. *Gandy*.[3] Therein, a right of action is given to the third person, when the person with whom the contract is made is a trustee express or implied for the third person for whom the benefit is intended.

Exceptions, like (*a*) the creation of a trust in favour of the plaintiff in respect of the amount sued for ; (*b*) the creation of a charge on immoveable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff ; (*c*) the creation of a settlement on marriage in which the plaintiff may be beneficially entitled as provided by

1. 2 Blackstone, Com 175.
2. Dr. Banerji's *Tagore Law Lectures*, 2nd Ed., App. C, 78.
3. (1885) 30 Ch. D. 57.

Sec. 23 (now Sec. 15), Specific Relief Act, and (*d*) **estoppel as against the** promisor owing to transactions between the plaintiff and the promisor.[1]

37. **Effect of a decree for specific performance of contract.**—A decree for specific performance passed on the basis of a contract for sale of immoveable property does not create any interest in the property in favour of the decree-holder. It only superadds the sanction of the Court to enforce it through the medium of Court. As such the decree-holder can enforce the said contract and get it enforced through Court, subject to whatever interest the judgment-debtor had at the time of execution.[2]

38. **Want of mutuality in the contract disentitles decree for specific performance.**—It is common ground that the plaintiff at the time of the agreement was a minor and the agreement could not have been enforced against him by the defendant. Thus there is a want of mutuality in the transaction and this defect disentitles the plaintiff to enforce the agreement for specific performance.[3]

39. **Benefit of contract to repurchase is assignable; good title passes on such assignment and suit for specific performance is maintainable.**—This section which enumerates the category of persons entitled to claim specific performance of contract does not support the extreme contention that specific performance could never be granted in favour of an assignee from one of the parties to the contract. That section says that besides the immediate parties to the contract the "representative-in-interest or the principal (if any such party was acting as his agent) can obtain specific performance, provided (1) that the contract itself does not prohibit the assignment and (2) that personal considerations do not form the foundation or the material element in the contract. The question whether specific performance can be enforced by a representative-in-interest of the parties to the contract has first to be determined on a fair construction of the contract itself. It is, however, suggested that the rule contained in this section will not apply to agreements to reconvey, which are essentially unilateral in character, inasmuch as it is not open to the other party, viz. the vendee, to compel specific performance.

An option to purchase may not by itself constitute a contract. But when the option is exercised in due conformity with the terms of the contract that will amount to an acceptance of the offer, with the result that a binding contract for reconveyance of the property results. A contract having thus come into existence on the exercise of the vendor to repurchase the property, the provisions of Sec. 23 (now Sec. 15) of the Specific Relief Act will apply. In *Kanakasabapathi Chetti* v. *Govindarajulu Naidu*,[4] a Bench of this Court held that an agreement to reconvey where it forms part of the original sale, should be regarded as supported by consideration, and that there was also the element of mutuality present in it.

If the provisions of Sec. 15 were held to apply, as indeed they should be, a contract having come into being, then an assignee of the vendor will be entitled to claim specific performance unless the contract itself prohibits the assignment or it has been stipulated therein that the benefit of repurchase could be claimed only by the vendor or by any particular person specified therein.

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1. Sk. Khadimul Haque *v.* Marai Dubey, A. I. R. 1965 Pat. 262 at p. 264; *see* also Ram Baran Prasad *v.* Ram Mohit Hazara, A. I. R. 1967 S. C. 744 and Umar Noor Mohammad *v.* Dayal Saran Darbari, A. I. R. 1967 All. 253.
2. Hiralal Agarwala *v.* Bhagirathi Gore, A.I.R. 1975 Cal. 445 at p. 447.
3. Bholanath *v.* Balbhadar Prasad, A.I.R. 1964 All. 527 at p. 528:1964 A.L.J. 494.
4. A. I. R. 1964 Mad. 219 at p. 221 : 77 M. L. W. 322.

It will be for the person who pleads that the contract is not enforceable, to show that the intention of the parties thereto was that it was to be enforced only by the persons named therein and not by the assignee.

The benefit of the contract of repurchase can be assigned by Govindammal and that, on such assignment taking place, the respondent acquired a valid title to claim specific performance.[1]

New	Old
16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—	**24. Personal bars to the relief.**—Specific performance of a contract cannot be enforced in favour of a person—
(*a*) who would not be entitled to recover compensation for its breach ; or	(*a*) who could not recover compensation for its breach ;
(*b*) who has become incapable of performing, or violates any essential terms of the contract that on his part remains to be performed or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract ; or	(*b*) who has become incapable of performing, or violates any essential terms of the contract that on his part remains to be performed ;
(*c*) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant.	(*c*) who has already chosen his remedy, and obtained satisfaction for the alleged breach of contract ; or
	(*d*) who previous to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made, and was then in force.
Explanation.—For the purposes of Cl. (*c*),—	

1. Sinnakaruppa Gounder *v.* M. Karuppaswami Gounder, A. I. R. 1965 Mad. 506 at pp. 507, 508 : I. L. R. (1965) 2 Mad. 20 : 78 M. L. W. 515.

New

(*i*) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court ;

(*ii*) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

Old

Illustrations

To clause (a)—A, *in the character of agent for* B, *enters into an agreement with* C *to buy* C's *house.* A *is in reality acting not as agent for* B, *but of his own account.* A *cannot enforce specific performance of his contract.*

To clause (b)—A *contracts to sell* B *a house, and to become a tenant thereof for a term of fourteen years from the date of a sale at a specified yearly rent.* A *becomes insolvent. Neither he nor his assignee can enforce specific perfotmance of the contract.*

A *contracts to sell* B *a house and garden in which there are ornamental trees, a material element in the value of the property as a residence.* A, *without* B's *consent, fells the trees.* A *cannot enforce specific performance of the contract.*

A, *holding land under a contract with* B *for a lease, commits waste, or treats the land in an unhusbandlike manner.* A *cannot enforce specific performance of the contract.*

A *contracts to let, and* B *contracts to take, an unfinished house,* B *contracting to finish the house, and the lease to contain covenants on the part of* A *to keep the house in repair.* B *finishes the house in a very defective manner ; he cannot enforce the contract specifically though* A *and* B *may sue each other for compensation for breach of it.*

Old

To clause (c)—A *contracts to let, and* B *contracts to take, a house for a specified term at a specified rent.* B *refuses to perform the contract.* A *thereupon sues for, and obtains, compensation for the breach.* A *cannot obtain specific performance of the contract.*

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1. **Legislative changes.**—This section corresponds to the old Sec. 24 of the repealed Specific Relief Act. It provides that no personal relief can be granted in certain specified cases. Sub-clause (*a*) of this section provides that specific performance of a contract cannot be enforced in favour of a person who would not be entitled to recover compensation for the breach of the contract. Sub-clause (*a*) of the new Sec. 16 reproduces sub-clause (*a*) of the repealed Sec. 24 with this modification that for the words "could not recover" the words "would not be entitled to recover" have been substituted. Sub-clause (*b*) corresponds to the old sub-clause (*a*) with this change that the words "or act in fraud of the contract or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract ;" have been added after the words "remains to be performed". Sub-clauses (*c*) and (*d*) of the old Sec. 24 have been deleted and in their place a new sub-clause (*c*) has been substituted. A new explanation has been added and the illustrations to Cls. (*a*), (*b*) and (*c*) of the repealed Sec. 24 have been omitted. Illustrations have also been omitted.

2. **Reasons for the change.**—The Law Commission of India in their report on the Specific Relief Act, 1877, have made the following observations. They state : "In Cl. (*a*) of old Sec. 24, the words 'could not' are quite clear and have occasioned a difference of views among the commentators as to their meaning.[1]

"We, therefore, recommend that in Cl. (*a*) of old Sec. 24 the words 'would not be entitled to' be substituted for the words 'could not'.

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1. Collett, *Law of Specific Relief*, 3rd Ed., p. 207 ; Banerji, *Law of Specific Relief*, 2nd Ed., App. C, 79.

"It has been laid down in England as well as India that the plaintiff in an action for specific performance of a contract is disentitled to the remedy not only where he has violated any of its essential terms but also where he has acted in contravention of it; without violating any of its terms.

"Thus in Fry[1] it is observed :

> 'We shall now consider the closely allied cases where he (the plaintiff) has disentitled himself, not by default merely, but by acts in fraud or contravention of the contract, or at variance with it, or tending to its rescission and the subversion of the relation established by it. For where the party to a contract, who asks the intervention of the Court, for its specific execution, has been guilty of such conduct, that circumstance may be put forward as a defence to the action.'

"This principle has been applied in India by the Privy Council in *Shish* v. *Banomali*.[2] In dismissing a suit for the specific performance of a compromise—the Judicial Committee observed :

> 'the conduct of Krishna was at variance with, and amounted to a subversion of, the relation intended to be established by the compromise.'

"In our view this principle would be incorporated into the section by adding suitable words at the end of Cl. (*b*) of Sec. 24 [now Sec. 16 (*b*)].

"We are of the opinion that Cl. (*c*) is unnecessary in view of the provisions of Order II, rule 2 of the Code of Civil Procedure. If a person has obtained a decree for compensation and for breach of contract he cannot again sue for specific performance, whether satisfaction of the decree is obtained or not, as his cause of action gets merged in the decree. The cause of action in breach of contract, whether the relief claimed is damages or specific performance, is the same and if the plaintiff is entitled to more than one relief, either singly or in the alternative, he must sue for the same in the same suit and cannot reserve it except with the leave of the Court.[3]

"Clause (*d*) of Sec. 24 (old), and Cl. (*c*) of Sec. 25 (old) [now Sec. 17 (*c*)] may be omitted as both of them are founded on the English law as it stood under a statute of the sixteenth century, which has since been altered by legislation. A conveyance without valuable consideration was voidable at the suit of a supervening purchaser for value with notice. This has ceased to be the law in England since the Voluntary Conveyance Act, 1876 (56 & 57 Vic.), now replaced by the Law of Property Act, 1925 (Sec. 173). Again under our law a prior settlement of property divests the title of the settlor immediately and any conveyance thereafter from the settlor to another even if it be for consideration, would be ineffective to convey any title.

"It has been held by the Privy Council that in a suit for specific performance, the plaintiff must show that all conditions precedent have been fulfilled and also allege and (where the fact is traversed) prove a continuous readiness and willingness to perform the contract on his part, from the date of the contract to the time of hearing.[4] Though there is no express

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1. *Specific Performance*, 6th Ed., Sec. 957, p. 450.
2. I. L. R. 31 Cal. 584 at p. 596 (P.C.).
3. Order II, rule 2 (3), C. P. C.
4. Ardeshir Mama *v.* Flora Sassoon, I.L.R. 52 Bom. 597.

requirement to this effect in the Specific Relief Act it has been held that failure to allege readiness and willingness will lead to a dismissal of the suit.[1]

"But the plaintiff need not prove performance of or over-readiness and willingness to perform non-essential terms ; or terms of a separate or collateral contract ; or terms, the performance of which has been prevented or waived by the defendant ; or terms, the performance of which has become impossible without the plaintiff's fault.

"We consider that the doctrine of readiness and willingness formulated should be incorporated into our Act.

"There is, however, a conflict of judicial opinion as to the exact scope of the plaintiff's readiness and willingness required by the doctrine.

"In England, it has been held[2] that a plaintiff claiming specific performance, who insists on a wrong interpretation of the contract, does not lose his right to specific performance in accordance with its right interpretation where the defendant offers to perform the contract as rightly interpreted.

"In India, the Calcutta[3] and Nagpur[4] High Courts have taken the view that the plaintiff must allege and prove his readiness to perform the contract as it really was and not as it was alleged by him to be. Thus where a purchaser sought specific performance alleging that he was always ready and willing to pay Rs. 85 which, according to him, was the price by the contract, but the Court found that the price fixed by the contract was, in fact, Rs. 130, the suit for specific performance was dismissed.[5] Similarly, it has been held that, if the plaintiff insists on a condition which he is not entitled to under the contract as properly interpreted, his suit for specific performance must fail.[6]

"The Madras High Court[7] has taken the view that even where the plaintiff alleges that the consideration payable by him was different from the real amount, there is a sufficient averment on the part of the plaintiff on his readiness and willingness to perform his part of the contract, if he adds in the plaint that he has no objection to paying the defendant any sum that the Court should be pleased to fix.[8]

"We are inclined to prefer the Madras view and recommend that the plaintiff should be entitled to specific performance if he avers performance or readiness and willingness to perform the contract according to its true construction.

"In connexion with contracts for sale, a question has arisen whether in order to establish his readiness and willingness the plaintiff should have made a tender of the money due from him to the defendant. The further question which has been raised is where the purchaser must, in order to show his readiness and willingness, tender the money on the date fixed by the contract for completion. In a Calcutta case,[9] it was held that such a tender

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1. Madan *v.* Kamaldhari, A. I. R. 1930 Pat. 121 at p. 127.
2. Berners *v.* Fleming, (1925) Ch. 264 (C. A.) ; Halsbury, 2nd Ed., Vol. 31, p. 436.
3. Smt. Parul Bala Ghosh *v.* Saroj Kumar Goswami, A. I. R. 1943 Cal. 147 ; Rustomali *v.* Ahider, 45 C.W.N. 837.
4. Shamjibhai *v.* Fagoo, I. L. R. (1940) Nag. 581 at p. 607-10.
5. Rustomali *v.* Ahider, 45 C.W.N. 837.
6. Shamjibhai *v.* Fagoo, I. L. R. (1940) Nag. 581 at pp. 607-10.
7. Arju *v.* Lakshmi, A.I.R. 1949 Mad. 265.
8. *Ibid.*
9. Manik *v.* Abhoy, 37 I. C. 257.

must be made, while in a Bombay case,[1] it was held that an actual tender was not necessary for a suit for specific performance, and it was enough if payment was made as directed by the Court. The Bombay view seems to have support in the observations of the Privy Council in *Bank of India Ltd.* v. *Jamsetji A. H. Chenoy*,[2] where it was held that the plaintiff in such a suit need not deposit the money in Court or prove his financial competence.

"Having considered the different aspects of the question, we recommended that it should be provided that it is not essential that the plaintiff should tender the money to the defendant or deposit it in Court except when so directed."[3]

In the Notes on Cl. 15,[4] which deals with the old Sec. 24 of the repealed Specific Relief Act, it was stated : "This is Sec. 24 of the existing Act (1877) with the following modifications :

(*i*) In sub-clause (*a*) (of old Sec. 24), for the words "is not entitled", the words "would not be entitled" have been substituted in order to make the meaning clear ;

(*ii*) in sub-clause (*b*) (of old Sec. 24), following the principles enunciated by case-law, it has been provided that specific performance cannot be enforced where the plaintiff has acted in fraud of the contract or acts at variance with or in subversion of the relationship intended to be established by the contract ;

(*iii*) clause (*c*) (of old Sec. 24) has been omitted as unnecessary in view of Order II, rule 2 of the Code of Civil Procedure, 1908 ;

(*iv*) clause (*d*) of existing [i.e. (old) Sec. 24] gives effect to a provision of English law as it stood under a statute of the sixteenth century, but the law has since been changed. A prior settlement of property would divest the title of the settlor immediately and any conveyance thereafter from the settlor to another, even if it be for consideration, would be ineffective to convey any title. This provision is therefore totally unnecessary ;

(*v*) sub-clause (*c*) of the present section is a new provision which incorporates the principles laid down by case-law that in a suit for specific performance the plaintiff must show that all conditions precedent have been fulfilled and also allege and prove a continuous readiness and willingness to perform the contract on his part from the date of the contract to the time of hearing of the suit. The plaintiff, however, need not prove performance of or over-readiness or willingness to perform non-essential terms ;

(*vi*) by an explanation it is made clear that it is not essential that the plaintiff should tender money payable under a contract, say, for sale to the defendant or to deposit it in Court, except when so directed. Further, the plaintiff should be entitled to specific performance if he avers performance or readiness or willingness to perform the contract according to its true construction.[5]

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1. Tribhobondas *v.* Balmukundas, 67 I.C. 865.
2. A. I. R. 1950 P. C. 90 at p. 96.
3. *Vide* Expl. (*i*) to Sec. 14, App. I, Law Commission Report, Ninth Report, pp. 28, 29, 30, 31 and 32.
4. Notes on Clauses, pp. 6, 7 and 8.
5. Notes on Clauses, pp. 6, 7 and 8

3. Scope of the section.—This section provides that the specific performance of the contract cannot be ordered in favour of persons enumerated in sub-clauses (*a*), (*b*) and (*c*) of Sec. 16 of the new Act. Sub-clause (*a*) of the section lays down a test to determine whether a specific performance of the contract could be enforced in favour of a person and the test is that the person, in whose favour the specific performance of a contract could be enforced should, in law, be entitled to recover the damages of the breach of a contract. If he is so entitled, the contract may be specifically enforced in his favour, if not, then it cannot be enforced in his favour. Sub-clause (*b*) of the present section prescribes that the contract cannot specifically be enforced in favour of one who either violates one or more of the essential canditions of the contract, or himself becomes incapable of performing his part of the contract or commits a fraud in relation to the contract or wilfully acts against or subverts the relation intended to be established by or under the contract. Sub-clause (*c*) of this section has been newly enacted. It lays down that the performance of a contract cannot be enforced in favour of a person, who has not averted in the pleadings and who has not proved that he on his part was ready and willing to perform his part of the contract, in its essential terms excepting only when the plaintiff proves that the defendant himself waived or prevented the performance of the terms of the contract.

The explanation enacts that for the purpose of sub-clause (*c*) of the section it is not necessary that where the contract involves the payment of money .that the money should be actually tendered to or deposited with the defendant except when the Court specifically directs the plaintiff to do so; and that he must aver in his pleadings that he was ready and willing to perform his part of the contract according to the true construction. It will be seen that sub-clause (*c*) of the section and its explanation deal with procedure and not with the substantive law and the basic principle behind this section is that the conduct of the party seeking the benefit of the specific performance of the contract should be the relevant consideration in order to find out whether the conduct of such person entitles or disentitles the specific performance of the contract in his favour. This section imposes a positive bar on personal specific reliefs.

4. "Would not be entitled to recover compensation for its breach."—This expression means that the person who does not possess the legal right of claiming compensation for the breach of the contract would be denied the right of enforcing the specific performance of the contract. Formerly, the words used in the repealed Sec. 24 (*a*) of the Specific Relief Act were : "could not recover". These words brought forth a lot of judicial controversy as to the legal implications of the words. These words signified that although the plaintiff had a legal right to recover compensation for the breach of the contract, yet he ought not to be given the relief for the default of his. The present words in its sub-section point out to the fact that it applied to those cases where the plaintiff has either a total want of title or as defective title or there are circumstanoes which prohibit the plaintiff from claiming compensation for the breach of the contract. The words "could not recover" have been interpreted to mean "ought not to recover" for it was the conduct of the party concerned which was the determining factor of the fact whether such a person could or should recover compensation for the breach of the contract. The principal test laid down in sub-clause (*a*) of the section is the determination of the legal right of the person to recover compensation for the breach, if he has the legal right he cannot be refused the relief under this section. if he has not, he is debarred from claiming the right of enforcing specific performance of the contract in his favour.

In this connexion a minor's case presents a typical illustration. A minor is not capable of entering into a contract nor is he entitled for compensation for the breach of any contract entered into with him. Therefore, a contract would not be specifically enforced against him nor would any decree for the breach of the contract be passed against him. In *Pandit Krishna Chandra Sharma* v. *Seth Rishabha Kumar*,[1] this question was considered at some length. Niyogi, J., said : "The general rule is that a contract to be specifically enforced by the Court must be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract or any other cause, the contract is incapable of being enforced against one party, that party is generally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.[2] In *Lumley* v. *Ravenscroft*,[3] Lindley, L. J., observed : 'You cannot get specific performance against an infant'. The doctrine has, no doubt, some limitations which it is not necessary to indicate here. The weight of authorities in India is opposed to the granting of specific performance in favour of or against a minor. In *Fatima Bibi* v. *Debnath Shah*,[4] Norris, J., following *Flight* v. *Bollan*,[5] held that a minor could not maintain a suit for specific performance of a contract entered into on his behalf by his guardian on the ground of mutuality. That view was not accepted by the Madras High Court in *Krishnasami* v. *Sundarappayyar*,[6] in which it was held, following the opinion or Mr. Whitley Stokes, that the doctrine of mutuality had no application in India. The same view was taken in *Khairunnessa Bibi* v. *Loke Nath Pal*.[7]

"In *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[8] the Calcutta High Court held that if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract, it is capable of being specifically enforced. In that case, the manager of an infant's estate entered into an agreement to purchase certain property on behalf of the minor and the question was whether the minor on attaining majority could sue for specific performance of the agreement. The appeal was taken to the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*.[9] Their Lordships approved of the application of the doctrine of mutuality but reversed the decision on the ground that it was not within the competence of the manager of a minor's estate to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and further that as the minor in that case was not bound by the contract there was no mutuality and that he could not obtain specific performance of the contract." The learned Judge concluded his observations thus : "The relief of the specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. This was pointed out by Sundaram Chetti, J., in *Venkatachalam Pillai* v. *Sethuram Rao*.[10] The

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1. A. I. R. 1939 Nag. 265 at pp. 265-66.
2. *See* Fry on *Specific Performance*, 6th Ed., Chap. 8. p. 219.
3. (1895) 1 Q. B. 683 at p. 684 : 64 L.J.Q. B. 441 : 14 R. 347 : 72 L. T. 382 : 43 W. R. 584 : 59 J. P. 277.
4. I. L. R. 20 Cal. 508.
5. (1828) 4 Rust. 298 : 28 R.R. 101.
6. I. L. R. 18 Mad. 415 : 5 M. L. J. 164.
7. I. L. R. 27 Cal. 276.
8. I. L. R. 34 Cal. 163 : 11 C. W. N. 34 : 4 C. L. J. 431 (F. B.).
9. I. L. R. 39 Cal. 232 : 13 I. C. 331 : 39 I. A. 1 : 16 C.W.N. 74 (P.C.).
10. I. L. R. 56 Mad. 433 at p. 441 : 64 M. L. J. 354 (F.B.).

Madras High Court, with the exception of *Krishnasami* v. *Sundarappayyar*,[1] which was decided before the clear pronouncement of the principle by their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[2] has been quite consistent in declining specific performance against a minor on the ground of want of mutuality as is evident from the two cases cited already, and *Chidambara Swamigal* v. *Ramakrishna Reddiar*[3] and *Nageswara Rao* v. *Mandava*.[4] I may in passing refer also to *Malla* v. *Muhammad Sharif*,[5] which applied to *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[6] in the wider sense indicated by the observations of heir Lordships of the Privy Council cited above.

"The review of the authorities shows that barring Wort, J., all the High Courts are unanimous of the view that a guardian's contract for sale or purchase made on behalf of the minor is not enforceable by or against the minor. The principle underlying the view enunciated by their Lordships of the Privy Council evidently appears to be that a minor is not personally bound by any contract made on his behalf by his guardian as was laid down by their Lordships of the Privy Council in *Waghela Rajsanji* v. *Shekh Masluddin*.[7] A contract for sale of immoveable property does not of itself create an interest in or charge on such property.[8] If it is a contract of purely personal nature and no personal liability can be imposed on the minor, it must logically follow that the minor cannot be compelled to perform the contract ; for the same reason he cannot take advantage of the contract and ask for specific performance. There is another aspect to the question : can the purchaser recover compensation from the minor for a breach of contract by the guardian ? In every case when there is refusal to implement the contract of sale by the guardian the breach is committed by the guardian and never by the minor. The purchaser therefore can only claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not therefore entitled to claim compensation from him. If that is so, Sec. 24 (*a*) (old), Specific Relief Act, debars the purchaser from claiming the relief of specific performance against the minor.'"[9]

5. Minor.—When the minor's property is already alienated the Court is required only to find whether the alienation is binding on the minor or not. In such a case no consideration of equity arises. The relief of specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. This was pointed out by Sundaram Chetti, J., in *Venkatachalam Pillai* v. *Sethuram Rao*.[10] The Madras High Court, with the exception of

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1. I.L.R. 18 Mad. 415 : 5 M. L. J. 164.
2. I. L. R. 39 Cal. 232 : 13 I. C. 331 : 39 I. A. 1 : 16 C.W.N. 74 (P. C.).
3. A. I. R. 1924 Mad. 863 : 82 I. C. 926 : 47 M. L. J. 683.
4. A. I. R. 1928 Mad. 830 : 110 I. C. 492.
5. A. I. R. 1927 Lah. 355 : 99 I. C. 648 : I. L. R 8 Lah. 212 : 28 P. L. R. 492.
6. I. L. R. 39 Cal. 232 : 13 I. C. 331 : 39 I. A. 1 : 16 C. W. N. 74 (P. C.).
7. I.L.R. 11 Bom. 551 : 14 I.A.89 : I.L.R. 5 Sar. 16 (P. C.) ; *see* also B. Ramjogayya *v.* Jaganadham, A. I. R. 1919 Mad. 641 : 49 I. C. 872 : I. L. R. 42 Mad. 185 : 96 M. L. J. 29 (F. B.).
8. *See* Sec. 54, Transfer of Property Act.
9. Pandit Krishna Chandra Sharma *v.* Seth Rishabha Kumar, A. I. R. 1939 Nag. 265 at pp. 266-67.
10. A. I. R. 1933 Mad. 322 : 142 I.C. 315 : I.L.R. 56 Mad. 433 : 64 M. L. J. 354.

Krishnasami v. *Sundarappayyar*,[1] which was decided before the clear pronouncement of the principle by their Lordships of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[2] has been quite consistent in declining specific performance against a minor on the ground of want of mutuality as is evident from the two cases cited already and *Chidambara Swamigal* v. *Ramkrishna Reddiar*,[3] and *Nageswara Rao* v. *Mandava*.[4] Reference may also be made to *Malla* v. *Muhammad Sharif*,[5] which applied *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury*,[6] in the wider sense indicated by the observations of their Lordships of the Privy Council cited above.

The review of the authorities shows that barring Wort, J., all the High Courts are unanimous on the view that a guardian's contract for sale or purchase made on behalf of the minor is not enforceable by or against the minor. The principle underlying the view enunciated by their Lordships of the Privy Council evidently appears to be that a minor is not personally bound by any contract made on his behalf by his guardian as was laid down by their Lordships of the Privy Council in *Waghela Rajsanji* v. *Shekh Masluddin*.[7] A contract for sale of immoveable property does not of itself create an interest in or charge on such property. If it is a contract of purely personal nature and no personal liability can be imposed on the minor it must logically follow that the minor cannot be compelled to perform the contract; for the same reason he cannot take advantage of the contract and ask for specific performance. There is another aspect to the question : can the purchaser recover compensation from the minor for a breach of contract by the guardian ? In every case when there is refusal to implement the contract of sale by the guardian the breach is committed by the guardian and never by the minor. The purchaser therefore can only claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing. The purchaser is not entitled to hold the minor personally responsible for the breach of contract of sale made by his guardian and he is not therefore entitled to claim compensation from him. If that is so, Sec. 24-A (old), Specific Relief Act, debars the purchaser from claiming the relief of specific performance against the minor.[8]

A reference to notes under the heading "Minority" (*ante*) may be made.

6. American law.[9]—An infant is not allowed to enforce a contract specifically because it is said the contract lacks mutuality. This is often thought to mean merely that since the adult could not have enforced the contract against the infant, the infant is similarly deprived of equitable relief but the difficulty is not simply that the adult could not have enforced the contract against the infant but that even though the adult performed the contract, the infant might subsequently exercise his privilege to rescind the transaction. The decree of the Court should not be used to deprive him of

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1. I.L.R. 18 Mad. 415 : 5 M. L. J. 164.
2. I. L. R. 39 Cal. 232 : 13 I. C. 331 : 39 I. A. 1 : 16 C. W. N. 74.
3. A I. R. 1924 Mad. 863 : 82 I. C. 926 : 47 M. L. J. 683.
4. A. I. R. 1928 Mad. 830 : 110 I. C. 492.
5. A. I. R. 1927 Lah. 355 : 99 I. C. 684 : I.L.R. 8 Lah. 212 : 28 P. L. R. 492.
6. I. L. R. 39 Cal. 232 : 13 I. C. 331 : 39 I. A. 1 : 16 C.W. N. 74.
7. I.L.R. 11 Bom. 551 : 14 I.A. 89 : I.L.R. 5 Sar. 16, *see* also Ramajogayya *v.* Jaganadham, A. I. R. 1919 Mad. 641 : 49 I. C. 872 : I. L. R. 42 Mad. 185 : 36 M. L. J. 29.
8. Pandit Krishna Chandra Sharma *v* Seth Rishabha Kumar, A. I. R. 1939 Nag. 265 at pp. 266-67 : I. L. R. (1940) Nag. 55.
9. Williston on *Contract*, Sec. 1438.

his privilege ; and unless he is deprived of it the adult is subjected to injustice if compelled to perform. This difficulty does not arise where the infant has come of age before seeking to enforce the contract. In such a case specific performance should be granted, also where the infant has irrevocably performed his side of the contract.[1]

If procedure existed or was created by statute, whereby the adult could be protected, there would seem little objection to granting specific performance where the infant is willing to perform and the Court is persuaded that the contract is fair. The Court exercises a similar jurisdiction when it allows an infant to enforce specifically a binding contract made by a guardian on his behalf. The infant's interest is safeguarded, for the Court may dismiss the action if the contract is not fair to him.[2]

7. **Sub-clause (b).**—Sub-clause (*b*) of this section corresponds to the old Sec. 24 (*b*) [now Sec. 16 (*b*)] of the repealed Act with appropriate modifications and alterations, the details of which have been noted elsewhere. Suffice it to say, here that this section makes a distinction between an essential term and non-essential term of the contract and their legal effect. Das Gupta, C. J., in *Gostho Behari Sadhukhan* v. *Omiyo Prosad Mullick*,[3] says : "Law and equity have always recognized a distinction between essential and non-essential terms. If the term as regards payment of solicitor's costs is to be considered essential, I fail to understand what term there can be in an agreement for lease which is non-essential. The essence of contract of lease should ordinarily he held to consist of the terms as regards the identity of the property demised, the period of lease, the amount of rent, the amount of premium, if any, the mode of payment, the time of payment, the consequences of non-payment and terms of a like nature. A term for payment of solicitor's costs for preparation of the lease is really ancillary to the main transaction and cannot reasonably be considered to be an essential term.

"Section 16 (*b*) (new) of the Specific Relief Act makes it clear that while violation of an essential term disentitles the plaintiffs to specific performance, violation of a non-essential term would not do so. Repudiation of non-essential term, therefore, would not disentitle the plaintiffs to specific performance." When that plaintiff in his suit for specific performance of the contract insists upon the implementation of the terms of the contract but on his own does not disclose his readiness and willingness to perform his own part of the term, it was held that such a suit cannot be decreed.[4] In *Ardeshir H. Mama* v. *Flora Sassoon*,[5] an injured party who sued at law for a breach going to the root of the contract elected to treat the contract as at an end himself as discharged from its obligation, but in a suit for specific performance : "He treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege and if the fact was traversed he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failing to make good that averment brought with it the inevitable dismissal of his suit.....Although so far as the Act is concerned, there is no express enactment that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England [Sec. 24 (*b*) (old) is the nearest], it seems invariably to have been recognized, and on principle their Lordships think rightly, that the Indian and English requirements in this matter are the same."

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1. Ashbury *v.* Mitchell. 121 Va. 276.
2. Guy *v.* Hansow, 86 Kan. 933.
3. A.I.R. 1960 Cal. 361at p. 365.
4. S. J. Silas *v.* C. J B. Kohlihoff, A.I.R. 1954 T. C. 440 at p. 442.
5. A. I. R. 1923 P. C. 208.

It is the continued desire of readiness and willingness on the part of the plaintiff to perform his own part of the contract that is a condition precedent to the grant of a decree for specific performance of the contract and it is the negation of that continued desire of readiness and willingness on the part of the plaintiff to perform his part of the contract that would entail by itself, the dismissal of such suit. But the right to have the specific performance of the contract enforced, is not an absolule right ; but rests entirely on the discretion of the Court, and that discretion should, no doubt, be judicial and not arbitrary, to be exercised in consonance with the well-recognized principles of justice, equity and good conscience, depending upon and with due reference to facts and circumstances of each case. It is also equally settled that when once the Trial Court has exercised its discretion, one way or the other, the Appellate Court would not normally interfere unless it is established that the discretion had been exercised perversely or arbitrarily or is violative of judicial principles.[1]

8. Essential term.—The question as to which terms of a contract are essential and which are non-essential cannot be answered without regard to the contraet itself. There is no hard and fast rule or cut and dried formula which would distinguish the essential nature of a term of contract from the non-essential ones. It all depends on the nature of the contract, its pith and substance, its terms add conditions and the relationship with the ultimate realization or fruition of the contract, that cumulatively determine the essential nature of a term and distinguish it from the non-essential one. In *Varanarajulu Iyer* v. *Arumugha Goundan*,[2] this question was discussed at length. In this case there was a lease for five years, there was a condition attached in the lease that if the rents were not regularly and punctually paid, there would be a forfeiture. Subsequently the lessor and the lessee entered into a contract of sale, under which the lessor agreed to sell and the lessee agreed to purchase the land which formed the subject-matter of the lease. In the agreement to sell also there was a stipulation that the agreement was to be performed within a period of seven years. It was also stipulated therein that the rent of the leased land would be paid regularly and punctually, failing which the lessee would incur forfeiture of the right under the agreement to sale. There was a default in the payment of rent and the lessor then repudiated the agreement for sale. It was held that that was not a contract of reconveyance. The agreements of lease and sale were two separate and distinctly independent transactions and were not parts of one of same transaction so that the agreement for sale could not be made one of re-purchase, that the time in the sale-deed was not the essence of the contract, therefore the non-performance of the term regarding payment of rent regularly and punctually in respect of the collateral transaction of the lease could not be considered to be a breach of any essential term of the agreement for sale—Ram Chandra Iyer, J., who delivered the judgment of the Court, quoted the following observations from Sir Edward Fry's *A Treatisc on the Specific Performance of the Contract*, 4th Ed. at page 404 : "of what terms must the plaintiff show the performance ? The answer is that he must show performance of—

(*i*) all conditions precedent ;

(*ii*) the express and essential terms of the contract ;

(*iii*) its implied and essential terms ; and

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1. S. J. Silas *v.* C. J. B. Kohlihoff, A.I.R. 1954 T. C. 440 at p. 442.
2. A. I. R. 1960 Mad. 203 at p. 205.

(*iv*) all representations made at the time of the contract on the faith of which it was entered into ; but that he need not show performance of

(*v*) non-essential terms ;

(*vi*) the terms of a collateral contract ; or

(*vii*) terms of which the defendant has prevented or waived the performance. Lastly, it will be necessary to consider

(*viii*) terms, the performance of which has become impossible without the plaintiff's fault or default." Then the learned Judge construes : "The question whether time was of the essence of a contract would depend on the intention of the parties thereto. A mere stipulation as to time for performance cannot make it an essential term. But a contract may, by express stipulation, make a term therein as to the time for performance, as an essential term ; or even if there is no such express term, such a provision can be implied in the circumstances. In *Jamshed* v. *Burjorji*,[1] the Privy Council held that, as a general rule, time would not be of the essence in regard to an agreement for sale of immoveable property.

The reason for the rule appears to be that, under the equitable principle which governs the rights of the parties in cases of specific performance of contracts to sell real estate, the Court looks not to the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time. But time can be made the essence of contract even in regard to an agreement to convey immoveable properties either by express stipulation or by subsequent notice.[2]

9. Plaintiff's duty to perform his part of the contract—Violation.—The general rule in equity is that a party who asks the Court to enforce agreements in his favour must aver and prove that he has performed, or has been ready and willing to perform, the agreement on his part.[3] Where, however, the strict application of this rule will work injustice the Court will relax it. A breach of an agreement may have been committed justifying an award of nominal damages. A breach may have been committed which may be considered to have been waived ; and if the party committing those breaches has substantially performed other parts of the agreement whereby at his expense the other contracting party has derived benefits under the agreement, a court of equity might fail in doing justice if it refused to decree specific performance.[4] But small instances of bad faith in plaintiff where the defendant has an adequate remedy for such breaches of faith in his own hands will not induce the Court to dismiss a suit where the result would be to leave the plaintiff without any adequate remedy but the Court will disallow costs to

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1. I. L. R. 40 Bom. 289 : A. I. R. 1915 P. C. 83.
2. Varadarajulu Iyer *v.* Arumugha Goundan, A.I.R. 1960 Mad. 203 at p. 205.
3. Lumley *v.* Wagner, (1852) 6 Jur. 871 ; Walker *v.* Jeffreys, (1842) 1 Hare 341 ; Holmes *v.* E.C. Rayco, (1875) 33 K. & J. 657 ; A. H. Mama *v.* F. Sassoon, I.L.R. 52 Bom. 597:55 I.A. 360 : 111 I.C. 413 : A.I.R. 1928 P. C. 208 : 26 A.L.J. 1220 : 55 M.L.J. 523 : 30 Bom. L. R. 1242 : 48 C. L. J. 451 : 1923 M. W. N. 893 : 28 L. W. 257 (P. C.) ; Karsandas *v.* Chhotalal, 25 Bom. L.R. 1037 ; Vishva Nath *v.* Bopu Narain, 1 Bom. H. C. R. 262 ; Manick Chandra *v.* Abhoy, 37 I. C. 257 : 24 C. L. J. 90.
4. Walker *v.* Jeffreys, *supra*.

mark its sense of plaintiff's misconduct.[1] Plaintiff's failure to fulfil representations though they do not amount to a guarantee or warranty may be pleaded successfully as a bar to specific performance.[2] A promisee's default not going to the root of the contract and which can be adequately compensated does not disentitle him to specific performance.[3] It is not possible to lay down as an abstract proposition that there is any necessary inconsistency in a party, who has unsuccessfully tried to rescind an agreement afterwards claiming performance of it.[4] If on the purchaser refusing to complete the contract, the vendor forfeits the earnest-money paid by him and rejects his offer to tender documents, the acts of the vendor may amount to an expression of opinion to rescind the contract and exclude *pro tanto* the idea of specific performance but do not disentitle him to relief by specific performance either under this clause or the following clause. There is no incapacity to perform within the meaning of this clause where the vendor had already performed his part of the contract by putting the purchaser into possession of the property and nothing remained but the matter of executing the conveyance. Nor can the vendor be deemed to have "chosen his remedy and obtained satisfaction" within the meaning of Cl. (*c*) of (old) Sec. 24.[5] Mere putting wrong interpretation on the agreement does not disentitle the plaintiff to a decree for specific performance provided he is willing to complete the transaction according to the correct interpretation put by the Court.[6]

Absence of averment.—In *Ouseph Varghese* v. *Joseph Aley*,[7] the Supreme Court held as follows :

> " . . . He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. In the absence of such an allegation the suit is not maintainable. In the present case the plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the writen statement of the defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in the Civil Procedure Code." (*See* the headnote.)

It is not possible to hold in view of .Sec. 16 (*c*) of the Specific Relief Act as also by the dictum laid down by the Supreme Court in the above-mentioned decision that a pleading in the plaint to the effect that the plaintiff is always ready and willing to perform his part of the contract is an empty formality. The Legislature has chosen to make a positive provision in the statute to the effect that such an averment is necessary for granting a decree for specific performance.

The Supreme Court's decision cited above was followed by a Bench of the Kerala High Court in A. S. No. 65 of 1967 (Ker.) taking the view that the averment with regard to the willingness and readiness of the plaintiff to perform his part of the contract is indeed essential to sustain an action for specific performance.[8]

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1. Holmes *v.* F. C. Ryco, (1875) 33 K. & J. 657.
2. Lamare *v.* Dixon, (1873) L. R. 6 : H.L. 414.
3. Ma Sa Bon *v.* Ma Da Twe, A.I.R. 1924 P.C. 233 : 20 L.W. 884 : 34 I. C. 561.
4. Sirish *v.* Bonomali, I. L. R. 31 Cal. 584 (P. C.).
5. Calcutta Improvement Trust *v.* Subamabala, 44 C. W. N. 451 (55 I. A. 360, explained).
6. Berners *v.* Fleming, (1925) 1 Ch. 264 : 94 L. J. Ch. 273 ; *see* also Preston *v.* Luck, 27 Ch. 502.
7. (1969) 2 S. C. W. R. 347.
8. Prabhakaran *v.* Bhavani, A. I. R. 1974 Ker. 158 at pp. 153, 154 : 1974 Ker. L. T. 115.

Where the plaintiff in a suit for specific performance did not make any averment in the plaint that he had been and still was ready to perform his part of contract as required in para. 3 of Form No. 47 of the First Schedule of the Code of Civil Procedure and also Sec. 16 (*c*) of the Specific Relief Act it was held that the plaintiff failed to make out any cause of action with regard to relief for specific performance of the contract and that therefore the suit should have been dismissed.[1]

10. Ready and willing to perform his part of contract.—In *Prem Raj* v. *D. L. F. Housing and Construction Private Ltd.*,[2] .the Supreme Court has observed as follows :

> "In the present case there is absence of an averment on the part of the plaintiff in the plaint that he was ready to perform his part of the contract. In the absence of such an averment it must be held that the plaintiff has no cause of action so far as the relief for specific performance is concerned."

In *Ouseph Varghese* v. *Joseph Aley*,[3] the Supreme Court has observed as follows :

> "A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in *Prem Raj* v. *D. L. F. Housing and Construction Private Ltd.*,[4] that it is well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation the suit is not maintainable."

Where there is no specific statement made in the plaint or in the deposition of the plaintiff that he was ready and willing to perform his part of the contract, the plaintiff is not entitled to any decree for specific performance.[5]

11. Plaintiff cannot set up a different case other than one stated in plaint.—There is, however, ample authority for the proposition that in a suit for specific performance a plaintiff cannot be allowed to depart from the case as set up in the plaint and therefore if one contract is set up but another is established, it is liable to dismissal.[6] This principle is equally applicable to suits for damages.[7]

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1. Rajendra Prasad Rai *v.* Rajdeva Rai, A. I. R. 1974 All. 294 at p. 296.
2. A.I.R. 1968 S.C. 1355 at p. 1357.
3. (1969) 2 S. C. C. 539 at p. 543.
4. A. I. R. 1968 S. C. 1355.
5. Idris Ali *v.* Abdul Samad Barbhuva, A. I. R. 1973 Gau. 132 at pp. 135, 136.
6. Hawkins *v.* Maltby, (1887) L. R. 3 Ch. 188; Mundy *v.* Jolliffee, (1839) 5 My. & Cr. 167 ; Ganesh Ram *v.* Ganpat Rai, 26 C. W. N. N. C. XXXIX.
7. Sulkanta *v.* Latif, 19 C.W.N. 933.

Where a party to a contract has committed breach, he is on the one hand not entitled to specific performance of it, and on the other hand the other party would be within his rights in refusing to perform his part of the contract.[1] If both the parties to a contract fail to perform their reciprocal promises, the one wilfully and the other because he was not bound to fulfil his part unless the former had fulfilled his preliminary part, the contract is at an end on account of default on the part of both the parties except for the purpose of enabling the innocent party to claim compensation from the other.[2] In the case of a conditional contract there is no right of specific performance in the plaintiff unless he has performed the condition binding on him under the contract.[3]

12. Suit for specific performance ; burden of proof in.—A plaintiff in a suit for specific performance has to allege, and if the fact has been traversed he is required to prove a continuous readiness and willingness from the date of the contract to the time of hearing to perform the contract on his part. Failure to make good that averment brings with it the inevitable dismissal of his suit. But the application of this principle obviously demands a finding of a fact as to whether there was or was not on behalf of the plaintiff a continuous readiness and willingness from the date of the contract to the time of hearing to perform his part of the obligation thereunder.[4]

Where, therefore, a party to a contract of sale made a claim for damages on the footing of its breach by the other party it would amount to a definite election on his part to treat the contract as at an end, thereafter no suit for specific performance could be maintained by him, for by such election, he had disabled himself from making the averment that he had always been ready and willing to perform his part of the contract.[5]

That section refers to a violation by the plaintiff of an essential term of the contract, that is a term which is absolutely vital to the bargain, and whose violation will alter the mutual relationship of the parties in such a material manner that it would be no longer equitable to decree specific performance as if their mutual relationship continued to be the same as it was at the time when the bargain was entered into. The illustrations given in the section made it clear that this will be the meaning of that provision, and that it cannot apply to a case like the present where the violation, if any, related only to the manner of the payment of the consideration, for an agreement to sell immoveable property, and for which liabilities in the nature of a penalty by foregoing part of the consideration was provided.

In a suit for specific performance the plaintiff has to allege and to prove a continuous readiness and willingness, from the date of contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of the suit.

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1. Krishan Das *v.* Punjab National Bank, 18 I. C. 911 : 149 P. L. R. 1913 : 87 P. W. R. 1913.
2. Sanapathy *v.* Vanmahilinga, I. L. R. 38 Mad. 959.
3. Rudra Das Chakravarti *v.* Kamakhya Narayan Singh, A.I.R. 1925 Pat. 259 : 84 I. C. 178.
4. Chandrabali Shah *v.* Prittam Singh, A. I. R. 1965 Pat. 211 at p. 212.
5. K. S. Sundramayyar *v.* K. Jagadeesan, A. I. R 1965 Mad. 85 at pp. 86-87 : 77 M. L. W. 493 : I. L. R. (1964) 2 Mad. 876 : (1965) 1 M. L. J. 362.

Between the date of the contract, being one of which specific performance can be decreed, and the conveyance, the legal estate remains in the vendor, but the equitable estate passes to the purchaser ; and as it is inequitable that the same person should enjoy both the rents and profits of the property and also the interest on the purchase-money up to the time, if any, fixed for completion, or if no time is fixed, up to the time at which completion ought to take place, that is, as a rule when a good title is shown, the vendor is entitled to the rents and profits, but is liable to bear the outgoings.[1]

13. Duty of vendee to pay purchase-money in Court.—In a suit for specific performance of a contract of sale, the plaintiff is bound, if he has not tendered money to the vendor previously, to pay it into Court.[2] But where a person agrees to sell an estate not in his possession in consideration of advances to enable him to sue for its recovery from a third party, it is not competent to the vendee having failed to make advances to claim specific performance and delivery of the estate otherwise recovered by the vendor by tendering the price.[3]

14. Time of contract.—It is true that the presumption is that in a contract for sale of immoveable property the time is not the essence of the contract. A mere stipulation of a date before which the sale-deed was to be executed and the stipulation that the earnest-money would be forfeited if the date was not adhered to also would not necessarily make the time the essence of the contract. But the sellers are entitled to make the time the essence of the contract by specifically giving a notice to the purchaser if the purchaser was found to be delaying the performance of the contract.[4] If time is of the essence in a contract for sale of land, the stipulation as to time be exactly complied with, not the delay but the failure to perform at the exact day cuts off the rights of the defaulting party.[5] Where the purchaser insisting upon an absolute warranty of title delays in the matter of payment for a long time his suit is liable to dismissal.[6] Where in a contract of sale the time was of the essence of the contract, and the defendant had served on the plaintiff a notice giving a reasonable extension of time to complete the contract and the plaintiff had failed to take any step to that end, the plaintiff's suit for specific performance was dismissed.[7]

Where time is not of the essence of the contract the defaulting party can enforce the contract.

A reference to notes as under the heading "Time whether essence of contract" (*ante*) may be made.

15. Sale of decree.—An agreement was effected whereby the plaintiff had agreed to assign a decree to the defendant. The decree though within limitation at the date of the agreement had become time-barred before the date of the suit. On decree-holder's suit for specific performance of sale of the decree it was held that the decree which was agreed to be assigned was a decree capable of

Assignor having allowed the decree to become time-barred cannot enforce the sale.

1. Sellappa Chetty *v.* Marappa Gundar, A. I. R. 1965 Mad. 37 at pp. 41-2 : I. L. R. (1964) 1 Mad. 691 : 77 M. L. W. 615 : (1964) 2 M. L. J. 441.
2. Mahbub Begum *v.* Habeebool Hoosein, 15 W. R. 44.
3. Prahlad *v.* Budhu, 12 W. R. 6 (P.C.) : 2 B. L. R. 111.
4. Smt. Raj Rani Bhasin *v.* S. Kartar Singh Mehta, A.I.R. 1975 Delhi 137 at p. 144 : 1975 Rajdhani L. R. 264.
5. Brickles *v.* Snell, (1916) 2 A. C. 599 : 38 I. C. 123.
6. Bindeshri *v.* Jai Ram, I.L.R. 9 All. 705.
7. Haji Fakir Mohamad *v.* Abdulla, I.L.R. 12 Bom. 658.

execution and that decree-holders who were the only persons entitled to keep the decree alive before the execution of a written assignment, having allowed the decree to become dead, could not force on the purchaser a worthless bargain.[1]

16. Pleadings and proof.—Under sub-clause (*b*) of the present Sec. 16 the plaintiff has to show that he had not become incapable of performing essential term of the contract or that he had not violated any of the essential terms of the contract or that he had performed his own part of the contract. Under sub-clause (*c*) of the new section the plaintiff must specifically allege and prove (1) that he has performed his part of the contract or (2) that he had always been ready and willing to perform the essential terms of the contract, which were required to be performed by him under the contract. The explanation prescribes the procedure as to how in case of payment of money the plaintiff is to proceed. It says in the case of the contract, involving payment of money, the legal requirements would be sufficiently met if he avers his readiness and willingness to perform the contract according to its true construction and it is not necessary to actually deposit the amount in Court or to tender the amount to the defendants unless he has been specifically directed by the Court to do so.

One of the essential conditions for the enforcement of the specific performance of the contract is that the plaintiff should not only be ready and willing to perform his part of the contract but also allege to prove his readiness and willingness to perform his part of the contract; where, therefore, the plaintiff has not performed his part of the contract or has not averred in his plaint or proved that he was ready and willing to do his duty in respect of the contract, it is not open to him to claim specific performance of the contract for the general rule of equity is that a person who asks the Court to enforce the specific performance of the contract must himself aver and prove that he was ready and willing to perform his part of the contract or that he has, on his part, performed it. But this rule of equity is liable to be relaxed in suitable cases. In *Ardeshir H. Mama* v. *Flora Sassoon*,[2] Lord Blanesburgh, delivering the judgment of the Judicial Committee of the Privy Council observed : "In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. Thus it was that the commencement of an action for damages, being on the principle of such cases as *Clough* v. *L. & N. W. R.*[3] and *Law* v. *Law*,[4] a definite election to treat the contract as at an end, no suit for specific performance, whatever happened to the action, could therefore be maintained by aggrieved plaintiff. He had by this election precluded himself even from making the averment just referred to, proof of which was essential to the success of his suit."

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1. Jatindranath *v.* Peyer Deye Debi, I. L. R. 43 Cal. 990 : 43 I. A. 108 : 34 I.C. 69 : 18 Bom. L.R. 509 : 20 M.L.T. 25 : 1915 M.W.N. 403 : 14 A.L.J. 527 : 31 M. L. J. 248 : 20 C. W. N. 866 : 24 C. L. J. 67 (P. C.).
2. A. I. R. 1928 P.C. 208 at p. 216.
3. (1872) 7 Ex. 26 : 41 L.J. Ex. 17 : 25 L.J. 708 : 20 W. R. 189.
4. (1905) 1 Ch. 140 : 74 L. J. Ch. 169 : 53 W.R. 227 : 92 L.T. 1 : 21 T.L.R. 102.

In order that the plaintiff be held disentitled to claim relief of specific performance of the contract, it is necessary to prove that the default on the part of the plaintiff went to the very root of the contract or of an essential terms of the contract. Where, therefore, the breach or default on the part of the omission or terms of the contract on the part of the plaintiff did not go to the root of the contract, and are trivial in nature, they would not, in the nature of things, disentitle the plaintiff to a decree for specific performance of the contract.[1]

Where one party does not perform his part of the contract he is not in law entitled to enforce its specific performance against the other party. The other consequence of such conduct of the party is that the other party would be at liberty and within his right to refuse to perform his part of the contract. And when both the parties fail to carry out the contract the contract comes to an end and is not liable to be enforced. Such contract remains alive only for the purpose of enabling the innocent party of the contract to claim compensation from the other party.

Where the period fixed under a lease had expired no decree for specific performance of the contract after the expiry of the period of the lease could be passed. In *Rudra Das Chakravarti* v. *Kamakhya Narain Singh*,[2] the Court had occasion to consider this aspect of the law. At page 277 of the report it was stated : "Darling, J., referred to the contention of the learned counsel for the appellant that it was impossible that specific performance of the agreement could be ordered by the Court after the expiration of the agreement itself, and observed as follows : 'Speaking frankly, I have no doubt that the Court of Chancery would not have granted specific performance in the present case, but I think that the basis upon which the specific performance would be granted has been altered in later times.' Then his Lordship observes : 'At one time it was said in the Court of Chancery that there could not be a decree for specific performance of an agreement from year to year upon the ground that it was inconceivable that a case could be heard within a twelve-month. That idea, however, has now been given up and the Court would make such an order before a tenancy of this kind would have expired.' In the case before his Lordship this term had expired on the date of judgment and therefore he proceeded to consider as to what should be the proper form of the decree and the principle upon which that decree should be based. His Lordship referred to the doctrine laid down in *Walsh* v. *Lonsdale*,[3] where Sir George Jessel, M. R., said : 'There is only one Court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the terms of equity, as if a lease had been granted'. Relying on this doctrine his Lordship observed : 'If the landlord is to be regarded here as if the lease had been granted it is perfectly plain that he must have the same rights as if it had been, and we must look at this case as if a lease had been actually granted.' And then the learned Judge concluded : 'Had the action been one for specific performance and not one for recovery of rent of the land of which the defendant had already been in occupation, I am not sure that the Court would have decreed specific performance of the agreement. I agree with the learned Subordinate Judge that no specific performance of the contract of the prospecting licence could be

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1. **Ma Sa Bon** *v.* Ma Da Twe, **A.I.R. 1924 P. C. 233 at p.** 237.
2. **A. I. R.** 1925 Pat. 259 **at pp. 277-78.**
3. (1882) 21 Ch. D. 9 : 52 L. J. Ch. 2 : 46 L. T. 858 : 31 W. R. 109.

decreed in the present case as the two years' period fixed thereby had already expired'."[1]

17. Clause (c)—Scope and application.—The perusal of Sec. 16 (*c*) leaves no room for doubt that a suit for specific performance has to fail if the plaintiff fails to plead and prove his readiness and willingness to perform his part of the contract.[2]

In the above cases it has been held that the want of averment in the plaint to this effect is fatal to suit for specific performance.

Where an averment that the plaintiff has all along been ready and willing to perform his part of the contract is lacking in the plaint the plaintiff is not entitled to any decree for the specific performance.

The plaintiff therefore cannot get a decree of specific performance notwithstanding the fact that no breach of contract was committed by the plaintiff and that it was the defendant who tried to evade execution of the sale-deed by hook or by crook.[3]

Under the clause mere choice of remedy is .no bar to an action for specific performance if satisfaction has not been obtained.[4] A decree for damages even if unexecuted has been held to be a bar to a subsequent suit for specific performance, the decree-holder's proper remedy being to execute the decree.[5] In a suit for specific performance of a contract for sale of a shop the facts were as follows : The defendant who was indebted to the plaintiff on the basis of three promissory notes agreed to sell his shop to him. The plaintiff instituted a suit on the basis of promissory notes and coming to know that the defendant was resiling from his agreement, filed an application in the suit for attachment before judgment of the shop in question. Subsequently the defendant sold the shop to another person who had notice of the contract for sale with the plaintiff. In the suit by the plaintiff for specific performance it was contended that the plaintiff had disentitled himself from the relief claimed by reason of his conduct in electing to attach the property, as the property of the judgment-debtor was capable of being sold in execution of such decree as might be passed in the suit. It was held, overruling this contention, that it was impossible to give effect to the doctrine of election on the basis of such a slender foundation, and that the plaintiff might very well have thought that the best way by which the defendant could be prevented from selling the property to another was by attaching the property before judgment and that it also might be a sort of lever to induce the defendant to sell the property to the plaintiff according to the contract.[6]

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1. Rudra Das Chakravarti *v.* Kamakhya Narayan Singh, A. I. R. 1925 Pat. 259 at pp. 277-78.
2. Prem Raj *v.* D. L. F. Housing and Construction Private Ltd., A. I. R. 1968 S. C. 1355 ; Rajendra Prasad Rai *v.* Rajdeva Rai, 1974 A.L.J. 378 : A. I. R. 1974 All. 294.
3. Sankatha Prasad *v.* Abdul Aziz Khan, A. I. R. 1976 All. 95 at p. 96.
4. Calcutta Improvement Trust *v.* Subamabala, 44 C. W. N. 541.
5. Sanitu *v.* Ferguson, (1849) 1 Mac. & G. 286.
6. Gaindo Devi *v.* Shanti Swarup, 167 I. C. 657 : A. I. R. 1937 All. 161 : 1937 A. L. R. 227 : 1936 A. W. R. 1290.

In *Mst. Asa Devi* v. *Mst. Champa Devi*,[1] it was held that the mere receiving of overdue instalments after seeking relief for that was not an alternative remedy to getting back the property on the failure of three consecutive instalments and that the remedy of getting back the property is not barred by reason of such receipt.

18. Purchaser must aver and prove that he was ready and willing to purchase the property.—The Specific Relief Act of 1877 did not specifically require that the purchaser must aver and prove that he was ready and willing to purchase the property from the date of the agreement till the date of the suit. Nevertheless it was held by the Privy Council in *Ardeshir H. Mama* v. *Flora Sassoon*,[2] that this was the law in England and that the requirements of the Indian and English law in this matter were the same. The Law Commission, therefore, recommended that the new Specific Relief Act should specifically include this requirement to be fulfilled by the plaintiff suing for specific performance. Section 16 (*c*) of the Specific Relief Act, 1963, therefore, enacts that it would be a personal bar to the relief of specific performance in favour of a plaintiff who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant.[3]

19. Contract open to more than one construction.—This section takes the place of Sec. 24 of the old Act. But there was no corresponding provision in Sec. 24 of the old Act like Cl. (*c*) of Sec. 16 of the new Act. This clause has been added on the basis of principles enunciated by case-law. By reason of Cl. (*c*) it is now expressly provided that in a suit for specific performance the plaintiff must aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. Explanation (*ii*) is also material. It provides that the plaintiff must aver performance of, or readiness and willingness to perform, the contract "according to its true construction".

On the language used in Cl. (*c*) read with the explanation, this argument that the plaintiff in a suit for specific performance must adopt only one construction of the contract and must allege his readiness and willingness to perform the contract in accordance with that construction cannot be accepted. A contract may be open to more than one construction and a plaintiff may allege the alternative constructions to which the contract may be open and claim relief on that basis. The true construction of the contract would be that construction which is finally accepted by the Court. The plaintiff for entitling him to the relief of specific performance, will have to satisfy that he alleged and proved his readiness and willingness to perform the contract in accordance with that construction which is ultimately accepted by the Court and, if he succeeds in establishing that he would not fail merely because other alternative constructions which are not accepted by the Court were also alleged and relief was claimed on that basis. Alternative constructions, if persisted throughout the trial, may, in some cases, create difficulty in proving readiness and willingness from the date of contract according to the true

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1. A. I. R. 1953 All. 559 at p. 563 : 1953 A. L. J. 295.
2. I. L. R. 52 Bom. 597 at pp. 622-23 : A. I. R. 1928 P. C. 208.
3. Smt. Raj Rani Bhasin *v.* S. Kartar Singh Mehta, A.I.R. 1975 Delhi 137 at p. 141 : 1975 Rajdhani L. R. 264.

construction, for if the alternative constructions are inconsistent, proof of readiness and willingness according to one construction may be destructive of readiness and willingness according to other construction. That difficulty, however, does not arise in the present case as the case of mortgage was given up by the plaintiff at the trial.[1]

20. Distinction between readiness to perform the contract and willingness to perform the contract.—A distinction may be drawn between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract. This includes his financial ability to pay the purchase price. But the more important question is whether he is willing to perform his part of the contract even if he had the financial capacity to do so. It is here that the plaintiff's conduct has to be properly scrutinised.[2]

21. Conduct which would disentitle plaintiff from specific performance and conduct which would not so disentitle him—Distinction between.—The distinction between conduct which would disentitle the plaintiff from specific performance and conduct which would not so disentitle him is as follows : If the conduct of the plaintiff shows that he was really unwilling to buy the property then the plaintiff is disqualified from specific performance. If, on the other hand, the plaintiff was always willing to buy the property but in doing so made a mistake in insisting on some thing which he was not entitled to get from the defendants then such a mistake would not disqualify him from specific performance if the mistake was corrected in time and the plaintiff had made it clear that he had withdrawn the mistaken demand and the mistake did not detract his essential willingness to purchase the property.[3]

22. Time, when essence of contract.—In *Smt. Raj Rani Bhasin* v. *S. Kartar Singh Mehta*,[4] the ground portion of the building in suit was leased by the defendants-appellants to the plaintiff-respondent in 1958. On 21st September, 1961, the defendants-appellants agreed to sell the building in suit to the plaintiff-respondent. The conveyance of the property, however, did not take place and a fresh agreement to sell was executed by the defendants-appellants in favour of the plaintiff-respondent on 20th March, 1962. The material clauses of the agreement to sell were as follows :

> "(2) The sellers were to pay off the mortgage on the suit property in favour of one Kaushalaya Rani and deliver to the purchaser the mortgage-deed duly discharged at the time of the registration of sale-deed.
>
> (3) The sellers were to get the permission from the Ministry of Rehabilitation for the transfer of the lease-deed of the land over which the said property was constructed before the execution and registration of the sale-deed.
>
> (4) The sellers were to produce satisfactory evidence as to the majority of Chandra Prakash and in case he was found to be a minor Smt. Raj Rani Bhasin was to obtain the requisite permission from the

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1. Bajranglal *v.* Purushottamdas Puranlal Narela, A. I. R. 1972 M. P. 137 at p. 140.
2. Smt. Raj Rani Bhasin *v.* S. Kartar Singh Mehta, A.I.R. 1975 Delhi 137 at p. 141 : 1975 Rajdhani L. R. 264.
3. *Ibid.*
4. A. I. R. 1975 Delhi 137.

Court of the District Judge, Delhi, for the transfer of the share of the said Chandra Prakash in the suit property.

(5) Subject to Cl. 9 the execution and registration of the sale-deed was to be completed by the 8th of August, 1962.

(9) In case the sellers failed to get the sanction from the Ministry of Rehabilitation or to get the permission from the District Judge or to obtain the wealth-tax certificate within the period stipulated for the transfer of the property, the sale-deed was to be executed and registered within one month from the grant of the sanction from the Ministry of Rehabilitaion or from the grant of the permission by the District Judge or from the grant of the wealth-tax certificate whichever would be the latest. The intimation regarding the receipt of sanctions and the certificate was to be given by the sellers to the purchaser by a registered acknowledgment due letter and the aforesaid period of one month was to be computed from the delivery of such letter to the purchaser or refusal by him to receive the said letter.

(16) The purchaser was to pay for the stamp duty, corporation tax, registration charges, etc., necessary for the execution and registration of the sale-deed."

A literal compliance with Cl. 9 of the agreement was fully made by the defendants on 13th August, 1962. By the registered notice dated 13th August, 1962, which was received by the plaintiff on 14th August, 1962, the defendants gave the plaintiff a little over 30 days' time to perform his part of the contract and thereby complied with the contract which required that the plaintiff should have 30 days' time to perform his part of the contract. During these 30 days the plaintiff kept on insisting on the additional terms contrary to the contract. It was held that the defendants were justified in concluding that the plaintiff was not interested in performing his part of the contract which thereby fell through by 16th September, 1962. No question of performance of the contract thereafter could arise.

The period of 30 days had to be counted from 14th August, 1962, when the said notice was received by the plaintiff.

As the time for performing the contract had expired the failure of the plaintiff to show willingness to perform his part of contract up to 16th July, 1962, disqualified him to specific performance and the defendants were not required to treat the contract as alive.

As observed by the Supreme Court in *Gomathi Navagam Pillai* v. *Pallaniswami Nadar*,[1] approving the observation of the Trial Court :

"Mere assertion in the plaint that he was ready and willing to perform the contract was not sufficient and his readiness and willingness had to be judged from what he had done or from his conduct subsequent to the agreement. The reasons set up by the respondent for the delay in taking steps in the matter were obviously untrue and that the respondent was trying to put the blame on the appellants and inventing excuses to explain the omission in taking the sale-deed."

1. (1967) 1 S. C. R. 227 at pp. 235-36 : A. I. R. 1967 S. C. 868

The finding of the Trial Court that the plaintiff-respondent was unwilling to purchase the property was upheld by the Supreme Court and the appeal of the defendant-appellant was allowed.[1]

New

17. Contract to sell or let property by one who has no title, not specifically enforceable.—(1) A contract to sell or let any immoveable property cannot be specifically enforced in favour of a vendor or lessor--

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the property;

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of moveable property.

Old

25. Contract to sell property by one who has no title, or who is a voluntary settler.--A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor---

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the same ;

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

Illustrations

(a) **A**, *without* **C**'*s authority, contracts to sell to* **B** *an estate which* **A** *knows to belong to* **C**. **A**, *cannot enforce specific performance of this contract even though* **C** *is willing to confirm it.*

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1. Smt. Raj Rani Bhasin *v.* S. Kartar Singh Mehta, A. I. R. 1975 Delhi 137 at pp. 143, 144 : 1975 Rajdhani L. R. 264.

Old

(b) A *bequeaths his land to trustees, declaring that they may sell it with the consent in writing of* B. B *gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with* C *to sell him the land.* C *refuses to carry out the contract. The trustees cannot specifically enforce this contract as in the absence of* B's *consent to the particular sale to* C, *the title which they can give* C *is, as the law stands, not free from reasonable doubt.*

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1. Legislative changes.—This section corresponds to old Sec. 25. The marginal note which ran "Contract to sell property by one who has no title or who is a voluntary settler", have been substituted by a fresh marginal note in these words, "Contract to sell or let property by one who has no title, not specifically enforcable". In the body of the section the first paragraph has been numbered as sub-section (1) in t .e new section. The words "a contract for the sale or letting of property whether moveable or immoveable" have becn substituted by the words "a contract to sell or let any immoveable property". Clauses (*a*) and (*b*) of the old section have been reproduced in the new Cls. (*a*) and (*b*) of the new sec ion verbatim. Clause (*c*) of the old section has been omitted. The illustrations have been also omitted. A new sub-sectio.n has been added as sub-section (2) of the new section.

2. Reasons for the change.—The Law Commission of India, in their Report on the Specific Relief Act, 1877, says : "Old Sec. 18 speaks of property generally and old Sec. 25 refers to moveable and immoveable property. It is, however, not clear how far the provisions of these two sections apply to contracts for the letting of moveable property. Nor do the reported decisions throw any light on this point. It may not be strictly accurate to describe contracts for the letting and hiring moveable property as contracts of lease. Letting and hiring of moveables is really a contract of bailment which is governed by Chapter IX (Secs. 148 to 170) of the Indian Contract Act, 1872. If the bailor does not deliver the moveable property which is the subject-matter of the contract, the bailee may have his remedy against the bailor for recovery of possession of the property. There is no provision in the Indian

Contract Act for the enforcement of such a contract. The matter must, therefore, be governed by Secs. 10 and 11 (now Secs. 7 and 8) of the Specific Relief Act. After the termination of the period of letting or hiring the bailor would be entitled to a return of the property and a corresponding duty is imposed on the bailee by Secs. 160 and 161 of the Indian Contract Act. Even in the case of contracts for the sale of moveables the scope for the application of old Secs 18 and 25 (now Secs. 13 and 17) is rather narrow inasmuch as it is only in the case of articles of special value that contracts for the sale of moveables are specifically enforced. Therefore for the sake of clarity, old Secs. 18 and 25 (now Secs. 13 and 17) deal only with immoveable property.

"Clause (*e*) of old Sec. 25 has been omitted as it was founded on the English law as it stood under a statute of the 16th century, which has since been altered by legislation. A conveyance without valuable consideration was voidable at the suit of a supervening purchaser for value with notice. This has ceased to be the law in England since the Voluntary Conveyance Act, 1873 (56 & 57 Vic.) now placed by the Law of Property Act, 1925 (Sec. 173)."[1]

3. Scope.—This section deals with cases in which the seller or lessor has either (1) no title to the property sold, let out or (2) cannot give the purchaser or lessee a title free from reasonable doubt, and (3) where previous to such sale or letting he has made a settlement of the subject-matter of the contract.

4. Contract without title.—*Clause* (*a*).—Under this clause specific performance cannot be decreed at the vendor's instance if he knew at the date of the agreement for sale of land that he had no title, although he is able to show a good title at the date of suit and the other party has not repudiated the contract in the meanwhile. The section does not, however, invalidate the contract. The contract is a perfectly good one and if one side thereafter chooses to repudiate it he is liable for damages for its breach. The measure of damages in the case like this is the difference between the market value of the land at the date of the breach and the price fixed in the agreement.[2]

When a person sells property which he is neither able to convey himself nor has the power to compel any other person, the purchaser as soon as he finds out that to be the case, can repudiate the contract and is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold.[3] There is a difference of opinion whether subsequent acquisition of title by the vendor or lessor before the time for completion of contract has passed, will or will not entitle him to enforce specific performance. Collett is of the view that if a man sells an estate to which he has no title and afterwards acquires a title he may enforce specific performance provided the time fixed for performance has not passed. This view though equitable is not borne out by the language of the clause. This view is not shared by Dr. Stokes who thinks that this is contrary to the intention of the Legislature which meant to lay

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1. Law Commission of India, Ninth Report, Specific Relief Act, (1877), pp. 30, 32 and 33.
2. Kishanlal Rudmal Agarwal *v.* Namdeo Krushnaji Dhangar, A.I.R. 1943 Nag. 299 at p. 302: 1943 N.L.J. 433 : I.L.R. (1944) Nag. 90 : 211 I. C. 525.
3. Forrer *v.* Nash, 35 Beav. 167.

down a rule in accordance with the view apparently held in *Adam* v. *Broke*.[1] The vendor's obligation to make good a title is not removed by the purchaser's knowledge on the date of the contract that the title was bad by reason, e. g. of a breach of covenant[2] though that may sometimes be a reason for refusing specific performance to the purchaser.[3]

Even where the purchaser has no title at the time of sale, so that the purchaser may, if he choose, before a decree for specific performance is made, repudiate the contract, yet, if he acquiesce in the steps taken by the vendor to get in the estate, he will thereby have waived the want of mutuality and be found to accept the title, if made out at the trial or other necessary time.[4]

5. Specific performance of agreement.—In *M. Veera Raghaviah* v. *M. China Veeriah*,[5] the vendor-father and his son constituted a joint family. The father entered into an agreement to sell the land to the plaintiff. The land was not the exclusive property of the vendor-father. It was the joint property of the vendor-father and the son. The agreement of sale was a collusive document brought into existence by the vendor-father and the plaintiff. The question was whether the plaintiff was entitled to specific performance. It was held that the specific performance of the agreement could not be deemed even in regard to the share which the father may get in the land if partition takes place.

6. Time for repudiation of title.—The same principle is also stated in *P. D. DeSouza* v. *K. R. Daphtary*[6] in India. "The right of repudiation must be distinguished from the common law right of rescission and arises out of that want of mutuality, which, unless waived, is generally fatal to relief by way of specific performance. But the right must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose." Again in Halsbury's *Laws of England* it is put thus : "A vendor of property in or over which he had no estate or power at the time of the sale may be met by this fact as a defence to a suit by him for specific performance."[7] A seller may and often does complete his title by procuring the concurrence of necessary parties ; but it is another matter to offer the buyer a conveyance wholly proceeding from a party he did not agree to buy from. The Court will not compel a buyer to accept such a conveyance, for it would be forcing a new contract on him, it is one thing to join a mortgagee or the like in the vendor's conveyance and another thing to substitute a new vendor.[8]

7. Any title.—The section requires that the vendor is bound to show a good title to property and to comply with all necessary and reasonable requisitions to ensure such a title.[9] The title which the vendor must show, must be a title in himself or in those whom he has a legal or equitable right to require to join in the convey nce, he has no right to say that some other person is

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1. 1 Y. & C. C. C. 627 : 27 R. R. 480.
2. *Re* Righet and Bird's Contract, (1903) 1 Ch. 287.
3. Sellerst *v.* Green, 40 L, R. A. 589.
4. Fry, Sec. 1371, p. 929, citing Hoggart *v.* Scott, 1 R. My. 293. In this connexion, *see* A. I. R. 1950 All. 692 at p. 693 , A. I. R. 1933 All. 432 at p. 434 and A.I.R. 1947 All. 431 at p. 433.
5. A. I. R. 1975 A. P. 350.
6. A. I. R. 1924 Bom. 252 at p. 257, *per* Mulla, J.
7. Halsbury, Sec. 397, p. 336.
8. Bryant and Barningham's Contract, (1890) 44 Ch. D. 218.
9. Sham Das *v.* Kishan Chand, A. I. R. 1928 Lah. 154 at p. 156: I. L. R. 9 Lah. 67 : 110 I. C. 850.

willing to come into a contract and to force the title of that other person on the purchaser.[1]

8. Vendor's remedy.—Where a person sells property to which he has no title and in consequence of it the vendee is dispossessed the latter is entitled to damage.

9. Distinction between Cls. (a) and (b).—Clauses (*a*) and (*b*) of Sec. 17 (new) of the Specific Relief Act draw a distinction between a person who knows that he has no title at the time of the agreement and one who though he has no good title believes that he has. This section quite clearly states that in the first case specific performance cannot be decreed at all at the vendor's instance but, in the second case it can be, if, by agreement of the parties or by order of the Court, a time is fixed allowing the vendor to perfect his title. There is, however, some difference of opinion in England on this point. It is not quite settled there whether a person, who has an imperfect title or no title at all, the date of the agreement can claim specific performance if he is able to show a good title at the date of suit, if the other side has not repudiated the contract in the meanwhile. There appears to be two views on the matter,[2] but so far as India is concerned Sec. 17 (new) of the Specific Relief Act resolves the doubt against the purchaser without title. The courts are bound to give effect to the Indian statute and the language of new Sec. 17 is plain and unambiguous on this point.

10. Title free from reasonable doubt.—The clause expressly lays down the test to be applied in determining whether the vendor is able to convey a title free from doubt and it is not safe to attempt to paraphrase it. When a vendor's title depends not upon a question of law but upon proof of disputed fact, that fact must be proved and if the vendor does not prove it he cannot be held to have made out a good title.[3] A vendor must in the absence of a contract to the contrary be able to give a title free from reasonable doubt if he wants a court of equity to enforce the purchase.[4] The question whether there is a room for reasonable doubt must be determined with reference to the facts of each individual case as they exist at the time the suit is brought.[5] The common way of expressing the rule under the clause is that the Court will not force a doubtful title on the purchaser. The vendor must make a good title, i.e. a reasonable, clear, marketable title about which there is not a considerable, a rational doubt.[6] The Court will not compel a purchaser to buy litigation.[7] Every purchaser of land has a right to demand a title which shall put him in all reasonabie security and which shall protect him from anxiety, least annoying if not successful, suits be brought against him and probably take

Each case should be determined with reference to the facts at the time the suit is brought.

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1. Sham Das *v.* Kishan Chand, A. I. R. 1928 Lah. 154 at p. 156 : I. L. R. 9 Lah. 67 : 110 I. C. 850 ; Fry, Sec. 878.
2. Lahiri's *Specific Relief Act,* 4th Ed., pp. 325-26.
3. B. Seetharamamma *v.* R. Patta Reddi, A. I. R. 1940 Mad. 739 at pp. 742-43 : 1940 M. W. N. 14.
4. Haji Mohamad *v.* Musaji, I. L. R. 15 Bom. 657; *see* Baneri, App. C, p. 82 , Mannu Singh *v.* Deputy Commissioner, Sitapur, A. I. R. 1928 Oudh 475 at p. 477 : 110 I. C. 564.
5. Ahmadbhoy *v.* Petit, 11 Bom. L. R. 545 : 3 I. C. 124.
6. Stapilton *v.* Scott, (1809) 16 Ves. 272; Ahmadbhoy *v.* Petit, *supra*; Krishnaji *v.* Ramchandra, A.I.R. 1932 Bom. 55 ; Cattell *v.* Conoll, (1940) 4 Y. & Ch. 228 ; *Re* Nichols and Van Joce's Contract, (1910) 1 Ch. 46 , Williams *v.* Scott, (1900) A. C. 499 ; Pyrke *v.* Waddingham, 90 R.R. 243 : 10 Hare 1; Ballavdas *v.* Kanailal, 64 I. C. 87 , Shrinivas *v.* Mehrbai, I.L.R. 41 Bom. 300 (P. C.).
7. *Ibid.*

from him the land upon which the money was invested. He should have a title which should enable him, not only to hold the land, but to hold it in peace, and if he wishes to sell it to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.[1] This principle is not varied whether the purchaser figures as a plaintiff or as a defendant in an action.[2] He may claim to be satisfied regarding the title of the vendor even before the stage of his acceptance of the title.[3] It cannot be said that there is a defect either in the property or in the title of the vendor because the subject-matter (alongwith other land) has been notified for compulsory acquisition in furtherance of a development scheme.[4] But a title is doubtful if there is a strong probability of litigation about it. No title offered by the head of joint Hindu family can be good enough to be forced on an unwilling purchaser, unless all the coparceners concur.[5] What then is a title free from reasonable doubt? The meaning of a title free from reasonable doubt was explained in *Pyrke* v. *Waddingham*,[6] as a remarkable title which can at all times be forced upon an unwilling purchaser, and it was held in that case that specific performance should not be allowed enen though the Court takes a favourable view of the title if it appears that its opinion may fairly and reasonably be questioned by other competent persons."[7]

Meaning of title free from reasonable doubt.

11. Marketable title.—A marketable title is one which so far antecedents are concerned, may, at all times and under all circumstances, be forced upon an unwilling purchaser.[8] A marketable title is one free from reasonable doubt.[9] The term "not free from reasonable doubt" may fairly be described as imperfect. It is obvious the question is one of degree. The doubt suggested must be a reasonable doubt and the imperfection must be material.[10]

Concept of marketable title.

In the absence of a contract to the contrary, the seller shall be deemed to contract to the buyer that the interest, which the seller professes to the buyer, subsists, and that he has power to transfer the same. The seller is to guarantee and convey marketable title to the buyer which, in the language of Sec. 17 (*b*) (new) of the Specific Relief Act, is a title free from reasonable doubt.

It is only necessary to give a clear analysis of the concept of "marketable title" or "a title free from reasonable doubt". It is indeed very difficult to lay down any hard and fast rule with regard to the requirement of such a title. Each case must be decided on its own facts and circumstances. In *J. N. Duggan* v. *K. M. Talyarkhan*,[11] Kania, J., defined "marketable title" as

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1. Pyrke *v.* Waddingham, 90 R. R. 243 : 10 Hare 1 ; Arun Prokash Boral *v.* Tulsi Charan Bose, A. I. R. 1949 Cal. 510 at p. 514 ; Jodha Mal *v.* Associated Hotels of India, A. I. R. 1950 Lah. 106 at p. 114.
2. Arun Prokash Boral *v.* Tulsi Charan Bose, *supra*.
3. *Ibid*.
4. Jodha Mal *v.* Associated Hotels of India, *supra*.
5. Ahmad *v.* Sir Dinshaw, 3 I. C. 124 : 6 M. L. T. 200 : 11 Bom. L. R. 336.
6. (1852) 10 Hare 1.
7. *Per* Broomfield, J., Lallubai *v.* Mohanlal, A. I. R. 1924 Bom. 16 at p. 18 : 36 Bom. L. R. 1021 : 155 I.C. 564 : I.L.R. 59 Bom. 83 ; *see* Sec. 56, Transfer of Property Act.
8. Pyrke *v.* Waddingham, *supra*.
9. Ramsing *v.* Ram Chand, 85 I. C. 995 : A. I. R. 1925 Sind 342 ; Khan Chand *v.* Dholomal, A. I. R. 1922 Sind 33 : 15 S. L. R. 180 ; Haji Oosman *v.* Haroon Saleh Mohammed, I. L. R. 47 Bom. 369 : 68 I. C. 862 : A. I. R. 1923 Bom. 148 : 24 Bom. L. R. 978.
10. Low & Co. *v.* Jyotiprosad, A.I.R. 1931 P. C. 299 at p. 301.
11. A.I.R. 1938 Bom. 77 at p. 78 : 39 Bom. L. R. 1166 : 173 I. C. 714.

one which could be forced on an unwilling purchaser under a contract for sale made without special conditions, at all times and under all circumstances. Unless the marketable title is proved, or where the rectitude of the title depends upon facts, capable of being disputed, specific performance of contract for sale cannot be granted.[1]

12. Distinction between "making" and "showing".—Distinction between "making" and "showing" a good title should not be lost sight of. A good title is shown when all matters essential to the title are stated in the abstract. It is made when these matters are proved.[2] When a vendor of immoveable property desires to enforce a contract of sale with a condition that the title adduced should be to the satisfaction of the solicitors of the purchaser, he must prove either that the solicitors did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it.[3] A last male owner died leaving a will which had the effect of placing his widow in possession of his properties, but the term did not clearly show that absolute estate was conferred on her and the Court of Wards who managed the properties on behalf of the widow entered into an agreement with a stranger to sell his properties believing that she had full proprietary title to the properties. *Held* that the purchaser was justified in refusing to take the property as the vendor was incapable of giving a title free from reasonable doubt and that the vendor was not entitled to any damages.[4]

13. Lessor subsequently obtaining renewal of lease.—Where at a time when a contract to sub-lease for five years was entered into, the lessor had only two years to run under his own lease, but under the terms of his unexpired lease he had a right to renew the lease, and subsequent to the contract to sub-lease, he got a renewed lease in accordance with those terms for another period, his claim for specific performance of the contract to sub-lease cannot be refused on the ground that he is not in a position to give the lessee a title free from reasonable doubt.[5] The mere fact of knowledge on the purchaser's part of earlier transactions relating to the source and the nature of the vendor's title would not disentitle the purchaser to insist upon proof of vendor's title unless he had agreed to limit the nature of the enquiry into title or had agreed to accept whatever title the vendor had.[6] As a rule of practice a doubtful title is one, on which the Court or other competent person may entertain a reasonable doubt.[7] In common practice judicial approval of a title is accepted as sufficient even when the question is of admitted difficulty.[8] The Court must feel such confidence in its opinion as to be satisfied that another court would not adopt another conclusion.[9] The existence of apparently conflicting decisions is a sufficient ground of doubt.[10]

14. Illustrations of "reasonable doubt" from English judicial decisions followed by Indian High Courts.—The following illustrations of reasonable

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1. Sachidananda Patnaik *v.* Messrs. G. B. & Co., A. I. R. 1964 Orissa 269 at pp. 273-74.
2. Hari Shanker *v.* Sardaprosad, A. I. R. 1932 Bom. 516.
3. Teacher & Co. Ltd. *v.* Mohamadally Adamji Peerbhoy, I. L. R. 35 Bom. 110 : 12 Bom. L. R. 597 ; Krishnaji Gopinath Rele *v.* Ramchandra Kashinath Mastakor, A.I.R. 1932 Bom. 51 ; Clock *v.* Wood, (1882) 9 Q. B. D. 276.
4. Mannu Singh *v.* Deputy Commissioner, Sitapur, 110 I. C. 564 : A. I. R. 1928 Oudh 475.
5. Kumar Gokul Chandra Daw *v.* Haji Mohammad Din, I.L.R. (1938) 1 Cal. 5 3 : 176 I. C. 332 : 11 R. C. 173 : 42 C. W. N. 97 : A. I. R. 1938 Cal. 136.
6. B. Seetharamamma *v.* R. Patta Reddi, A.I.R. 1940 Mad. 739 at p. 740 : 1940 M. W. N. 14.
7. Fry, Sec. 790.
8. Pollock and Mulla.
9. Thackray and Young's Contract, (1888) 40 Ch. D. 34.
10. Palmer *v.* Locke, (1881) 18 Ch. D. 281.

doubt culled from judicial precedents have been mentioned by Fry (Secs. 889-890) : (1) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable or where there is "reasonable decent probability of litigation".[1]

The Court will not compel the purchaser to buy a litigation.[2] Thus the Court declined to force the title upon the purchaser where it appeared that some infants, who had by customary feoffments conveyed their shares of gavel-kind land to the vendor, might possibly, on attaining twenty-one assert some claim against the land;[3] also where a person claiming to be entitled to the benefit of a condition for reverter had given a notice amounting to a threat of litigation, although Court considered the conditions to be obnoxious to the rule against perpetuities and therefore void;[4] and again where a lease contained the usual qualified covenant against assigning without the lessor's consent, and the lessor had declined to consent to an assignment to the purchaser.[5] The unwillingness of the Court is increased where the title depends on a question of a fact to be proved by oral testimony of witnesses whom, at the time when the controversy is raised, it may be difficult to find or who may be dead, or out of the jurisdiction.

(2) Where there has been a decision of co-ordinate jurisdiction adverse to the title or to the principle on which the title rests, though the Court thinks that decision is wrong.[6]

(3) Where there has been a decision in favour of the title which the Court thinks wrong.[7]

(4) Where the title depends on the construction and legal operation of some ill-expressed and artificial instrument and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other court.[8]

15. Modern view.—"The defence that a title is too doubtful to be forced on a purchaser has in modern times found tittle favour with the Court, and the general rule now is that it is the duty of the Court, unless in exceptional circumstances, to decide the rights between the vendor and purchaser, even though its decision will not bind a third party to the action and to ascertain and determine as best it may what the law is.[9] When and in what circumstances will a court find the title doubtful and when not ? It is difficult to precisely state the same,[10] but the following rules given by Fry in his valuable book will be of use."[11]

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1. Cattell *v.* Conoll, 4 Y. & C. Ex. 23 ; Price *v.* Stranger, I.L.R. 6 Mad. 159.
2. Mannu Singh *v.* Deputy Commissioner, Sitapur, 110 I. C. 564 : A. I. R. 1928 Oudh 475 ; Heseltine *v.* Sim Simons, 6 W. R. 268 , Price *v.* Stranger, I.L.R. 6 Mad. 159 at p. 165; Sharp *v.* Adcock, 4 Russ. 374 ; Pegler *v.* White, 33 Beav. 403 , Potter *v.* Parry, 7 W. R. 182 ; Burnell *v.* Firth, 15 W. R. 546 , *see* also Williams *v.* Scott, (1920) A. C. 499 ; *In re* New Land Development Association and Gray, (1892) 2 Ch. 138 , and *In re* Calcott and Elvin's Contract, 46 W. R. 457 at p. 459 : 67 L. J. Ch. 327.
3. *In re* Maskell and Goldfinch, (1895) 2 Ch. 525 ; *cf. In re* Douglas and Powell, (1902) 2 Ch. 296 at p. 314 : 71 L.J. 850.
4. *In re* Hollis, Hospital and Hague, (1899) 2 Ch. 540 at p 555.
5. *In re* Marshall and Salt's, (1900) 2 Ch. 202; *see* also *In re* Verrell, (1903) 1 Ch. 65 : 72 L. J. Ch. 44 : 51 W. R. 73.
6. Mullings *v.* Trinder, L. R. 10 Eq. 454.
7. *Ibid.*
8. Alexander *v.* Mills, L. R. 6 Ch. 124 at p. 139, *per* James, L. J.
9. Halsbury, p. 386 (Hailsham Ed.) ; Alexander *v.* Mills, *supra* ; Johnson *v.* Clarke, (1928) Ch. 847.
10. Halsbury, *supra.*
11. Fry, Sec. 890, pp. 416 to 422.

As a rule of practice a doubtful title is one, on which the Court or other competent person may entertain a reasonable doubt.[1] In common practice judicial approval of a title is accepted as sufficient even when the question is of admitted difficulty.[2] The Court must feel such confidence in its opinion as to be satisfied that another court would not adopt another conclusion.[3] The existence of apparently conflicting decision is a sufficient ground of doubt.[4]

"The Court would, it is conceived, consider title doubtful in the following cases :

(*i*) 'Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable.

(*ii*) 'Where there has been a decision by a court of co-ordinate jurisdiction adverse to the title or to the principle on which the title rests, though the Court thinks that decision wrong.

(*iii*) 'Where there has been a decision in favour of the title which the Court thinks wrong.

(*iv*) 'Where the title depends on the construction and legal operation of some ill-expressed and inartistically drawn instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other court.

(*v*) 'Where the title rests on a presumption of fact which he regards as doubtful'.

"On the contrary, it is conceived that the Court would consider the title not to be doubtful in any of the following cases, viz.[5] :

(*i*) 'Where the probability of litigation ensuing against the purchaser in respect of the doubt is not great, the Court, to use Lord Hardwick's language in one case, "must govern itself by a moral certainty, for it is impossible in the nature of things, there should be a mathematical certainty of good title".[6]

(*ii*) 'Where there has been a decision adverse to the title by an inferior Court, which decision the superior Court holds to be clearly wrong.

(*iii*) 'Where the question depends upon the general law of the land. This is a general and almost universal rule.[7]

(*iv*) 'Where the question though one of construction, turns on a general rule of construction, unaffected by any special context in the instrument and the Court is in favour of the title.

(*v*) 'Where the title depends upon a presumption arising from a fact which the Court favours.

(*vi*) 'Where the doubt raised rests not on the proof or presumption, but on a suspicion of *mala fides*'."

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1. Fry, Sec. 790.
2. Pollock and Mulla.
3. Thackray and Young's Contract, (1888) 40 Ch. D. 34.
4. Palmer *v.* Locke, (1881) 18 Ch. D. 281.
5. Fry, Sec. 891, pp. 416 to 422; Halsbury, pp. 385-88.
6. Lyddall *v.* Weston, 2 Atk. 19.
7. *Per* James, L. J., in Alexander *v.* Mills, L. R. 6 Ch. 124 at pp. 131-32.

The doubt which may prevent the Court from compelling the purchaser to accept title may be a doubt either of law or of the fact ; and as to law it may be connected with the general law of the realm or with the construction of particular instruments ; and as to fact, it may be in reference to facts appearing on the title or to facts extrinsic to it. Again it may be a matter of fact which admits of proof, but has not been satisfactorily proved or about such a matter as from its nature admits of no satisfactory proof.[1]

It is settled law that if there is reasonable doubt as to title to the properties, courts will not exercise their discretion in favour of granting specific performance of an agreement to sell.[2]

There is no provision either in the Specific Relief Act or in any other Act which forbids the parties concluding an agreement not conforming to the provisions of Sec. 17 (new) of the Act. Section 17 (new) would come into play only if there is no agreement to the contrary between the parties or if its benefits are not waived by the party entitled to avail of the same.

The provisions of Sec. 17 (new) may either be waived by the party entitled to their benefits or those provisions may be got over by a specific the contrary.

A plain reading of the section yields the conclusion that it is open to the parties to agree subsequent to the original agreement to implement a agreement to part and not the whole of it.[3]

16. Right of repudiation.—It is the duty of the vendor to show satisfactory title to the vendee, and if he fails in this, he is not entitled to specific performance while the vendee can rescind the contract and recover the money paid and claim damages as well.[4] A prospective lessee has a right to demand all the title-deeds from a prospective lessor before concluding an agreement for lease for his satisfaction and if the lessee is not satisfied with the title of the lessor he can repudiate the lease. Under Sec. 17 (old Sec. 25), Specific Relief Act, a lessor is bound to give the lessee a title free from reasonable doubt, and where a prospective lessee demands title-deeds from the prospective lessor for his investigation and approval, it cannot be said that there has been a final and concluded agreement between them, although most of other material terms may have been agreed upon by them. In such case the lessee is free to back out of the contract if he is not satisfied about the lessor's title and so long as one party is left free to back out of a contract at his choice, it cannot be said that any binding contract has been arrived at between the parties.[5]

The vendee's right to repudiate contract must be exercised as soon as the defect in vendor's title is discovered. If after ascertaining the existence of defect he treats the contract as subsisting, e. g., by continuing to negotiate

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1. Fry, Sec. 889.
2. Thambireddi Seshureddi *v.* Vangallu Mallareddi, 42 L. W. 422 : A.I.R. 1935 Mad. 852 : (1935) M. W. N. 111 : 8 R. M. 370 : 158 I. C. 878.
3. Smt. Nirmala Sundari *v.* Kumode Bondhu, A.I.R. 1976 Gau. p. 58.
4. Sham Das *v.* Kishan Chand, A. I. R. 1928 Lah. 154 at pp. 155-56 : I.L.R. 9 Lah. 67 : 110 I. C. 850 : 99 P.L.R. 310.
5. *See* Baij Nath *v.* Kshetrahari Sarkar, A. I. R. 1955 Cal. 210 at p. 215.

he does not retain the right to repudiate at a subsequent moment he may choose, but must give the vendor a reasonable time to remove the defect.[1]

17. Sale by co-sharer.—Where a person who is not the sole owner of land but only a co-sharer enters into contract for sale of the whole land and gives an undertaking to obtain the consent of other co-sharers and the contract is not fulfilled due to the refusal of other co-sharers to transfer their shares in the land, the vendee is entitled to damages for non-performance of the contract.[2] A statement by the vendee that he would confine his claim to damages only as the specific performance was not possible has bearing on the course of the trial of the suit brought by him for specific performance and in the alternative for damages.[3]

18. Covenant of title.—A covenant of title is broken immediately after the execution of the deed if the seller does not possess the estate professed to be granted and the purchaser is not bound to wait till his possession is disturbed to bring a suit against the vendor for breach of such covenant. A covenant for quiet enjoyment, on the other hand, affords no right of action until a disturbance.

Distinction between covenant of title and covenant for quiet possession.

19. Burden of proof as to breach of covenant.—In an action for damages for breach of covenant of title, the burden is on the plaintiff to prove a breach of the covenant and if the evidence adduced is inconclusive, the defendant is entitled to succeed.[4]

20. Want of a good title.—A court will not normally force doubtful title on the purchaser. The phrase "defect in title" is loosely used in some of the cases in order to indicate that the vendor, through some material error in description, fails in effect to convey to the purchaser the property he intends to buy, In other cases, the expression may be used in more literal sense, such cases as *Re Niebet and Potts*,[5] in which a title which seemed to be unencumbered turns out to be burdened with restrictive covenants. Yet other cases there are in which there is not a defect in the vendor's title but a definite want of it. Clearly the purchaser cannot be compelled to take the land, if the vendor's title to it turns out to be definitely bad. Equally clear is that he cannot refuse to take it if the vendor's title turns out to be definitely good. But between the good and the bad lie an indefinite variety of doubtful titles. Will the Court, without going the full length of labelling these as bad yet refuse to compel a purchaser to accept them. Originally the answer was negative, but the decisions in *Marlow* v. *Smith*,[6] and *Shoplant* v. *Smith*[7] established a new doctrine that the Court would not force a doubtful title upon a purchaser, or as it is expressed in more homely language, the Court will not force a party to purchase a law suit.

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1. Halsbury, Vol. XXV, Sec. 692; Bai Dasibai *v.* Bai Dhanbai, I. L. R. 49 Bom. 325 : A. I. R. 1925 Bom. 85 : 35 Bom. L. R. 1071; Lakhmidas *v.* Sir D. Tata, I. L. R. 51 Bom. 247 : 101 I. C. 229 : A. I. R. 1927 Bom. 195 : 29 Bom. L. R. 19.
2. Pollock and Mulla; Ibrahimbhai *v.* Fletcher, I. L. R. 21 Bom. 827 (F. B.); Shiv Ram *v.* Bal, I.L.R. 26 Bom. 519.
3. Mangal Singh *v.* Pandit Dial Chand, 42 P.L.R. 185 : A.I.R. 1940 Lah. 159 : 188 I. C. 383.
4. V. M. Meerkanni Rowther *v.* A. V. Periyakaruppan, A. I. R. 1934 Mad. 687 : 67 M. L. J. 647 : (1934) M. W. N. 1207 : I. L. R. 57 Mad. 1016 : 151 I. C. 920.
5. (1906) 1 Ch. 386.
6. (1723) 2 P. Wms. 198. Here a return of the deposit was ordered by Hekyll, M.R., the property being a trust estate, and so within the exclusive jurisdiction of equity.
7. (1780) 1 Bro. C. C. 75.

Lord Eldon in *Vancouver* v. *Blissin*,[1] confessed that, though he felt himself bound to apply the doctrine, yet he heartily disapproved of it, on the ground that it created a spirit of unrest among landowners, and encouraged tentative attacks on property by any who might think they had a shadow of a claim on it. But in favour of the doctrine it must be borne in mind that just because the judgments of equity were *in personam* and not *in rem*, it would be running counter to its own principles of conscience if it were to force *A* at the suit of *B*, to accept land which might afterwards bereft from him by an action of ejectment brought by *C*, who would of course not be stopped by the judgment for specific performance against *A*.

But the doubt must be substantial. Having once allowed the idea of a class of doubtful title to take root, midway between good and bad titles, equity was faced with the problem of drawing a line between those titles which a purchaser would, and those which he would not, be compelled to accept. For nobody has dreamed of suggesting that the Court should never force a doubtful title on a purchaser. Maitland says that the modern cases indicate that the doubt which is to serve as the purchaser's defence must be a very serious doubt.

If the purchaser wishes to escape from carrying out a completed contract to purchase a piece of land, he must show that the title is clouded with a very substantial doubt, such a doubt as renders subsequent litigation, if not morally certain, at least exceedingly probable. But Court must never lose sight of the principle, which emerges from the cases just discussed on misdescription of the subject-matter, that a purchaser will never be compelled to take something substantially different from that which he contracted to buy. In *Re Brine and Davies Contract*,[2] the vendor led the purchaser to assume that he had an absolute title in the freehold which formed the subject-matter of the sale. As a matter of fact his title was only possessory, but this was revealed only by the abstract. It was held that the purchaser need not complete, notwithstanding a condition in the contract that he had 14 days only from the delivery of the abstract for lodging objections to the title.

Where a question of title is raised in a suit for specific performance between a vendor and a purchaser it has got to be decided by the Court between the parties to the suit even though this may have to be in the absence of other person or persons who may be interested in the title of the property in question, but have not been made party to the suit and therefore are not before the Court. The courts are bound in such eventuality to pronounce their judgment upon the efficacy or otherwise of the title in question though the judgment of the Court in such an action would be only *in personam* and not *in rem*. The above principle is as much applicable to a vendor's suit for specific performance as to a purchaser's suit for refund of earnest money or for damages, as the case may be, for there appears to be no valid reason whatsoever for making any distinction between the two classes of cases so far as the applicability of the principle referred to above is concerned.[3] In this connexion it would be fruitful to review the following

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1. (1805) 11 Ves. 458 at p. 465.
2. (1935) Ch. 388; *see* also Smith *v.* Colbourne, (1914) 2 Ch. 533 at p. 541—He seems to have abandoned a different viewpoint taken by him four years earlier in *Re* Nichols and Von Joel, (1910) 2 Ch. 43 at p. 46. The cases are admirably classified and examined by Fry, *op. cit*, 416 ff.
3. *See* Shankar Lal *v.* Jethmal, A. I. R. 1951 Raj. 196.

English cases, which throw a flood of light on the position of the English law on the point in question.

In *Glass* v. *Richardson*,[1] Turner, V. C., in a suit for specific performance between a vendor and a purchaser observed as follows :

> "The question which the Court has to try in this case, as in other cases of the like nature, is attended with peculiar difficulty. The Court has to determine, in the absence of a third party by whom a claim is or may be advanced, whether there is any just foundation for the claim. On the one hand, the Court has to take care that the just rights of the party asking for its interference are not defeated by the assertion of an unfounded claim ; on the other hand, it has to take equal care that the party against whom its interference is sought is not exposed to the danger and expense of contesting a claim, which may be founded upon substantial grounds."

Again James, L. J., delivering the judgment of the Court of Appeal in *Alexander* v *Mills*[2] laid down that, barring exceptional cases, it was a general and almost universal rule to decide questions of law between a vendor and a purchaser; though it must be added as Jessel, M. R., pointed out in *Osborne* v. *Rowlett*[3] that any such decision does not technically bind anyone else but the parties actually before the Court and does not prevent any person not bound by the decision from at any time bringing fresh litigation upon the purchaser with reference to the same title.

Another case that may be cited in this connexion is *Smith v. Colbourne*,[4] where Cozens-Hardy, M. R., made the following trenchant observations :

> "Lastly it was urged that the title is too doubtful to be forced upon a purchaser. The courts have in modern times not listened with favour to such a defence. It is the duty of the Court unless in very exceptional circumstances, to decide the rights between the vendor and the purchaser, even though a third person not a party to the action will not be bound by the decision."

The correct legal position is that where a question of title is raised in a suit for specific performance between a vendor and a purchaser it has got to be decided between the parties to the suit even though this may have to be in the absence of some other person or persons who may be interested in the title of the property in question but have not been made parties to the suit and therefore are not before the courts. Section 17 (*b*) (new) of the Specific Relief Act provides that a contract for the sale of moveable or immoveable property would not be capable of specific enforcement at the instance of a vendor who, though he may have entered into the contract, believing that he had a good title to the property cannot at the time fixed by the parties or the Court for the completion of the sale, give a purchaser a title free from reasonable doubt. What a seller is, therefore, required to give is a "marketable title" or as Sec. 17 (new), Specific Relief Act, describes it "a title free from reasonable doubt". If he can ensure that it is sufficient compliance of the provisions of Sec. 17 (*b*) (new) of the Specific Relief Act and Sec. 55 (2) of the Transfer of Property Act, the question then arises as to what a

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1. (1852) 9 Hare 698.
2. (1870) 6 Ch. All. 124.
3. (1880) 13 Ch. D. 774.
4. (1914) 2 Ch. 533.

"marketable title" is ? The leading English case on the question is *Pyrke* v. *Waddingham*,[1] in which Turner, V.C., ruled that the marketable title was one which so far as his antecedents are concerned may, at all times and under all circumstances be forced upon an unwilling purchaser. According to Turner, V. C., such a title cannot be held to be made out, where the purchaser "if compelled to take the title might not be exposed to substantial and not merely idle litigation or even that he would be free from all possible hazard". Kania, J., as he then was, in *J. N. Duggan* v. *K.M. Talyarkhan*,[2] followed the dictum of Turner, V. C. (quoted above) in *Pyrke* v. *Waddingham*,[3] lays down the following principle, "the rule rests upon this that every purchaser is entitled to require a marketable title, by which I understand it to be meant a title, which so far as its antecedents are concerned, may, at all times and under all circumstances be forced upon an unwilling purchaser. I think, therefore, that in these cases it is the duty of the Court not to have regard to its own opinion only, but to take into account what the opinion of the other competent persons may be . . . . If the doubt arise upon a question connected with the general law, the Court is to judge, whether the general law upon the point is or is not settled, enforcing specific performance in the one case . . . and refusing to enforc it in the other . . . with reference to the doubt upon the legitimacy, to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances which neither the purchasers nor the Court has the means of satisfactorily investigating, specific performance is to be refused." At page 10,[4] the learned V. C. observes " . . . . in determining whether specific performanee is to be enforced or not, it must not be lost sight of that the exercise by the Court of its jurisdiction in cases of specific performance is discretionary ; and that . . . the Court has no means of binding the question as against adverse claimants, or of indemnifying the purchase, if its own opinion should ultimately turn out not be well founded." The principles enunciated by Turner, V. C., in *Pyrke* v. *Waddingham*,[5] were fully approved in England in subsequent cases and in India were accepted and followed in *Krishnaji Gopinath Rele* v. *Ramchandra Kashinath Mastakar*.[6]

Sub-section (1) deals only with immoveable property and sub-section (2) extends the provisions of sub-section (1) *mutatis mutandis* to moveables so that possible cases calling for application of sub-section (1) may be covered.

21. Company in liquidation and company dissolved—Transfer of shares—When specific performance can be ordered.—"Specific performance may be ordered of a contract to sell shares, even although the company pending the litigation has gone into liquidation, and also of a contract to take a transfer of shares whereon nothing has been paid."[7]

"The fact that the company is being wound up may have an effect on the grant of relief by the Court. This depends on whether the winding up petition was presented when the contract was made, neither party being aware of the fact, in which case the contract is not enforced : but it seems that if the petition is presented after the contract was made the purchaser is

1. (1852) 10 Hare 1.
2. A. I. R. 1938 Bom. 77 at pp. 78, 79.
3. (1852) 10 Hare 1 at pp. 8, 9.
4. (1852) 10 Hare 1.
5. (1852) 10 Hare 1 at pp. 8, 9.
6. A.I.R. 1932 Bom. 51 : 135 I. C. 417 : 33 Bom. L. R. 1377.
7. Halsbury's *Laws of England*, 3rd Ed., Vol. 6, p. 249.

liable, and, even if specific performance ought not to be granted, the vendor will be entitled to an indemnity."[1]

In *Kidambi Vatapatra Sayi* v. *V. Venkata Punnayya*,[2] the suit itself was instituted with the knowledge that the petition for winding up was filed in the High Court. The plaintiff, therefore, cannot claim specific performance of the agreements. Further, it is impossible to grant a decree for specific performance as the company itself is dissolved. Nor can the appellant derive any help from Sec. 17 (new) of the Specific Relief Act. This section cannot be invoked because it cannot be said that at the time the plaintiff entered into the agreement, he believed that he had good title to the property, as on his own admission the transfer deed is incomplete and defective, and he never made any attempts to get the transfer registered. Even if a time for the plaintiff to transfer the shares can be fixed he is not in a position to do so, as the company is not only wound up, but also dissolved. For invoking Sec. 21 (new) of the Specific Relief Act, it is necessary that the defendant should have committed a breach of the agreement. Inasmuch as the plaintiff never acquired title to the shares before the institution of the suit, their Lordships cannot hold that the defendants committed breach of the contract.

New	Old
18. Non-enforcement except with variation.—Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely :	**26. Non-enforcement except with variation.**—Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with a variation so set up, in the following cases (namely) :
(*a*) where by fraud, mistake of fact of misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract ;	(*a*) where by fraud or mistake of fact, the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it ;
(*b*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce ;	(*b*) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff ;
	(*c*) when the defendant, knowing the terms of the contract, and understanding its

1. Halsbury's *Laws of England*, Vol. 36, para. 381, p. 276.
2. A.I.R. 1965 A. P. 353 at p. 359 : (1965) 1 Com. L. T. 257 : (1965) 1 Andh. W. R. 441.

New

(*c*) where the parties have, subsequently to the execution of the contract, varied its terms.

Old

effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil ;

(*d*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce ;

(*e*) where the parties have, subsequently to the execution of the contract contracted to vary it.

Illustrations

(a) A, B *and* C *sign a writing, by which they purport to contract each to enter into a bond to* D *for Rs.* 1,000. *In a suit by* D *to make* A, B *and* C *separately liable each to the extent of Rs.* 1,000, *they prove that the word "each" was inserted by mistake ; that the intention was that they should give a joint bond for Rs.* 1,000. D *can obtain the performance sought only with the variation thus set up.*

(b) A *sues* B *to compel specific performance of a contract in writing to buy a dwelling-house.* B *proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract except with the variation set up by* B.

(c) A *contracts in writing to let to* B *a wharf, together with a strip of* A's *land delineated in a map. Before signing the contract,* B *proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of* A's *land of the same dimensions, and to this* A *expressly assented.* B *then signed the written*

Old

contract. A *cannot obtain specific performance of the written contract, except with the variation set up by* B.

(d) A *and* B *enter into negotiations for the purpose of securing land for* B *for his life, remainder to his issue. They execute a contract the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.*

(e) A *contracts in writing to let a house to* B, *for a certain term, at the rent of Rs.* 100 *per month, putting it first into tenantable repair. The house turns out to be not worth repairing ; so with* B's *consent,* A *pulls it down, and erects a new house in its place ;* B *contracting orally to pay rent at Rs.* 120 *per mensem.* B *then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variation made by the subsequent oral contract.*

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1. **Legislative changes.**—This section corresponds to the old Sec. 26. In Cl. (*a*) of the old Sec. 26, the following changes have been introduced. After the words "mistake of fact" the words "or misrepresentation" have been inserted. Before the word "contract", the word "written" has been

added. After the word "terms", the words "or effect" have been introduced. The words "that which the defendant suffered it to be when he entered into it" have been replaced by the words "what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract". Thus sub-section (*a*) of the new Sec. 18 has been shaped out of the insertions, omissions, and substitutions of the words and expressions referred to above. Sub-sections (*b*) and (*c*) of Sec. 26 of the repealed Act have been deleted.

Sub-section (*b*) of the new Sec. 18 reproduced the language of sub-section (*d*) of the old Sec. 26 verbatim, while sub-section (*c*) of the new section contains the language of sub-section (*e*) of the old Sec. 26 with slight variations, namely for the words "contracted to vary it" the words "varied its terms", have been substituted in the new sub-section (*c*).

The illustrations have been omitted.

2. **Reasons for the change.**—The Law Commission of India in their Report on the Specific Relief Act, 1877, says :

> "Clause (*b*) contains certain non-technical words such as 'surprise' and 'misapprehension' the use of which has been commented upon." Thus, Pollock[1] says :
>
> > "The use of the word 'surprise' now seldom if ever heard in an English Court,.....may be taken as no more than a piece of abundant caution."
>
> "Banerji[2] observes that at one time the word 'surprise' was used as almost synonymous with 'fraud'. Collett's view is that 'surprise' takes place 'when something has been done which operated to mislead or confuse the party on the sudden'.[3] 'Surprise', accordingly does not go beyond the concept of fraud. We have not been able to find any Indian decision where specific performance has been granted with a variation on the ground of surprise. As regards 'misapprehension' Collett[4] suggests that it means mistake in regard to the effect or consequence of the contract as contrasted with mistake in regard to the terms of the contract. Banerji[5] further says that the addition of the word 'reasonable' to qualify 'misapprehension' does not make such material difference in its meaning. While Cl. (*a*) of old Sec. 26 deals with a mistake as to the terms of contract, Cl. (*b*) of the section seems to deal with a mistake as to the effects of the contract.
>
> "If so, it is possible to incorporate Cl. (*b*) with Cl. (*a*) with suitable drafting changes. As Banerji[6] points out, Cl. (*c*) of old Sec. 26 means nothing more than that the terms of the contract in writing do not embody the whole agreement between the parties and that the plaintiff must fulfil his entire engagement before he can have specific performance. That being so, Cl. (*c*) of old Sec. 26 also may be amalgamated with Cl. (*a*) with suitable drafting changes. Clause (*d*) (of old Sec. 26), however, cannot be amalgamated with Cl. (*a*) because here, as Banerji points out—
>
> > 'Neither party is to blame ; both were agreed as to their object, viz., some legal result; but by reason of error in drafting, they are both balked of their purpose.....'

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1. *Tagore Law Lectures on Fraud*, p. 74.
2. *Specific Relief*, 2nd Ed., p. 342.
3. Collett, *Law of Specific Relief*, 3rd Ed., p. 220.
4. *Ibid.*, 3rd Ed., pp. 220, 244-45.
5. *Specific Relief*, 2nd Ed., p. 343.
6. *Ibid.*, p. 247.

"In other words, the discrepancy in the written instrument may not be due to any fraud, mistake or misrepresentation of either party but may be due to the ignorance or carelessness of the draftsman, and that is why Cl. (*d*) (of old Sec. 26) does not start with the words 'where by fraud or mistake.....' as Cls. (*a*) and (*b*) do. We do not propose to alter Cl. (*d*) (of old Sec. 26). Only a drafting change has been suggested in Cl (*e*) (of old sec. 26)."

3. Scope.—This section does not apply unless there is a completed contract. It sets out cases in which contracts cannot be enforced except with a variation and there are three particular cases set out in which a contract may be enforced subject to a variation, such variation being in favour of the defendant and the section assumes that the parties are agreed to the exercise of the contract but not agreed as to specific terms. The section provides that when fraud or mistake of fact or misrepresentation has induced the defendant to sign an agreement, that agreement can only be enforced on the terms which the defendant intended to agree to. There is no provision of law which entitles the plaintiff to claim a variation in the terms of his contract, when he finds that the contract itself cannot be carried out.[1]

The section embodies the result of various English cases of which *Woolam* v. *Hearn*[2] is the leading one. It was laid down in that case that though a defendant resisting specific performance may give oral evidence to show that by fraud, the written agreement does not express the real terms, a plaintiff cannot do so, for the purpose of obtaining specific performance with a variation.[3] In India it is quite clear from Secs. 91 and 92, Evidence Act, that when the terms of a contract are reduced to writing, a plaintiff cannot give oral evidence to make out a variation; but then that does not debar a defendant from showing that by the reason of fraud or misrepresentation the writing does not contain the true contract; he can under proviso 1 to Sec. 92, give evidence to prove this ; thus it is that proof of the variation that is permitted to the defendant, and a plaintiff in that case cannot have a decree unless he submits to the variation. The section does not contemplate that the defence goes to the contract as a whole: but it contemplates that the original contract may be enforced though not exactly, in the same form as it is worded, and it renders to the plaintiff the performance with the variation, as made out by the defendant.[4] Therefore where a person sues for specific performance of a written contract and the defendant sets up a vuriation, the plaintiff must do equity and give the defendant an opportunity to prove the variation.[5] If the plaintiff does not accept specific performance with variation as set up and proved by the defendant his suit will be dismissed.[6]

4. Intentional omission in contract.—Where there was an omission in the written contract and that was done purposely, the Court will not include the same. In the words of Fry : "The Court on a clear principle will not

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1. Narain *v.* Abikhoy, I.L.R. 12 Cal. 152.
2. (1802) 7 Ves. 211 : 2 L. C. 468. Wh. T. L. C. 517 ; *see* also Dart, Sec. 1046.
3. Collett, *Specific Relief Act*, Sec. 26 ; Pollock on *Contracts*, 1951 Ed., pp. 417-18.
4. *Ibid.*
5. Sundra Bai *v.* Dwarkadas Parpia, A.I.R. 1922 Bom. 336 at p. 336: 70 I.C. 768 ; *see* Illus. (*b*).
6. Clarke *v.* Grant, 14 Ves. 619 ; Smith *v.* Wheatcroft, 9 C. D. 223 ; Joynes *v.* Statham, 3 Atk. 388; Martin *v.* Pecroft, 2 D. M. & G. 785.

interfere for the rectification of a written contract where it was by the intention of the parties to it that the writing did not comprise all the terms of the actual contract for what is done where there was a contract for an annuity and the parties to it designedly omitted a proviso for redemption thinking it would render the transaction usurious, the Court refused to rectify the deed."[1] But specific performence will be refused where a clause has been introduced by inadvertance into the contract.[2]

5. **Plaintiff's option.**—In a case falling under this section the plaintiff is put on his election either to have his action for specific performance dismissed or have it subject to the variation. But even if he elects not to accept the variation he does not lose his ordinary common law remedy of damages. This is the effect of new Sec. 18, though in England there are dicta income cases,[3] to the effect that the plaintiff has no such option, but to accept the specific performance with variation.[4] "Of course", remarks Dr. Stokes, "the plaintiff need not submit to the variation. He may take instead of specific performance, damages for breach of the contract. Where the defendant avails himself of the variation by way of defence, he may as plaintiff sue to rectify the contract and then to apply to have the rectified contract specifically enforced."[5]

6. **Contract in writing.**—The section requires that the contract should have been reduced to writing whether by agreement of parties or on account of some statutory provisions. The section contemplates a real contract. Thus where the certificated guardian of a certain minor agreed with another to sell to him lands belonging to the minor at a certain price upon the permission of the Court which was necessary, it was held that the other party could not enforce the contract specifically. It being contingent on the permission of the Court was not a complete contract.[6]

7. **Scope of Cl. (a).**—The clause deals with difference in terms between the actual agreement and the written contract.[7] It contemplates the case of an error on the part of the defendant as to the terms provided he is induced by fraud or mistake of fact or misrepresentation. Where a purchaser entered into a contract to purchase land under a mistake as to the boundaries, caused by a plan which was represented to him, drawn by the vendor's agent, the Court refused to decree specific performance.[8] Where a part of the land sold included an area which was already in lessee's possession and there was no evidence of fraud, misrepresentation and the wrongly entered area was small as compared with the whole sold, it was held that the rent could be reduced *pro rata*.[9]

But it is open to the plaintiff to admit a parol addition or variation for the defendant's benefit, and so to enforce specific performance, which the defendant might have successfully met if it had been sought to enforce the written agreement simply. Thus where the agreement was silent as to

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1. Fry, Sec. 808, p. 377, quoting Lord Irnham *v.* Child, 1 Brow G. C. 219; Hare *v.* Morris, 3 Brow G. C. 168 : 1 Ves. Jus. 241; also *per* Lord Eldon in Marquis Townsend *v.* Strangroom, 6 Ves. 322.
2. Watson *v.* Marton, (1853) 4 D. M. G. 230 : 102 R. R. 100; Pollock, p. 418.
3. Fife *v.* Clayton, 13 Ves. 465; Higginson *v.* Clowes, 15 Ves. 516.
4. Desai.
5. *Anglo-Indian Codes*, 909; *see* also Sec. 34, *infra*.
6. Narain *v.* Abikhoy, I.L.R. 12 Cal. 152.
7. Dr. Banerji's *Tagore Law Lectures*, App. C. p. 85.
8. Denny *v.* Hencock, L. R. 6 Ch. 1.
9. Rammon *v.* Mathuri, I. L. R. 39 Cal. 1016 : 15 C. L. J. 665.

premium payable and parol evidence showed it to be £200, the plaintiff was permitted to enforce the agreement if he consented to pay that amount.[1]

8. **Supposed it to be.**—"Whether reasonably or not." But it would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back their property which they foolishly made away with.[2]

9. **Illustrative cases.**—(1) In a suit for specific performance the plaintiff admitted in his plaint a variation favourable to the defendant. It was held that it did not involve a departure from the normal rule that a plaintiff could not set up a variation, for all that the plaintiff had done was to anticipate the defendant's defence.[3]

(2) Where joint land was shown as several land in the deed, the case would fall within the rule of this clause.[4]

(3) Similar is the case where the terms of the payment of certain expenses by the plaintiff are omitted by mistake.[5]

(4 & 5) Where there is a contract for lease and oral stipulation for the payment of certain amount to the defendant,[6] or where the boundaries of the land sold are wrongly recorded,[7] the defendant can set up a variation.

(6) Where a broker agreed with a third party to form partnership to purchase real estate at a bargain price and assigned all his commissions as broker to the third party which commission broker without fraud represented would be about $1,500, but only $600 commissions was allowed and the third party completed the purchase while the broker was absent in the army, the broker was held entitled to specific performance of the partnership contract and an accounting, upon payment to the third party of the sum of $1,500.[8]

10. **Distinction between Cls. (a) and (b).**—The defect in the first two cases is to be found in the document itself but not so in the third. The distinction between the first two cases is that in Cl. (*a*) the terms actually embodied in the document are different from those which had been agreed to by the defendant, while in Cl. (*b*) the terms are literally those which were agreed upon, but in substance and actual import they are different. In the first case it may be said that some term which was part of the agreement has been omitted or altered, or a new term has been imported into the document as ultimately drawn up. In the second case the words "actually agreed to and used" are ambiguous, but the defendant having agreed to their use under a misconception which, under the circumstances of the case, cannot be considered unreasonable the document cannot be taken to represent the real agreement between the parties. Where, therefore, the terms of the agreement as put in writing are ambiguous so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court upon that ground alone, may refuse to

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1. Watson *v.* Marton, (1853) 4 D. M. G. 23 : 102 R.R. 100 ; Pollock, 1951 Ed., p. 418.
2. Dr. Stokes *Anglo-Indian Codes*, Vol 1, 968.
3. Martin *v.* Pyecroft, 2 De M. & G. 785 ; Preston *v.* Luck, 27 Ch. D. 497; Higginson *v.* Clowes, 15 Ves. 516 ; Clarke *v.* Moore, 1 Jon. & L. 723.
4. Lord Gordan *v.* Marquis of Hertford, 2 Madd. 106.
5. Ramsbotham *v.* Gosden, 1 V. & B. 165.
6. Martin *v.* Pyecroft, 2 De M. & G. 785.
7. Denys *v.* Hencock, 6 Ch. App. I.
8. Bakke *v.* Keller, 19 N.W. (2d) 803 : 230 Minn. 333.

enforce it.[1] But mere suspicion of the fraud is not a sufficient ground for relief.[2] As to terms omitted it has to be further noted that where the party complaining has deliberately executed written agreement, and there was no fraud or surprise, but the agreement as drawn up does not contain stipulations he had negotiated for, that is no ground for refusing specific relief.[3] Where again the terms alleged to have been omitted were never actually agreed to and all that appears is that the defendant intended to propose them but did not, there is still less ground for not granting specific performance of the written contract.[4]

11. Reasonable misapprehension.—The misapprehension required under this section is a reasonable one. It is not every misapprehension that would avoid specific performance. In other words, the Court must be satisfied that the parties would not have entered into the contract but for such a misapprehension.[5] Reasonable apprehension is such as a man of ordinary capacity, using ordinary caution, might still in the circumstances have fallen into. It is enough if in fact the defendant was misled ; and reasonableness or otherwise of his blunder is only of value as evidence of the fact of the blunder.[6] If there is a real ambiguity and a reasonable misapprehension is the result the application of the clause would be attracted.[7]

12. Misrepresentation, plea how met.—"The allegation of misrepresentation may also be met by proof that the party alleging it was from the beginning cognizant of all the matters complained of, or after full information concerning them continued to act on the footing of the contract, or to deal with the property comprised in it as if held under the contract ; as for instance, where a lessee of mine after knowledge of alleged misrepresentation, continued to work it."[8]

13. Mistake.—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.[9] But where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.[10] It may be noted that an erroneous opinion as to the value of the thigh which forms the subject-matter of the agreement is not to be deemed a mistake to a matter of fact.[11]

A contract is not voidable because it was caused by a mistake as to any law in force in India, but a mistake as to law not in force in India has the same effect as a mistake of fact.[12] Thus where *A* and *B* made a contract grounded on erroneous belief that a particular debt is barred by the Law of Limitation, the contract is not voidable.[13]

The courts are usually not prepared to refuse specific performance for every mistake of fact. It should be mistake which should occasion hardship, amounting to injustice which would be inflicted upon the defendant if the bargain is enforced.[14]

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1. Dart, *Vendor and Purchaser*, 1048 ; Neap *v.* Abbot, 47 E. R. 531 : (1838) C. P. Coop. 333.
2. Templin *v.* James, (1880) 15 Ch. D. 215.
3. Shelburne *v.* Inchiguin, (1784) 1 Bro. Ch. 338 ; Rich *v.* Jackson, (1794) 4 Bro. Ch. 514.
4. Dr. Banerji's *Tagore Law Lectures*, p. 246 ; Parker *v.* Taswell, (1858) 2 De G. & J. 559.
5. Weston *v.* Marstan, 4 De G. M. & G. 230.
6. Collet, *Specific Relief Act*, Sec. 26.
7. Hegginson *v.* Clowes, 15 Ves. 516.
8. Fry, Sec. 681.
9. Indian Contract Act, Sec. 22.
10. *Ibid.*, Sec. 20.
11. *Ibid.*, Expln. to Sec. 20.
12. Indian Contract Act, Sec. 21.
13. *Ibid.*, Illus. to Sec. 21.
14. Tamplin *v.* James, 15 Ch. D. 215, Hans Raj *v.* Ranchordas, 7 Bom. L. R. 319.

Mistake may be either in matter of law or in matter of fact. It is often said that relief is given against mistake of fact but not against mistake of law. But neither branch of the statement is quite accurate, since each requires a great deal of limitation and explanation.

A mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference arising from an imperfect or incorrect exercise of the judgment upon fact as they really are.[1] Mistake as to foreign law is a mistake of fact.[2]

(*i*) Mistake as to a general rule of law is not a ground for relief, although even here it is conceivable that a common mistake of law might so go to the root of the matter as to prevent any real agreement from being formed. (*ii*) A mistake in the construction of an instrument, or at least of a contract, is a mistake of law, so far as the question of relief is concerned. A mistake as to private rights, such as rights of ownership is generally a mistake of fact and law, and is apparently assumed to be former until the latter is proved and a mistake of fact which involves a mistake of law is still a mistake of fact.

Mistake of law may be a misapprehension of the law or of their private rights to property by both parties to a transaction both of them making substantially the same mistake ; or it may be a misapprehension of the law or of his private right by one of the parties alone.

The jurisdiction of equity over a mistake is exercised much more liberally where the mistake is in matter of fact, than where it is in matter of law. The admission of ignorance of fact as a ground of relief, is not attended with those inconveniences which seem to be the reason for rejecting ignorance of law as a valid excuse. Whether the ignorance really existed, and whether it was imputable or not to the inadvertance of the party, is a question which may be solved by looking at the circumstances of the case. The inquiry is limited to a given incident, and to the circumstances attending that incident, and is, therefore, not interminable.

14. Mistake of fact.—Mistake of fact is a mistake not caused by the neglect of legal duty on the part of the person making the mistake and consisting in an unconsciousness, ignorance not caused by the other party, or forgetfulness of a fact past or present material to the transaction or in the belief in the present existence of a thing not material to the transaction which does not exist, or in the past existence of a thing which has not existed.

15. Mistake and fraud distinguished.—In "fraud" as distinguished from "mistake" there is necessarily a misapprehension or mistake in the party defrauded which alone would not vitiate his dealings with others ; but there is the additional circumstanee that the party with whom he deals intentionally causes the mistake for the purpose of effecting the dealing and this precludes the party so occasioning the mistake for holding the other bound to it.

16. Mistake as ground of relief must be material.—Mistake to be a ground for relief must be of a material nature and must be the determining ground of the transaction. Mistake in matters which are only incidental to and are not of the essence of a transaction and in the absence of which it is reasonable to infer that the transaction would nevertheless have taken place

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1. Burkhauser *v.* Schmitt, 30 Amer. Rep. 743.

2. Leslie *v.* Baillie, 2 Y. & C. C. C. 91 : 12 L. J. Ch. 153 : 60 R. R. 51.

goes for nothing. Nor does the circumstance that the mistake may be in a material matter and induced the contract entitle a man to rescind unless the error goes to the root of the matter. In the case of fraud a misrepresentation of any material fact gives right to rescission but mistake to be ground for such relief must be a fundamental error, an error which affects the substance of the whole consideration.

Mistake of fact is not the less a ground for relief because the person who made the mistake had the means of knowledge and still less where there is misrepresentation.

Mistake of fact may be the mistake of one party only to a contract or there may be a mistake of both parties respecting the same matter ; and thus there arise two different conditions of the question which are governed by considerations of a different character.[1]

17. Mistake mutual or unilateral.—The general principles under this heading add : mistakes are either mutual or unilateral where a contract is concluded but one of the parties to it alleges that his mind was affected by a fundamental mistake or fact and that he never intended to make that precise contract, the question that arises in such a case was to the consent of the party concerned. The whole question is of offer and acceptance. Blackburn, J., in *Kennedy* v. *Panama Royal Mail Co.*[2] stated that at common law only fundamental mistakes are material and mistakes of non-fundamental nature do not at all matter. If the mistake results in a complete difference in substance between what the party bargained for and what in fact he actually gets if the contract is fulfilled it is material substantial. For example, in a case whether buyer intends to buy real pearls and the seller intending to sell imitation pearls there is no identity of purpose nor of mind so far as the offer and acceptance in the contract is concerned. The formation of agreement depends upon the correspondence of offer and acceptance and if the offer is made in one sense and the acceptance is made in another there is no general consent and therefore no genuine agreement capable of enforcement. Then again a mistake as to motive or reason for the bargain is immaterial. It cannot be said to be fundamental one so as to vitiate the entire bargain. So long as there is agreement as to the identity of the terms and identity of the subject-matter between the parties they are bound by the agreement. Lord Atkin in *Bell* v. *Lever Brothers Ltd.*,[3] states : "*A* buys *B*'s horse, he thinks the horse is sound and he pays the price of a sound horse, he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If *B* has made no representations as to soundness and has not contracted that the horse is sound, *A* is bound and cannot recover back the price . . ." *A* agrees to take no lease or to buy from *B* an unfurnished dwelling-house. The house is in fact uninhabitable. *A* would never have entered into the bargain if he had known the fact. *A* has no remedy and the position is the same whether *B* knew the facts or not, so long as he made no representation or gave no warranty. *A* buys a road-side garage business from *B* butting on a public thoroughfare, unknown to *A*, but known to *B*, it has already been decided to construct a bye-pass road which will divert substantially the whole of the traffic from passing *A*'s garage. Again *A* has no remedy. All these cases involve hardship on *A*, and benefit to *B*, as most people would say unjustly. They can be supported on the ground that it is of paramount importance that contracts should be obscure and that if parties honestly

1. *See* Kerr on *Fraud and Mistake*, Part II.
2. (1867) L. R. Q. B. 580.
3. (1932) A. C. 161 at p. 224 : (1931) All E. R. Rep. 1 at p. 30.

comply with the essentials of the formation of contracts, i. e. agree in the same terms on the same subject-matter, they are bound, and must rely on the stipulations of the contract for protection from the effect of facts known to them. "Another principle is that the burden of persuading the Court to disturb what to outward appearances is a binding contract falls on the party who alleges the mistake. Moreover the burden is not light, for the result of holding that there is no contract may seriously prejudice a third party, who has in good faith made a bargain relating to the subject-matter of the apparent agreement, thirdly, it may be asked by what standard the fact of agreement is to be affirmed or denied. Is it to be objective, as is generally the case with problems of offer and acceptance, or is it to be subjective so as to involve an injury into the parties' real intention ? It is here that the distinction between mutual and unilateral mistake becomes of vital importance. To determine the matter objectively upon the basis of what a reasonable man would infer from the facts is the rational and recognized procedure in a case of a mutual mistake where *B* is ignorant of *A*'s mistake. But in unilateral mistake *B* knows that the very character of his offer has been completely misunderstood by *A* and if he allows *A* to proceed under the influence of this misunderstanding and takes advantage of it, it scarcely lies in his mouth to demand an application of the objective test.[1] The objective test will not, however, be discarded unless *B*'s knowledge actual or inferential of *A*'s mistake is proved beyond reasonable doubt."[2]

In the case of mutual mistake, there may be lack of genuine *consent* as both the parties, the promisor having made the promise in one sense and the promisee having accepted it in another sense. In such a case the Court is called upon to determine the sense of promise. There may have been mistake of fundamental character which caused the one to put a wrong interpretation upon the promise of the other but the Court is to decide as to what, if any, interpretation is to be put on what the parties have said or done. Blackburn, J., in *Smith* v. *Hughes*,[3] explains the attitude of the law in the following passage : "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's term. The leading case on the point is *Raffles* v. *Wichelhans*.[4] In this case the facts were these : *A* agreed to buy and *B* agreed to sell a consignment of cotton which was to arrive ex. *Peerless* from Bombay. In actual fact two ships called *Peerless* sailed from Bombay, one in October and the other in December. Upon proof that the buyer meant the October vessel and the seller the December vessel, it was held that the buyer was not liable for refusal to accept cotton despatched by the December ship. It will be seen from the facts of the above case that the expressed terms in the agreement were so ambiguous that they prevented the Court from presuming the existence of any agreement between the parties. From what has been said above it will be clear that the attitude of the law has been that the mutual mistake and person will not nullify the contract. The courts will look to determine what Austin says, 'the sense of the promise'. If the mistake is of a fundamental character, which caused the parties to put wrong interpretation upon the other's promises, the Court will find out as to how a sensible third party would take the agreement to mean or whether any, if so, what meaning can be attributed to it. If the terms of

1. Smith *v.* Hughes, (1871) L. R. 6 Q. B. 597 at p. 609, *per* Hannen, J.
2. Paragraphs 1, 2 and 3 of p. 191 of the *Law of Contract*, 5th Ed., by Cheshire and Fifoot.
3. (1871) L. R. 6 Q. B. 597 at p. 607.
4. (1864) 2 H. & C. 906 : 332 J. (Ex.) 160.

the agreement are vague and ambiguous the Court will refuse to enforce. In the case of unilateral mistake the distinguishing feature is that the mistake of one party is known to the other party. In *Hartog* v. *Colins Shields*,[1] an offer was accepted to sell certain hare skins at a certain price per pound. The preliminary negotiations, however, had proceeded on the clear understanding that the skin would be sold at so much per piece, not per pound and at the trial expert evidence proved the existence of a trade custom to fix the price by reference to a piece. The value of the piece was approximately one-third of a pound. It was held that the buyer must be taken to have known the mistake made by the sellers on the formulation of their offer. His suit for damages was, therefore, dismissed.

"Here it must de remembered that every unilateral mistake will not free the innocent party from his liability unless it is of a fundamental nature, i. e. unless it relates to the character of the offer or of acceptance. Where there is a complete lack of agreement about the identity of acceptance in respect of the nature and character of promise and acceptance between the parties thereto, it cannot be said that there is a contract between the parties in the sense intended by them. If by any means he knows that there was no real agreement between them and the promisor he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent."[2]

The mistake regarding the personality of the person offering and accepting is a fundamental mistake which is sufficient to avoid the contract. A mistake about the personality of making the promise or accepting may justify the rescission of the contract or a refusal to decree its specific performance on the ground of misrepresentation[3] is a typical illustration of mistaken identity. The facts were these : Jones, who had been accustomed to deal with Brocklehurst sent him a written letter ordering for fifty feet of leather hose on the very day that Brocklehurst transferred his business to his foreman the plaintiff. The plaintiff executed the order but Jones accepted and used the goods in the belief that they had been supplied by Brocklehurst. He refused to pay the price alleging that he had intended to contract with Brocklehurst personally, twice he had a set-off which he wished to enforce against him. It was held that Jones was not liable for the price. This case presents typical example of unilateral mistake of personality.[4] A fraudulent person named Blankarn, writing from 37 Wood Street, Cheafside, offered to buy goods from the plaintiffs and he signed his letter in such a way that his name appeared to be "Blankiron & Co." The latter was a respectable firm carrying on business at 123 Wood Street. Blankarn occupied a room which he called 37 Wood Street but in fact its entrance was from an adjoining street. The plaintiffs who were aware of the high reputation of Blankiron & Co. though they neither knew nor troubled to ascertain the number of the street where they did business purported to accept the offer and despatched the goods to "Messrs. Blankiron & Co., 37 Wood Street, Cheafside." These were received by the rogue Blankarn and he in turn sold them to the defendants who took them all in good faith. The plaintiffs now sued the defendants for conversion. The Queen's Bench, consisting of Blackburn, Mellor and Lust, JJ., held that the plaintiffs though deceived by the fraud of Blankarn content to sell to the person who trade at 37 Wood Street

1. (1939) All E. R. 566.
2. Smith *v.* Hughes, (1871) L. R. 6 Q. B. 597 at p 610, *per* Hannen, J.
3. Gorden *v.* Street, (1899) 2 Q. B. 641; Boulton *v.* Jones, (1857) 2 H. & N. 564: 27 L. J. (Ex. 117).
4. Cundy *v.* Lindsay, (1878) 3 App. Cas. 459.

from which address the offer to buy had come and to which address the goods were sent. The result was that though there was a contract with Blankarn of 37 Wood Street the contract was voidable against Blankarn on account of his fraud Blackburn, J., in *Lindsay* v. *Cundy*[1] stated : "The rule is that where a person has *bona fide* acquired an interest in the goods under an existing but voidable contract you cannot as against that person avoid the contract. The Queen's Bench unanimously based their decision on the above approach of the case. This case was taken up in appeal. The Court of Appeal in *Cundy* v. *Lindsay*[2] with equal unanimity held that the plaintiff intended to sell the goods to Blankiron & Co. but that Blankarn fraudulently assumed the position of the buyer. If this was the correct position an offer to sell to Blankiron & Co. was fraudulently accepted by Blankarn and therefore there was no contract at all. The House of Lords also took the same view as the Court of Appeal, holding that there was no contract between the plaintiffs and Blankarn and that he had no title in the goods received by him and therefore he could pass no title to the third person. Reference in this connexion may be made to *Sowler* v. *Potter*.[3] In this case no third party was involved and the contract was declared a nullity,[4] and furnishes another illustration of the mistaken identity. The facts were : A man called North catered the plaintiff's shop and selected pearls of the value of £ 2,550 and a ring worth £ 450. He then wrote out a cheque for £ 3,000 saying, as he did so, you see who I am, I am Sir George Bullough, and then he gave an address in St. James' Square. The plaintiff had heard of Bullough, and upon consulting a directory he found that he lived at the address given. He then said, would you like to take the articles with you. North replied, you had better have the cheque cleared first but I should like to take the ring as it is my wife's birthday tomorrow. The plaintiff let him do so. North pledged the ring to the defendant for £ 350, who had no notice for the fraud. Horridge, J., inferred that the jeweller intended to sell to the person present in the shop. He believed the story of the person present in the shop that he was Bullough. It was held that the contract of sale has been concluded though it was viodable for the fraudulent misrepresentation of North. It was valid until disaffirmed and thus a good title to the ring passed on to the defendant.

"Here it would be relevant to consider the effect of the doctrine of estoppel in the case of unilateral mistake of identity. The relevant rule of estoppel can be made applicable to the cases of mistakes by misreprsentation. The doctrine of estoppel by misrepresentation operates when a man gives to another a false impression of some fact as the result of his own language or conduct. The rule as laid down by Bramwell, B., in *Cornish v. Abington*[5] that if a man so conducts himself, whether intentionally or not that a reasonable person would infer that a certain state of things exist and acts on that inference, he shall afterwards be estopped from denying it."

8. Effect of mutual and unilateral mistakes.—Cheshire and Fifoot in their works, *The Law of Contract*, 5th Ed. at p. 202 summarise their conclusion thus : "Equity follows the law in holding that a mutual mistake does not as a mat er of principle nullify a contract.[6] In the nature of things indeed, there is no room for equitable relief since the Court after considering the mistake and every other relevant fact, itself determines the sense of the promise. In general, therefore, a party is not allowed to obtain rectification

1. (1876) 1 Q. B. D. 348 at p. 355.
2. (1877) 2 Q. B. D. 96 : (1878) 3 App. Cas. 459 : 47 L. J. (Q. B.) 481.
3. (1940) 1 K. B. 271 : (1939) All E.R. 478.
4. Phillips *v.* Brook Ltd., (1919) 2 K. B. 243.
5. (1859) 4 H. & N. 549 at p. 556.
6. Preston *v.* Luck, (1884) 27 Ch. D. 497.

or rescission of a contract or to resist its specific performance on the ground that he understood it in a sense different from that determined by the Court." The position is illustrated by the case of *Tamplin* v. *James*,[1] followed in *Vanpraugh* v. *Everidge James*,[2] who had been the highest bidder at an auction sale of a public home, resisted a suit for specific performance on the ground that he had made a mistake. At the time when he made his bid he believed that a certain field, which had long been occupied by the publican was part of the lot offered for sale, though in fact it was held under a separate lease from a third party. There was no misdescription or ambiguity in the particulars of sale. On these facts specific performance of the contract in the sense understood by the auctioneer was decreed. Beggalay, L. J., who delivered the judgment in the case at pages 217 and 218 observed : "Where there has been no misrepresentation and where there is no ambiguity in the terms of the contract the defendant cannot be allowed to evade specific performance of it by the simple statement that he had made a mistake, were such to be the law the performance of a contract could seldom be enforced upon an unwilling party who was also unscrupulous." Where a lessor's agent had agreed to grant a lease for seven or fourteen years, which the lessor mistakenly understood to mean a lease determinable at his option at the end of seven years instead of at the tenant's option, it was held that specific performance must be decreed against the lessor according to the ordinary accepted meaning of the word used.[3] The particular remedy of specific performance since it is exceptional in nature is one that lies very much within the discretion of the courts and these certainly are cases in which it has not been forced upon a party who has mistaken the admitted sense of a contract. The remedy will not indeed be withheld "merely upon a vague idea as to the true effect of the contract not having been known"[4] but as Bacon, V. C., said in *Burrow* v. *Scammel*,[5] it cannot be disputed that courts of equity have at all times relieved against honest mistakes in contracts, when the literal effect and the specific performance of them would be to impose burden not contemplated and which it would be against all reason and justice to fix upon the person who without the imputation of fraud, had inadvertently committed an accidental mistake would be to give an unconscionable advantage to either party.[6] The same learned author while summarising the attitude of equity towards mutual and unilateral mistakes at page 204 says : "In the case of mutual mistake therefore while equity generally follow the law it may be prepared, if the occasion warrants to relieve a party from an apparent contract that might be enforceable at law, but the relief that it has usually granted has been a refusal to make a decree of specific performance against the mistaken party. To prescribe the exact limitations within which such decree will be granted or refused is not possible since specific performance is an extraordinary and discretionary remedy that is not granted as a matter of course. But the authorities show a reluctance to exercise this discretion against the defendant if it would be a hardship to hold him to a contract that he has misunderstood."

In the case of unilateral mistake it is clear that if one party to the knowledge of the other is mistaken as to the fundamental character of the offer if he did not intend, as the other well knew, to make the apparent contract, the apparent contract is a nullity and there is no need, indeed no room for any equitable relief. However, although equity follows the law in this respect admits that the contract is a nullity, it is prepared to clinch the

1. (1880) 15 Ch. D. 215.
2. (1902) 2 Ch. D. 266.
3. Powel *v.* Smith, (1872) L.R. 14 Eq. 85.
4. Watson *v.* Marton, (1855) 4 De G. M. 230 at p. 238, *per* Turner, L. J.
5. (1881) 19 Ch. D. 175 at p. 182.
6. *See* also Paget *v.* Marshall, (1884) 28 Ch. D. 255 at p. 263 ; Cheshire and Fifoot on the *Law of Contract*, 5th Ed., p. 203.

matter by formally setting the contract aside or by refusing a decree for its specific performance.[1] In *Webster* v. *Cecil*,[2] for instance Cecil, who had already refused to sell his land to Webster for £ 2,000 wrote a letter to him in which he offered to sell for £ 1,250. Webster accepted by return of post whereupon Cecil, realizing that he had mistaken by writing £ 1,250 for £ 2,250 immediately gave notice to Webster of the error. This was operative mistake of common law for at any rate in the case of sale of land any mistake as to price "must necessarily go to the whole substance of the consideration of law".[3] Knowledge of the mistake was clearly to be imputed to Webster and on the result Lord Romilly refused a decree of specific performance. In *Garrard* v. *Frankel*,[4] and *Harris* v. *Pepperell*,[5] the party aware of the mistake was given the option of having the contract set aside or of submitting to it with the mistake rectified.

19 Surprise.—It is not a technical term and has not been defined anywhere. Story describes it as "the state of being taken unawares; and when a court of equity relieves on the ground of surprise, it does so upon the ground that the party has been taken so unawares that he has acted without the deliberation and under confused and sudden impression. Its true use is where something has been done which operated to mislead or enforce the party on the sudden."[6] Surprise, though a very old head of equity is not a separate ground for relief and has no technical signification. As a ground of relief it seems to fall either within mistake or undue advantage. The situation may not be due to fraud, but to take advantage of it may be considered constructive fraud. Mere surprise, that is, surprise arising from rash and indiscreet action or want of mature deliberation is no ground for relief. It is not of itself a sufficient cause for setting aside a transaction, apart from fundamental error or unconscionable advantage.[7] The word "surprise" is a word of general signification, so general and uncertain that it is not possible to fix it. A man is surprised in every rash and indiscreet action or whatsoever is not done with so much judgment as it ought to be; but a court of equity gives relief only when the surprise is accompanied by such circumstances as indicate that the party had no oportunity to use suitable deliberation.[8]

20. Fraud at commou law and in equity.[9]—In a sense, the inevitable outcome of fraud is to cause mistake, but fraud may be roughly distinguished from mistake on the footing that the latter may be spontaneous, while the former postulates the influence on one party of some action or word on the part of the other. We have mentioned fraud as a prominent example of the concurrent jurisdiction of equity. This is true, but it is only a part of the truth, for a good deal of the contribution made by equity to the subject comes within the exclusive jurisdiction. Is the equitable conception of fraud wider or narrower than the common law conception? This is a question which it is not easy to answer by a plain affirmative or negative. The truth is that common law and equity, though applying different remedies, yet, as a matter of substantive law, originally looked on fraud in more or less the same way, as a failure in the performance of a special contractual or fiduciary duty. Of course, equity acknowledges a wider range of fiduciary relation but the fact remains that the same idea of a special duty

1. Wilding *v.* Sanderson, (1897) 2 Ch. 535, *Re* International Society of Auctioneers and Valuers, Baillie's cases, (1898) 1 Ch. 110.
2. (1861) 30 Beav. 62.
3. Williams, *Vendor and Purchaser*, 1st Ed., p. 679.
4. (1862) 30 Beav. 444.
5. (1867) L. R. 5 Eq.
6. Story, *Equity*, Sec. 251.
7. Kerr on *Fraud*, 6th Ed., p. 5.
8. Earl of Bath's case, 3 Ch. Cas. 56.
9. Hanbury, *Modern Equity*, 1949 Ed., p. 698 *et seq.*

was common to both systems. But in *Pasley* v. *Freeman*,[1] common law advanced into a region into which equity could not follow it by extending the action on the case to cover all false statements which caused damage to another apart entirely from any contractual relation between the parties. Fraud ceased to be regarded as an invasion of a personal right and came to be regarded as an invasion of a real right. It overran the sphere of contract and entered the sphere of tort. Honesty, to use the words of Viscount Haldane in *Nocton* v. *Lord Ashburton*,[2] became "a duty of universal obligation".

21. No damages unless representation fraudulent.—With the conception of fraud as a tort, and with its inevitable compliment, an action for damages, equity had, of course, nothing to do, but it continued to develop it along the lines of its own conception, which remained constant. In the common law the very extension of the scope of the action of deceit necessitated the growth of a greater provision in the definition of fraud itself. To visit on the head of a morally innocent, though carelessly inaccurate man, the payment of heavy damages, is a serious step, and common law eventually declined to take it. It was finally settled in *Derry* v. *Peek*,[3] that an action in tort will not lie against a man for a statement made by him unless he had either deliberately spoken what he knows to be untrue, or has spoken recklessly, without caring whether his statements were true or false.[4] If he has what he honestly believes to be true, then he cannot be sued for deceit, notwithstanding that the grounds on which he based his belief seem flimsy and inadequate. This decision sets a gulf between fraud and innocent misrepresentation, and gives the rule that no damages can be obtained for an innocent misrepresentation.[5]

22. **Conditions and warranties.**—Fraud rendered a contract voidable at common law ; that is to say, if a person could show that he had been induced to enter into a contract with another by a fraudulent representation it was open to him to repudiate the contract. But if the representation fell short of fraud, he could not repudiate unless he could show that the representation was not only material, but fundamental.[6] In cases other than those of fraud, common law established a hierarchy of representations. If, as in *Bannerman* v. *White*,[7] a representation, though not actually incorporated in the contract, is nevertheless so vital to it that one of the parties would not have entered into the contract at all had he known it was inaccurate, it is then regarded as a condition and the breach of it will render the contract voidable entitling the party who relies on its accuracy to repudiate. But if as in

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1. (1789) 3 T. R. 51; *see* Holdsworth, *History of English Law*, Vol. VIII, 425 and Nocton *v.* Lord Ashburton, (1914) A. C. 932 at p. 947.
2. (1914) A. C. 932 at p. 954.
3. (1889) 14 App. Cas. 337 ; *see* also Angus *v.* Clifford, (1891) 2 Ch. 449.
4. *See* Reese River Mining Co. *v.* Smith, (1869) L. R. 4 H. L. 64 , Arkwright *v.* Newbold, (1881) 17 Ch. D. 301.
5. There is one exception at common law, in the action on an implied warranty of authority evolved in Collen *v.* Wright, (1857) 7 E. & B. 301 : 8 F. & B. 647 ; *see* Anson on *Contract*, 19th Ed., 408, which gives an action for damages against a director who has issued a prospectus containing untrue statements, at the suit of any person induced hereby to take shares in the company, unless the director can show, not only that he honestly believed in the truth of the statements, but also that he had reasonable grounds for doing so. This nullifies the actual decision in Derry *v.* Peek, (1889) 14 App. Cas. 337, but does not, of course, effect the general principle land down in that case. *See* Collins *v.* Associated Greyhound Racecourses, (1930) 1 Ch 1.
6. *See per* Blackburn, J., in Kennedy *v.* Panama, etc., Mail Co., (1867) L. R. 2 Q. B. 580.
7. (1861) 10 C. B. (N. S.) 844 (representation that sulphur had not been used in the treatment of hops).

Russell v. *Nicolopulo*[1] the representation amounts to an independent promise but collateral to the main contract, then it will be regarded as a warranty and the breach of it will entitle the party who relied on it not to repudiate the whole contract but to sue for damages.[2] Sometimes a purchaser who has relied on a condition which has been broken finds that repudiation are of no use to him in fact meaningless if, as in *Wallis* v. *Pratt*,[3] he has already parted with the goods to a sub-purchaser ; here he is entitled to treat the breach of condition as a breach of warranty, and sue on a warranty *ex post facto*. In *Gilchester Properties* v. *Gomm*,[4] *X* sold leasehold properties to *Y*, innocently overstating the rentals. *Y* arranged to resell to *Z*, stating the same wrong figure. *Z* on discovering the truth, refused to complete. *Y* could not enforce specific performance against *X* with abatement of purchase price, for this would be tantamount to giving damages for an innocent misrepresentation not amounting to a warranty.

23. Suggested distinction between fraud and deceit : Nocton v. Ashburton.—But this hierarchy was unknown to equity ; which went on the even tenor of its way, giving relief to the victim or withholding it from the perpetrator of an act which came within the equitable view of fraud. Law had come to regard fraud as synonymous with deceit, as primarily a tort, and hedged about with stringent requirements, the chief of which was a strong moral, or rather immoral element, while equity regarded it, as it had all along regarded it, as a conveniently comprehensive word for the expression of a lapse from the high standard of conscientiousness that it exacted from a party occupying a certain contractual or fiduciary relation towards another party.

Needless perplexities were caused by the insularity, to which the practitioners of both systems must plead guilty. They quarrelled over the possession of the word "fraud" like two dogs over a bone, of which neither side was sufficiently strong to tear all the meat. The whole law would have been simpler had common law been content to use the word "deceit" and leave "fraud" to equity. We should then have had the perfectly simple proposition, that common law will give an action for damages for deceit, while equity will, on the ground either of deceit or of fraud, grant cancellation, order the restoration of the property, or withhold specific performance.

But unfortunately neither side cared to understand the other, and the result was that, after the Judicature Act, 1873, appalling confusion arose, dispelled only in 1914, by the speech of Viscount Haldane in *Nocton* v. *Lord Ashburton*.[5] For this confusion, the practitioners of common law and equity were equally to blame. In *Weir* v. *Bell*,[6] Bramwell, L. J., said :

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1. (1860) 8 C. B. (N. S.) 362 (representation that the contents of a cargo were equal to the samples delivered to the plaintiff).
2. As Professor Gutteridge had pointed out (51 L. Q. R. 119) "there is a very marked tendency to treat any stipulation as to quantity, quality, or the time or the mode of delivery as a condition, and careful search in the Digests reveals only a very few cases in which such stipulations have been treated as warranties. It would seem, in fact, that if a promise by the seller is in any way material it must be treated as a condition".
3. (1911) A. C. 394. The mere fact that the sellers have inserted a clause "sellers give on warranty" in the contract does not preclude the buyer from taking full advantage of the breach of a statutory condition under the Sale of Goods Act, 1893, which may involve treating the breach of such a condition as a breach of warranty. *See* also Baldry *v.* Marshall, (1925) 1 K. B. 260. Further, in Andrews *v.* Singer, (1934) 1 K. B. 17, it was held that a clause excluding implied statutory conditions could not cover the breach of an express condition. But in L. Estrange *v.* Graucob, Ltd., (1934) 2 K. B. 394, sellers at last found an impregnable armour by excluding all conditions, express or implied. As to the unfortunate practical effect of this decision, *see* P. A. London, in 51 L. Q. R. 272.
4. (1948) 1 All E. R. 493.
5. (1914) A. C. 932.
6. (1878) L. R. 3 Ex. D. 238 at p. 243.

"To make a man liable for fraud, moral fraud must be proved against him.

"I do not understand legal fraud."

Well, or course, he is right, so far as the common-law action for damages goes, but his words are capable of conveying, and did convey, the erroneous impression that the Judicature Act had, in some mysterious way, annihilated the old equity jurisdiction to relieve against "equitable fraud" by granting or withholding its own particular remedies.

The contribution of equity practitioners to the confusion began before the Judicature Act. Instead of taking a bold line and applying the word "fraud" indifferently to all failures in relations wherein equity set a certain standard of conduct, they fled to timid and unconvincing epithets, using the phrase "actual fraud," to express situations in which a party had been guilty of moral fraud, fraud according to common law, and "constructive fraud" to express situations of which equity alone would take cognizance. In a word, they used one expression to denote the concurrent, and another to denote the exclusive, jurisdiction of equity.

After the Act, Jessel, M. R., went to the other extreme, by attributing to it a totally wrong effect. For, in *Smith* v. *Chadwick*,[1] he said that an action for deceit would lie in a case in which one party had been induced to act to his detriment on a representation made by another without reasonable grounds for belief in its truth. He must have reasoned thus to himself: "Law and equity" were in conflict over fraud: now the Act says that in such a case equity is to prevail; therefore an action for damages now lies in any case in which a man has been guilty of conduct which equity will label "fraud". His first premise contains truth, but his conclusion is a complete *non sequitur*. He was suffering from an aggravated attack of the heresy that has been so prevalent during and since his time, that the Judicature Act fused equity with law, whereas it was mainly a reform in adjective, and not in substantive law.

The real effect of the Act was to enable the Supreme Court of Judicature to apply any remedy previously applicable either at law or in equity,[2] but the remedy of damages was never applicable in equity at all, or at law for fraud other than moral fraud; how, then, could the Act possibly have conferred any new power on the Court to grant damages for equitable fraud? But it is a common phenomenon that those who live contemporaneously with the passing of a great statute view it, as it were, with belladonna in their mind's eye: its true interpretation is left to a disillusioned posterity. Fortunately for us, Viscount Haldane has now brought light out of darkness. In *Nocton* v. *Lord Ashburton*,[3] *A*, a solicitor advised *B*, his client, to release part of a mortgage. *B* took his advise and suffered heavy loss thereby. *B* sued *A* for an indemnity to cover the whole of his loss. Neville, J., treated the claim simply as one for damages for deceit. Finding no moral fraud, he decided in favour of *A*. He conceded that *B* might have succeeded had he based his

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1. (1882) 20 Ch. D. 2744. His dictum was *obiter*, for the plaintiff failed on the ground that the plaintiff had not relied on the false statement and so had not fulfiled one stringent requirement both of law and of equity.
2. So Scrutton, L. J., is clearly correct in pointing out in Lever *v.* Bell, (1931) 1 K. B. 557 at p. 588, "The case of Kennedy *v.* Panama, etc. Mail Co., (1867) L. R. 2 Q. B. 580, so far as it decided that an innocent misrepresentation, though material is not a ground for rescission unless it is also fundamental, is no longer law."
3. (1914) A. C. 932.

claim on negligence, on the principle *imperitia culpae adnumeratur*,[1] but held that it was not permissible to turn an action for deceit into an action for negligence.

The Court of Appeal agreed with him on this point of procedure, but took the most unusual step of upsetting his finding of fact, and giving relief on the footing that he had been guilty of fraud. The House of Lords affirmed their judgment, but on very different grounds. They strongly deprecated the practice of the Court of Appeal upsetting the finding of fact by the Trial Judge, in view of the fact that the latter had, what the former had not, the advantage of seeing and hearing the parties in the witness-box. But they based their decision on the ground that this was not a common law action for deceit at all, but an equitable action based on the fiduciary relation between the parties. A solicitor owes duties to his client analogous to those which a trustee owes to his *cestui que trust*, and if he fails in these duties, he must indemnify the client for any loss he suffers, just as a trustee must reimburse his *cestui que trust* for the loss of his money through an improper investment made by the trustee. The indemnity claimed here by *B* is analogous to this duty of the trustee to make good a loss, and in no sense to the damages recoverable at common law for the tort of deceit.[2]

24. Equitable remedies for fraud—Difference between innocent and fraudulent misrepresentation not vital in equity.—Before examining some of the important cases in equity, it should be again noted that in law the word "fraud" connotes moral obliquity ; in equity it does not necessarily connote any moral obliquity, but is simply a generic term signifying conduct which falls short of the standard which equity prescribes In equity there is little real distinction between innocent and wilful misrepresentation. Of course, according to the traditional division, the former falls within the exclusive, the latter within the concurrent jurisdiction but division has outlived its practical usefulness. But they are alike in that, where either is proved, equity will decree cancellation for the victim, or refuse specific performance to the perpetrator of the fraud, one difference, it is true, there is. If the misepresentation is innocent, equity will not order cancellation of a contract unless the parties can be restored to their previous position ; thus in *Angel* v. *Jay*,[3] cancellation of an executed lease was refused. But as to cases of wilful misrepresentation, Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.*[4] said : "The practice has always been for a court of equity to give the relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

25. Rectification never asked for unless mistake induced by fraud.—Rectification is never asked for in cases of pure fraud (except, of course, in a case such as that put by Lord Macclesfield, in *Viscountess Montacute* v. *Maxwell*[5] of parties making an agreement which is required by the Statute

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1. Distinguish the position of a banker, who is under no duty to advice a customer as to investments. *See* Banbury *v.* Bank of Montreal, (1918) A. C. 626.
2. *See* further, on the distinction between damages and indemnity, Whittington *v.* Seale Hayne, (1900) 82 L. T. 49 ; New Bigging *v.* Adam, (1886) 34 Ch. D. 582.
3. (1911) 1 K. B. 666 ; *see* also Seddon *v.* North Eastern Salt Co., (1905) 1 Ch. 326. But Scrutton, L. J., in Lever *v.* Bell,(1931) 1 K.B. 557 at p. 558, reserved liberty to question this principle, and *see* Cheshire and Fifoot, *Law of Contracts*, 188, 190 ; H. A. Hemmelmann, 55 L. Q. R. 90.
4. (1878) 3 App. Cas. 1218 at p. 1278 ; *cf.* Armstrong *v.* Jackson (1917) 2 K.B. 822.
5. (1720) 1 P. Wms. 618 at p. 620.

of Frauds to be in writing and one of them fraudulently changing it for an entirely different agreement which he gets the other to execute) though it may be asked for when it has led to mistake. One is left with refusal of specific performance and cancellation. It has been seen that the former leaves the remedy at law still standing while the latter destroys it.[1] As in the case of mistake, so in the case of fraud, equity is more chary of applying the latter than the former.

26. In fraud, as in mistake, easier to resist specific performance than to get cancellation.—The distinction is taken in *Cadman* v. *Horner*.[2] *A*, who was *B*'s agent, had agreed to take *B*'s farm off his hands. *B* refused to convey on the ground that *A* had misrepresented its value, and also had said that much more had to be done to it in the way of repairs than turned out to be the case. The conduct of *B* is difficult to understand, as he admitted a rental value of the farm, which worked out very close to the figure named by *A* as its value. Grant, M. R., thought that *B* probably could not have obtained cancellation, but was entitled to resist specific performance on the ground that any misrepresentation by a plaintiff, however slight, provided only that it is material, disqualifies him from applying for equitable relief. Plumer, M. R., in *Viscount Clermount* v. *Tasburgh*,[3] said that the misrepresentation operated as a personal bar to the party who has practised it. A purchaser is entitled to look at the ostensible authority of the agent of the vendor ; it was held in *Mullens* v. *Miller*[4] that if such an agent misleads an intending purchaser by making untrue though unauthorized statements about the property, the vendor cannot compel specific performance.

27. Misrepresentation must be material.—But in order to enable a defendant to resist a decree, it must be shown that the misrepresentation was material, Lord Eldon, in *Stewart* v. *Alliston*,[5] cites Lord Thurlow as authority for the proposition that it is against conscience to take advantage of small variation in the description of the thing contracted for, and goes on to make the somewhat paradoxical remark :

> "The principle, being once established, was gradually enlarged till a specific performance in equity became at length a performance of anything rather than the real contract between the prties."

One must here go back to consider, in the light of some more cases, the subject of misdescriptions in a contract of sale. In *Johnson* v. *Smart*,[6] a house was described as "substantial and convenient," and having five bedrooms : actually it was out of repair and some of the bedrooms were very small inner rooms, without fireplaces. It was held that the purchaser must complete, as there was no misstatement of fact, there being in fact five bedrooms, and the adjectives related to matters of opinion, not of fact. In *Scott* v. *Hanson*,[7] an imperfectly watered piece of land was described as "uncommonly rich water meadow" ; here, too, it was held that there had been no material misrepresentation. The words, taken as a whole, represented nothing more than the loose opinion of an auctioneer, on which the purchaser could not be supposed to have placed reliance ; the word "rich" referred to the quality of the land, not of the irrigation ; and a meadow may still be properly described as a "water mead w" although it has not at all times the uncontrolled use and command of water. In a case *Mohan* v. *Aincough*,[8] a person to purchase a dwelling-house in Liverpool and before the contract, on an inquiry by him as to whether the house sustained war damage the vendor's

1. Mortlock *v.* Buller, (1804) 10 Ves. 292.
2. (1810) 18 Ves. 10 ; *see* also Wall *v.* Stubbs, (1815) 1 Madd. 80.
3. (1819) 1 Jac. & W. 112.
4. (1882) Ch. D. 194.
5. (1815) 1 Mer. 26.
6. (1866) 2 Giff. 151.
7. (1826) 1 Sim. 13 : (1829) 1 Russ. & My. 128.
8. 1952 W. N. 68 at p. 69.

solicitor made an innocent representation : "I understand not." After the sale was completed it turned out that the house sustained war damage. In a suit by the vendor for damages for £ 95 as damages for breach of warranty, Evershed, M. R., held that the answer did not amount to a warranty and that no damages could be recovered. But in *Smith* v. *Land and House Property Corporation*,[1] *A* had agreed to buy a hotel from *B* who had described his lease in present occupation as "a most desirable tenant". It was held that these words were an expression of fact, not of mere opinion, and so, when the lessee, prior to completion of the sale, went into liquidation, *A* was entitled to cancellation of the whole agreement Cancellation will not be granted on account of a statement of opinion, as opposed to a statement of fact, but Lord Merrivale pointed out in *Bisset* v. *Wilkinson*[2] that—

> "a representation of fact may be inherent in a statement of opinion and, at any rate, the existence of the opinion in the person stating it is a question of fact."

The purchaser was claiming to rescind on the ground of the falseness of a statement made by the vendor as to the carrying capacity of the land for sheep ; it was held that he could not, as the vendor's words came within the category, not of misstatement of fact, but of statement of an opnion which he honestly held.

28. Cases on particulars of sale at auctions.—Vagueness in the particulars of sale at an auction puts a purchaser upon inquiry ; thus, in *Trewer* v. *Newcome*,[3] specific performance was decreed against such a purchaser, who had brought land vaguely described, without troubling to make any investigations. But a definite representation on a point affecting the value of the subject of sale will, if untrue, entitle the purchaser to resist specific performance. Thus, in *Lord Brooke* v. *Rounthwaite*,[4] the amount of timber on an estate had been wrongly stated; compensation was impossible, the Court being unable to measure the extent of the deficiency, owing to the fact that the particulars of sale did not express the number of trees or the quantity of timber, so the bill was dismissed. In a sale of certain property by auction the defendant was declared to be the highest bidder. Later, on the representation that he was in fact a purchaser and not a puffer, the defendant entered into a contract to sell the property to the plaintiff, subject to National conditions. In an action by the plaintiff for specific performance the defendant pleaded that he was only a puffer. Repelling this plea Luxmoore, J., decreed specific performance.[5] In *Hunt* v. *Palmer*,[6] leasehold shops described in the particulars of sale as "valuable business premises" were put up for auction, subject to certain conditions and to National conditions of sale. The defendant who became aware of the sale on the day of auction bid at the auction and made the deposit. During investigation of title it appeared that there were restrictive covenants which prohibited any other trade or business than that of a ladies' outfitter, etc. In an action by the vendors for specific performance the defendant counter-claimed rescissions of the contract and to recover his deposit. Clauson, J., held that a shop which could be used for one purpose only was not fairly described as "valuable business premises" and that this misleading representation disentitled the vendors to specific performance. Refund of the deposit to the vendee was also ordered.

Representation, not a puffer.

Representation as valuable business premises.

1. (1884) 28 Ch. D. 7.
2. (1927) A. C. 177.
3. (1813) 3 Mer. 704 ; *cf.* Clarke *v.* Mackintosh, (1872) 4 Giff. 134.
4. (1864) 5 Hare 298 at p. 304.
5. Hills and Grant *v.* Hodson, (1934) 1 Ch. 53 : 103 L. J. (Ch.) 17 : 150 L. T. 16.
6. (1931) 2 Ch. 287 : 100 L. J. (Ch.) 356 : 145 L. T. 630.

29. Reliance must have been placed on representation.—The requirement of materiality in the representation goes hand in hand with the requirement, not less stringent, that reliance must have been placed upon it. In *Fellowes* v. *Lord Gwydyr and Page*,[1] Fellowes falsely assumed the character of agent to Lord Gwydyr; but it was held that Page could not resist specific performance on that ground, as the evidence showed that the personality of the contractee was of no moment to him ; it was all one to him with whom he dealt.[2] It is laid down in *Clapham* v. *Shillito*[3] that the Court will attach much importance to the fact that a party has taken energetic steps to verify representations made to him, for such action on his part will lend colour to the supposition that he was not deceived by the representations. So, in *Clarke* v. *Mackintosh*,[4] where the vendor of a brewery made various inconsistent representations, as to the profits of the concern which demanded investigation for which the vendor gave every facility, and which the purchaser partially carried out, specific performance was decreed. It is suggested by Stuart, V. C., that the innocene of the statements throws upon the party to whom they are made the onus of making inquiries and that equity will not help him if he does not make them at all, or is negligent in making them, but this can hardly stand in view of the emphatic words of Jessel, M. R., in *Redgrave* v. *Hurd*[5] :

> "The effect of a false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence."

The very fact of a material misrepresentation having been made with the object of inducing a man to enter into a contract raises an inference of law that he was actually induced by it. The plaintiff had greatly overstated the value of his business. The defendant, on discovering its real value refused to carry out his agreement to purchase it, counter-claiming, against the plaintiff's suit for specific performance, cancellation and the return of his deposit. He was successful in obtaining both. Had the overstatement been fraudulent he could, of course, also have recovered damages in tort. Jessel, M. R., took occasion to say that it is just as much against conscience for *A* to attempt to keep *B* to a contract which *A* now knows to have been induced by misrepresentation as originally to urge him to it by means of a statement which *A* then knew to be untrue. For the purpose of equitable remedies, the two processes are identical ; for the purpose of the common law action of deceit, they are as wide as the poles apart. *With* v. *O'Flanagan*[6] carries the principle of *Redgrave* v. *Hurd*[7] a little further. The facts were very similar, with the exception that the representation by the defendant as to the value of his medical practice was actually true when stated, but had become untrue owing to change of circumstances before the contract was signed. It was held that the representation must be treated as continuing until this date, and that the plaintiff was entitled to rescission.

30. How far concealment can amount to fraud.—This brings us to the subject of concealment in general. Can fraud be committed by refraining

1. (1829) 1 Russ. & My. 83 , *cf.* Smith *v.* Wheatscroft, (1878) 9 Ch. D. 223.
2. *Cf.* Dyster *v.* Raudall, (1926) Ch. 922, where the defendant sought to resist specific performance on the ground that he would not have entered into the contract had he known the plaintiff to be the undisclosed principal. The defence failed, as the contract was simply for the sale of land for a lump sum, and not one in which the defendant could show that he relied on any special qualifications of the agent.
3. (1844) 7 Beav. 146.
4. (1862) 4 Giff. 134. The requirement that the false representation must actually deceive is found also in the common law action for deceit ; *see* Hosfal *v.* Thomas, (1862) 1 H. & C. 90, *cf.* *per* Lord Tenterdon in Dobel *v.* Stevens, (1825) 3 B. & C. 623.
5. (1881) 20 Ch. D. 1 at p. 14.
6. (1936) Ch. 575.
7. (1881) 20 Ch. D. 1 at p. 14.

from speech as well by speaking ? The broad common law rule was stated by Lord Cairns in an often-cited passage in *Peek* v. *Gurney*[1] :

"There must be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absotutely false." There is no more lying report of a speech than a garbled report with words, really spoken, wrenched from their context; so the concealment of one item in a set of facts may represent all the revealed facts in a totally wrong light. In such a case an action of deceit will lie. But mere non-disclosure, by itself will give rise to no action at common law except in contracts *uberrimae fidei*. It may be a ground for equitable remedies.[2] As to the undesirability of the same solicitor being employed by both sides, see *per* Lord Eldon in *Owen* v. *Foulkes*.[3] *H* and *B* were clients of the same solicitor, *MB* gave *M* authority in writing to sell certain property. Acting on this, *M* entered into an agreement with *H* to sell the property to him. Lord Cranworth held that this was a transaction in which there was a necessity for the utmost openness of dealing, and, not being satisfied that this existed, refused specific performance. It appeared that *M* had failed to disclose to both the whole nature of the dealing. But though equity demands candour it does not demand garrulity. For instance, a vendor of land must describe the land accurately,[4] and disclose every material defect in his title, unless, of course, he can get the purchaser to agree to a special condition that he is to take the land as he finds it. But he need not go out of his way to be communicative; above all, he is not compelled to supply eyes to a purchaser who chooses to inspect the property blindfold. Thus, in *Bowles* v. *Round*,[5] *A* bought a meadow from *B*; *B* never told him that a road went through it; but it was held that *B*'s silence did not entitle *A* to resist specific performance, as he could easily have discovered the presence of the road for himself. But in *Shirley* v. *Stratton*,[6] the vendor "industriously concealed" the existence of a wall which would have to be repaired at some expense to prevent the flooding of the estate; Lord Thurlow dismissed the bill for specific performance. These two cases differ widely from each other; in the former the vendor was merely silent about an inconvenience, whereas in the latter he took active steps to conceal a vital obstacle. It is impossible to lay down hard and fast rules as to what facts a man is under an obligation to disclose. It has been seen that in *Bell* v. *Lever*[7] the House of Lords has finally condemned the idea that a servant who has been guilty of breaches of his duty towards his employer is bound to inform him of them. In *Turner Green*,[8] Chitty, J., follows the example of Fry[9] in citing the words of Cicero to explain the difference between mere silence and active concealment :

"*Aliud estcelare, aliud tacere, neque enim id est celare quicquid reticeas.*" He adopts as an authoritative statement of law a sentence of Fry :

> "Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance."

A and *B* had met in order to arrange a compromise of an action. Before the meeting *C*, *A*'s solicitor had telegraphic information of some proceedings which were turning out favourably for *B*. It was held that *C* was under

1. (1873) L. R. 6 H. L. 377 at p. 403 ; *see* also Reynell *v.* Sprye, (1852) 1 De G.M. & G. 660.
2. Hesse *v.* Brian, (1865) 6 De G. M. & G. 623.
3. (1802) 6 Ves. 631 n.
4. Swaisland *v.* Dearsley, (1861) 29 Beav. 430.
5. (1800) 5 Ves. 508.
6. (1785) 1 Bro. C. C. 440.
7. (1932) A. C. 161.
8. (1895) 2 Ch. 205 at p. 209.
9. *Specific Performance*, 6th Ed., p. 336.

no duty to disclose this, and the compromise must stand. In *Greenbalgh* v. *Brindley*,[1] it was held that the vendor of a house with windows overlooking the land of a third person is under no obligation to disclose that the windows have acquired no easement of light over the land.

31. **Contracts uberrimae fidei.**—In the case of contracts *uberrimae fidei* disclosure of every material fact is required both by law any by equity. By far the most important of this type of contract is the contract of insurance. Not all contracts of insurance are contracts of indemnity,[2] but all are contracts *uberrimae fidei*. A policy may be vitiated through concealment of matters which are in fact material, though the party did not believe them to be material.[3]

London Assurance v. *Mansel*.—The most frequently cited case is *London Assurance* v. *Mansel*.[4] Mansel made a proposal for life assurance to the plaintiff office. One of the questions they put to him was, "Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?" He answered, "Insured now in two offices for £ 16,000 at ordinary rates. Policies effected last year." This was true as far as it went, but it kept back a vital part of the real truth, that Mansel had made proposals to several other offices, who had declined him altogether. It was held that the office was entitled to have the policy cancelled, on the ground that Mansel had been guilty of a material concealment. In *Locker and Wolf* v. *Western Australian Insurance Co.*,[5] Slesser, L. J., remarked that it is fundamental in insurance law that the company is entitled to be satisfied as to the "moral hazard". On this footing the Court of Appeal decided that non-disclosure by a proposer for a fire policy, of a refusal by another company to issue a motor car policy, on the ground of untrue statements in the proposal form, amounts to non-disclosure of a material fact entitling the fire company to avoid the policy.

Wauton v. *Coppard*: *Lamare* v. *Dixon*.—At the risk of seeming to retrace old ground, it will be useful to mention two more cases, from which one shall attempt to draw a final moral, which will be seen to apply to fraud in all its phases. In *Wauton* v. *Coppard*,[6] *A* entered into negotiation with *B*, the agent of *C*, for the purchase of a house for the purpose, known to *B*, of carrying on school for boys. *B* admitted to *A* that there was a covenant affecting the

1. (1901) 2 Ch. 324. The head-note borrows the terminology of the common law in saying that such a contract "implies no representation or warranty" that the windows enjoy the easement. Where equity would say that a man is under a duty to disclose a thing, common law says that there is an implied condition or warranty as to that thing. A plaintiff may, by different roads, come round to the right to repudiate at law, or a right to have the contract cancelled in equity. In Keates *v.* Lord Cadagon, (1851) 10 C.B. 591, it was held that no action would lie against *B*, who had let to *A* an unfurnished house, without disclosing that it was in a ruinous state. But in Collins *v.* Hopkins, (1923) 2 K. B. 617, it was held that in the case of a furnished house there is an implied condition that the house is reasonably fit for habitation, and so the tenant could repudiate his contract, on discovering that the house had recently been occupied by a person suffering from pulmonary tuberculosis. The distinction between furnished and unfurnished houses applies also to flats; *see* Manchester Bonded Warehouse Co. *v.* Carr, (1880) 5 C. P. D. 507; Cruse *v.* Mount, (1933) Ch. 278; *cf.* Smith *v.* Marrable, (1843) 11 M. & W. 5; Hart *v.* Windsor, (1843) 12 M. & W. 68.
2. Life insurance is not. Dalby *v.* India and London Life Co., (1854) 15 C. B. 365; Law *v.* London Indisputable Life Policy Co., (1855) 1 K. & J. 223.
3. *See per* Role, B., in Dalglish *v.* Jarvie, 2 Mac. & G. 331 at p. 343, cited by J. B. Porter, *The Laws of Insurance*, 8th Ed., 155; *see* also *per* Lord Blackburn in Brownlie *v.* Campbell, (1880) 5 App. Cas. 925 at p. 954.
4. (1879) 11 Ch. D. 363.
5. (1936) 1 K. B. 408.
6. (1899) 1 Ch. 92.

house, but told him that nothing in it would prevent him from carrying out his purpose. Romer, J., being satisfied that *B* was wrong, and that the covenantee would be able to restrain *A* from using the house as a school, held that *A* was entitled to rescind his contract with *C*. In *Lamare* v. *Dixon*,[1] *A* agreed to take a lease of some cellars from *B*. *B* had verbally promised him that they would be dry, *A* having insisted that this was essential to his purpose of storing in them a large stock of wine. Relying on the promise, he brought in many bottles, but found to his disgust, that the cellars were damp. He went on using them, but never relaxed his complaints; eventually he refused to execute the lease; and it was held that the non-performance of the promise by *B* rendered it impossible for him to obtain specific performance against *A*. In both these cases there was a complete absence of such deceit as could form the grounds for an action at law for damages, but in each case one of the parties had, by his conduct, put himself out of harmony with equity. The keynote of the whole equitable view of fraud is that one of the parties has, by his conduct in a certain situation, raised up against himself a personal bar.[2]

Victim of fraud may lose remedy through delay.

The victim of equitable fraud may, of course. disentitle himself to relief through delay. In *Lamare* v. *Dixon*,[3] the plaintiff argued that the defendant's conduct in entering into possession of the cellars and occupying them for two years, together with the payment of rent, amounted to acquiescence on his part and precluded him from resisting specific performance. But it was held that these actions were susceptible of the interpretation that they were necessitated by the paramount consideration of preserving the wine, and in no way prevented the defendant from raising as a defence the non-performance by the plaintiff of his promise, of which he was constantly being reminded by the defendant's complaints.

32. "Do not contain all terms agreed between the parties."—In a case contemplated by last paragraph of Cl. (*a*) the terms of the contract in writing do not embody the whole agreement between the parties, and, but for a misrepresentation made or an undertaking given by the plaintiff, the defendant proves he would not have consented to have the truncated agreement reduced to the form of writing. The defendant was induced to enter into the contract by reason of this engagement on the part of the plaintiff ; the plaintiff must, therefore, fulfil his agreement before he can get specific performance.[4] The clause was held to apply in a case where the plaintiff sued for specific performance of an agreement in writing which set forth, *inter alia*, that the defendant agreed to sell under certain conditions as agreed upon, a share in a house and the defendants in defence to a suit for specific performance alleged that the written agreement did not contain the whole of the agreement between the parties and offered parol in support of there contentions.[5] "If it can be shown that the written contract which is sought to be enforced was only signed in consequence of some collateral contract having been come to the plaintiff must either submit to the collateral contract or have his action for specific performance dismissed; and this although the collateral contract is not evidenced in writing. Thus, in *Clark* v. *Grant*,[6] where trustees of a charity sought specific performance of written contract to take a lease and the

1. (1873) L. R. 6 H. L. 414.
2. *See per* Plumer, M. R., in Viscount Clermont *v.* Tasburgh, (1819) 1 Jac. & W. 112.
3. (1873) L. R. 6 H. L. 414.
4. Myers *v.* Watson, (1851) 1 Sim. N. S. 523 ; Lamare *v.* Dixon, (1873) 6 H. L. 414.
5. Cutts *v.* Brown, 6 Cal. 328.
6. 14 Ves. 519 at p. 525.

main defence was a parol contract of the same date as the written one and affecting the parcels, Grant, M. R., held that evidence to prove the parol contract was admissible, and that, if it were proved, it would be against equity and fraud on the defendant to insist upon his performance of a contract, which he had only signed on the faith of an alteration being made in one of its terms.[1]

33. Scope and application of Cl. (b) to Sec. 18 (new).—This clause contemplates a case where neither party is to blame. Both are agreed to as their object, i.e. some legal result; but by reason of error in drafting they are both baulked of their purpose. The error may be either of fact or law; but where the parties have agreed upon the law there can be no relief.[2] But here both the parties with their eyes open draw up their contract in one way because they at the time think it best to do so, they cannot afterwards ask the Court to make and execute different contract for them, when facts turn out otherwise than they calculated.[3]

34. Scope and application of Cl. (c) to Sec. 18 (new).—This clause covers a case of addition or alteration subsequent to the written agreement, which does not amount to an abandonment of it.[4] It has no application to the case of the substitution of the original agreement by a new one.[5] The clause, however, is not confined in its application to variation before the breach of the contract and the parties may agree to vary the terms after the breach.[6]

New	Old
19. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—	**27. Relief against parties and persons claiming under them by subsequent title.**—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—
(*a*) either party thereto ;	(*a*) either party thereto ;
(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract ;	(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract,
(*c*) any person claiming under a title which, though prior to the contract, and known to the	(*c*) any person claiming under a title which, though prior to the contract, and known to the

1. Fry, Sec. 568 ; *see* also Ramiah *v.* Samasi, 29 I. C. 449 : 29 M. L. J. 125 : 1915 M. W. N. 408.
2. Dr. Banerji's *Tagore Law Lectures*, App. C, p. 87.
3. Croome *v.* Ledgard, 2 My. & K. 251.
4. Dr. Banerji's *Tagore Law Lectures*, App. C, p. 88.
5. More *v.* Manable, (1866) 1 Ch. 217.
6. Ramiah *v.* Samasi, 29 I. C. 449 : 29 M. L. J. 125 : 1915 M. W. N. 408.

New

plaintiff, might have been displaced by the defendant ;

(*d*) when a company has entered into a contract, and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation ;

(*e*) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by terms of the incorporation, the company :

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Old

plaintiff, might have been displaced by the defendant ;

(*d*) when a public company has entered into a contract, and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

(*e*) when the promoters of a public company have, before its incorporation, entered into a contract with the company; provided that the company has ratified an l adopted the contract and the contract is warranted by the terms of the incorporation.

Illustrations

To clause (b)—A *contracts to convey certain land to* B *by a particular day.* A *dies intestate before that day without having conveyed the land.* B *may compel* A*'s heir or other representative in interest to perform the contracts specifically.*

A *contracts to sell certain land to* B *for Rs.* 5,000. A *afterwards conveys the land for Rs.* 6,000 *to* C, *who has notice of the original contract:* B *may enforce specific performance of the contract as against* C.

A *contracts to sell land to* B *for Rs.* 5,000. B *takes possession of the land. Afterwards* A *sells it to* C *for Rs.* 6,000. C *makes no enquiry of* B, *relating to his interests in the land.* B*'s possession is sufficient to affect* C *with notice of his interest and he may enforce specific performance of the contract against* C.

A *contracts in consideration of Rs.* 1,000, *to bequeath certain of his lands to* B. *Immediately after the contract* A *dies intestate, and* C *takes out administration to his estate.* B *may enforce specific performance of the contract against* C.

Old

A *contracts to sell certain land to* B. *Before the completion of the contract,* A *becomes a lunatic, and* C *is appointed his committee.* B *may specifically enforce the contract against* C.

To clause (c)—A, *the tenant for the life of an estate, with remainder to* B, *in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to* C, *who has notice of the settlement. Before the sale is completed,* A *dies.* C *may enforce specific performance of the contract against* B.

A *and* B *are joint tenants of land, his undivided moiety of which either may alienate in his lifetime, but which, subject to that right devolves on the survivor.* A *contracts to sell his moiety to* C, *and dies.* C *may enforce specific performance of the contract against* B.

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1. Legislative changes.—This section corresponds to old Sec. 27. Clauses (*a*), (*b*) and (*c*) of the old section have been reproduced verbatim in this section. In Cls. (*d*) and (*e*) of the old section the word "public" before the word "company" wherever they occur have been omitted. In Cl. (*e*) the words "with the company ; provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation" occurring at the end of Cl. (*e*) have been substituted by the words "for the purpose of the company and such contract is warranted by the terms of the incorporation, the company". A new proviso has been added at the end of this section. The illustrations have been deleted.

2. Reasons for the change.—The Law Commission of India in their Report on the Specific Relief Act, 1877, says :

> "Clause (*h*) of Sec. 23 (old) and Cl. (*e*) of Sec. 27 (old) deal with pre-incorporation contracts of companies.....Section 27 (*e*) (old) lays down the converse rule of liability of the company in respect of similar contracts made by the promoters. These two provisions of one Act are founded on the English law as it stood at the time when the Act was passed.[1] Later English decisions have taken the view that a company is neither bound by[2] nor entitled to take the benefit of[3] the pre-formation contracts made by its promoters. The provisions of the Specific Relief Act have, however, been applied in India even recently,[4] without referring to the change in judicial opinion in England. Though a company cannot technically ratify a contract made before its incorporation, there would appear to be no reason why the company should not be entitled to choose to take the benefit or the burden of a contract made on its behalf by its promoters, by communicating its acceptance of the benefit or the burden to the other party to the contract. There is no provision in the Companies Act, 1956, which prevents a company from accepting the benefit or burden of a pre-incorporation contract. We, therefore, recommend that Cl. (*h*) of Sec. 23 (old) and Cl. (*e*) of Sec. 27 (old) be retained, with suitable verbal changes indicating that the contract would be enforceable by or against a company if the company accepts the contract and signifies its acceptance to the other party to the contract." Again at page 34 of the Report the Law Commission says : "In (old) Sec. 27, Cl. (*e*) has to be omitted in view of the present state of the law relating to promoter contract (*see* para. 55, *ante*). In (old) Sec. 27, Cl. (*d*), the word 'public' has been omitted inasmuch as the principle embodied in the clause is applicable to all companies governed by the Indian Companies Act....."[5]

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1. Earl of Shrewsbury *v.* North Staffordshire Ry. Co., (1865-66) 1 Eq. 593.
2. *In re* English & Colonial Produce Co. Ltd., (1906) Ch. 435 (C. A.).
3. Natal Land Co. *v.* Pauline Colliery Syndicate Ltd., (1904) A. C. 120 ; Newborne *v.* Sensolid Ltd., (1953) 1 All E. R. 708 (C. A.).
4. Commissioner of Income-tax, Bihar and Orissa *v.* Bhurangiya Coal Co. A.I.R. 1953 Pat. 298 at p. 300.
5. Law Commission of India, Ninth Report on Specific Relief Act, 1877, pp. 28 and 34.

3. Scope of the section.—This section is a counterpart of present Sec. 15 enumerating classes of possible defendants to a specific performance suit who were not original parties to the contract, as that section enumerated classes of possible plaintiffs. The rules here given for convenience exhibit no common ground of principle and title, if any, of practice belonging to actions for specific performance more than to other forms of proceedings.[1] As the learned authors point out, a defendant who has pleaded and conducted his defence on the merits cannot on appeal raise the question whether he was a proper party.[2]

Contract means executory contract, e. g. an agreement to sell and not an actual sale.[3] A transferee cannot claim specific performance of the contract under which he became a transferee, if the property is already subject to a previously executed contract.[4]

4. Clause (a).—This clause only lays down the general principle that it is only a party to the contract who can be sued and the following clauses provide exceptions to this general rule. As a rule only the parties to the contract should appear on the file in a suit for specific performance, they alone being sufficient and necessary parties. A stranger to the contract is not a proper party and the decree cannot be passed against him unless his case falls under any of the exceptions enunciated in the following clauses of this section.[5] In a suit for specific performance of a contract of sale, it is not permissible to join people who are strangers and whose claim has to be investigated apart from the agreement of which specific performance is sought. If a person, who is a stranger to the contract and who sets up an independent title is joined as a defendant, the proper course for the Court is to order that he be discharged. The plaintiff after perfecting his title by obtaining specific performance against the executants of the agreement would be in a position to bring a fresh suit against him if he stands in the way of obtaining possession. It is not possible in the suit for specific performance to investigate the title which he sets up. Such a cause of action cannot be joined in the suit.[6] Where contract is made on behalf of disabled person specific performance can be decreed against him after removal of disability.[7] But according to modern decisions a contract of sale by the natural guardians on behalf of the minor under the Hindu law for a necessary and binding purpose is valid and specific performance can be decreed in his favour or against him.[8] The liability of a Hindu son to fulfil the obligation of his father may be determined and this clause is no bar to it.[9] Where a

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1. Pollock and Mulla, 7th Ed., p. 717.
2. Jagannatha Rao *v.* Soma Lakshminarayana, (1930) 125 I. C. 540.
3. Akbar *v.* Prem Singh, 2 P. R. 1885; Punjab Banking Co. Ltd., Lahore *v.* Mohd. Hassan Khan, I. L. R. 6 Lah. 344 : 39 I. C. 615 : A. I. R. 1925 Lah. 542 : 26 P. L. R. 691.
4. Punjah Banking Co. Ltd., Lahore *v.* Mohd. Hassan Khan, *supra.*
5. Fry. Sec. 205; Buppu *v.* Annamalai Chettiar, A. I R. 1923 Mad. 313; Kazi *v.* Kanu. I.L.R. 24 Cal 832, Mokund *v.* Chotay, I.L.R. 10 Cal. 1061; Ahmadbhai *v.* Dinshaw, 13 Bom. L. R. 1061; *see* also I.L.R. 5 Bom. 177.
6. Mst. Nagi *v.* Damodar Jagobaji, I.L.R. (1947) Nag 623 : 1947 N. L. J. 497 : A. I. R. 1948 Nag 181.
7. Gregson *v.* Udoy, I. L. R. 17 Cal. 229 (P. C.).
8. Sri Kakulam Subramanyam *v.* K. Subbarao. A. I. R. 1948 P. C. 95 at p. 97 : 75 I. A. 115 : I. L. R. (1949) Mad. 141 : (1948) 2 M. L. J. 22 : 1948 A.L.J. 226 : 52 C. W. N. 706; Ramalingareddi *v.* Subbammal Ammal, (1950) 2 M. L. J. 597 at p. 598 : 1950 M. W. N. 669. It is submitted that Rambilas Singh *v.* Lokenath Chaudhuri, A. I. R. 1949 Pat. 405 at p. 406 : I.L.R. 27 Pat. 143 is not good law in view of the above Privy Council case.
9. Tiruvenkatachariar *v.* Venkatachariar, 25 M. L. J. 218; Kasury *v.* Ivalury, I.L.R. 26 Mad. 74; Srinivasa *v.* Sivarama I.L.R. 32 Mad. 320; Panaka *v.* Vadamadi, I. L. R. 33 Mad. 359.

contract to sell was executed by *M*'s executor who had obtained probate and also by *M*'s widow who executed it in exercise of the power given to her by the will of her husband to assent to a conveyance by the executor but the probate was subsequently revoked it was held, that if the contract was one which ought otherwise to be specifically performed, it could be enforced against the interest of the widow in the property.[1]

Of course, no suit is competent against a certified purchaser in execution sale on the ground that the purchase was made on behalf of the plaintiff.[2] But that does not debar from bringing the suit against such a purchaser on the ground of an agreement to convey the property made after the purchase.[3] A suit for specific performance may be decreed against the official assignee or receiver where a party bound under the contract has become insolvent.[4]

Strangers to the contract making a claim adverse to the title of the defendant (vendor) contending that they are the co-owners of the contracted property are neither necessary nor proper party and are, therefore, not entitled to be joined as parties to the suit.

For specific performance of a contract for sale, see *Panne Khushali* v. *Jeewan Lal Mathoo Khatik*.[5]

5. Clause (b)—Principle.—In the commentary of Mr. Collett relating to Cl. (*b*) of Sec. 27 (old) the position of the contracting parties is thus described :

> "The general principle of this clause and its illustration is that from the time of the contract for the sale of the land the vendor, as to the land, becomes a trustee for the vendee : and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. And every one coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased.....The maxim of equity at the bottom of it all is that equity regards as done what is agreed to be done."

The defendants in *Kansi Ram* v. *Ishwardas*,[6] however, claimed exception from this rule of equity under the proviso attached to Cl. (*b*) according to which a transferee for value, who has paid his money in good faith and without notice of the original contract, is exempted. It is, therefore, for the appellants to make out that they came within that exception. In the case of *Himmatlal* v. *Vasudeo*,[7] the rule as to the onus of proof in such a case is thus stated in the head note :

> "Defendants Nos. 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff, defendant Nos. 3 and 4 were bound to show

1. *Obiter dicta, per* Cox, J., in Kedar Nath *v.* Manu Bibi, 13 I. C. 879 : 16 C.W.N. 247 (Hoorocks *v.* Righby, 9 Ch. D. 180: 47 L.J. Ch. 800 : 38 L.T. 782: 26 W R. 714, referred to).
2. *See* Sec. 66, C. P. C.
3. Venkatappa *v.* Jalayya, I. L. R. 42 Mad. 613 (F. B.) ; Ramabai *v.* Peria, I. L. R. 43 Mad. 643 (P. C.) : 47 I. A. 108 : 56 I. C. 395 : 24 C.W.N. 699.
4. Pearce *v.* Bastables Trustee in Bankruptcy, (1901) 2 Ch. 122; Kamal Krishna Kundu Choudhuri *v.* Chatoorbhuj Dossa, A.I.R. 1925 Cal. 324 ; Purushotam *v.* Punnurangha, 21 I. C. 576 : 15 M. L. T. 92.
5. A. I .R. 1976 M. P. 148 at p. 152.
6. A. I. R. 1923 Lah. 108.
7. 14 Bom. L. R. 634.

three things, namely, that (1) they were purchasers for value and (2) *bona fide*, and (3) without notice. The plaintiff under his contract having a prior equity was entitled to succeed. One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge."

A similar rule was laid down in the case of *Hamid Hussain* v. *Bishen Sarup*.[1]

But equity does not take as done, what might have been, but only what ought to have been done. In other words, the equity fastens upon what is material part of a contract and not what is accidental, collateral or unnecessary.[2]

In *Durga Prasad* v. *Smt. Lilawati*,[3] Durga Prasad had no notice of the contract for sale. There was no doubt that he was a purchaser for value and had paid the sale consideration. The evidence on the record clearly showed that Durga Prasad was a purchaser for value in good faith. He had no notice of the earlier transaction. It was held that the plaintiffs suit for specific performance of the contract for sale could not succeed.

6. Scope.—By a plain reading of Sec. 19 (*b*) (new) it appears that a subsequent purchaser in order to successfully resist a suit for specific performance of a prior agreement of sale must establish that he is a purchaser for value without notice of the prior agreement of sale and he paid the consideration money for the sale before he had notice of the prior agreement of sale. In order to better appreciate what payment means it is necessary to examine some decided cases on this point.

In *Himatlal Motilal* v. *Vasudeo Ganesh Mahashar*,[4] it was held that the purchaser of property which is owner had previously agreed to sell to another person, must show three things to resist the latter's claim for a prior equity :

(*a*) that he is a purchaser for value ;
(*b*) that he is a *bona fide* purchaser ;
(*c*) that he had no notice of the prior contract.

What happened in that case was there was an agreement of sale in favour of the plaintiff on 9th February, 1906, executed by defendants 1 and 2. On 21st May, 1906, the defendants 1 and 2 executed a sale-deed in respect of the same property in favour of defendants 3 and 4, who held a mortgage of long standing over it. The sale-deed was registered on 22nd May, 1906, and possession of the property was delivered to defendants 3 and 4 on 29th May, 1906. The price settled to be paid by defendants 3 and 4 was Rs. 4,000 more than the plaintiff had agreed to pay. In addition to the mortgage money which was already due to the defendants 3 and 4 from defendants 1 and 2 the former gave to the latter two *chittis* for Rs. 6,001 and Rs. 4,224, respectively as security for the payment of the balance of the purchase money. Before the plaintiff filed the suit for specific performance and possession of the property defendants 3 and 4 had paid Rs. 2,500 only to defendants 1 and 2

1. (1918) 137 P. W. R. 1918 : 46 I. C. 659; Kanshi Ram *v.* Ishwardas, A.I.R. 1923 Lah. 108 at p. 110.
2. Story, *Equity*, Sec. 792.
3. 1972 A. L. J. 945 at p. 948.
4. I. L. R. 36 Bom. 446 : 16 I. C. 680 : 14 Bom. L. R. 634.

on account of the said *chittis*. The summons in the plaintiff's suit was served on the defendants 3 and 4 on 9th August, 1906 and the residue of the purchase money they paid to defendants 1 and 2 only after that date, i. e., during the pendency of the plaintiff's suit. Under these circumstances their Lordships of the Bombay High Court held that giving of the *chittis* as security t› payment of the balance of the purchase money by defendants 3 and 4 to defendants 1 and 2 does not amount to actual payment of money and therefore defendants 3 and 4 are not entitled to get benefit of Sec. 27 (*b*) (old) of the Specific Relief Act.

In the decision *Gudur Ranga Reddy* v. *Gundala Pitchi Reddi*,[1] it was held that the phrase "paid his money in good faith" in Sec. 27 (new Sec. 19) of the Specific Relief Act did not cover the case of a person who after the execution of his conveyance and before its registration has notice of a prior contract to sell the property to a third person and who does not pay any cash for any sale but takes it in adjustment of a prior outstanding mortgage in his favour. In that case it was found that before the purchaser had notice of the agreement after the execution of his sale-deed no endorsement of discharge was made on the mortgage bond towards the adjustment of which the sale was taken. Their Lordships of the Madras High Court held that the recital in the sale-deed that the sale amount was to be adjusted toward mortgage does not operate as an adjustment so as to put the purchaser in the same position as a man who had "paid his money in good faith".

In the decision *Arunachala Thevar* v. *Madappu Thevar*,[2] the consideration for subsequent sale consists of payment of cash in part and discharge of certain debts due to the purchaser and to their mother. It was held in that case that these debts must be treated as discharged by the execution of the sale-deed and on that footing they also count as payment.

In the decision *Marwadi Sumermal Jamatraj* v. *Thukkappa*,[3] a portion of the consideration paid by the subsequent transferee was in adjustment of an outstanding debt and the remainder was paid in cash. Under those circumstances it was held that the transferee thereby paid to the transferor all that had to be paid under the contract before notice of the prior agreement of sale was received and the transferee had "paid his money" within the meaning of Sec. 27 (*b*) [new Sec. 19 (*b*)] of the Specific Relief Act.

In the decision *Smt. Mary Joseph* v. *Tayab Mohammad Hajee Moosa & Co.*,[4] it was held that the phrase "paid his money" being paid money or moneys' worth and it cannot therefore be held that the defendant had paid the consideration in money but only by adjustment of a debt he could not claim benefit of Sec. 27 (*b*) [new Sec. 19 (*b*)] of the Specific Relief Act.

In the decision *Satya Mandalini* v. *Shadur Mondal*,[5] a question arose as to claim benefit of Sec. 27 (*b*) (old) of the Specific Relief Act besides execution of the sale and payment of the purchase money whether registration of sale-deed was also necessary before notice of the prior agreement of sate. Their Lordships of Calcutta High Court held after discussing the case-law on the point that non-registration of the document does not affect the protection given under Sec. 27(*b*) (old) of the Specific Relief Act. The question of mode of payment has not arisen in that case because the payment of the consideration

1. (1914) 1 L. W. 879 : 25 I C. 973.
2. A. I. R. 1936 Mad. 949.
3. (1944) 1 M. L. J. 376 : A. I. R. 1944 Mad. 391.
4. (1958) 2 M. L. J. 538 : A. I. R. 1959 Mad. 86.
5. A. I. R. 1962 Cal. 40.

amount in cash was made before notice of the prior agreement of sale. In the decision of *Veeramalai Vanniar* v. *Thadikara Vanniar*,[1] the facts are the entire sale consideration has not been paid at the time when the controversy arose and even at the time when the suit was filed. A portion of the price had been paid and for the balance it was provided in the sale-deeds that it is to be paid in convenient instalments. Therefore, that is a case of clear non-payment of entire consideration amount either in cash or by way of adjustment. Under these circumstances, it was held that the subsequent purchaser is not entitled to claim the benefit of Sec. 27 (*b*) (old) of the Specific Relief Act.

From the above discussion the following would emerge :

> "To claim the benefit under Sec. 27 (*b*) of the Specific Relief Act by a subsequent transferee he must establish—
>
> (*a*) he is a purchaser for value ;
>
> (*b*) he had no notice of the prior agreement of sale and without notice he obtained the sale-deed from the owner ;
>
> (*c*) before he had notice of prior agreement of sale he paid the consideration money to the owner ;
>
> (*d*) the payment of consideration need not be in money only, it may be either in money or money's worth or may be by way of some adjustment but there must be actual payment or adjustment and not merely a promise to pay or mere agreement for adjustment. The agreement cannot merely remain executory but it must be executed. That is nothing should remain to be paid or to be adjusted."[2]

7. Specific performance against person not impleaded in plaint are not available.—In *Kshetra Mohan Nath Sarma* v. *Mohammad Sadir Bepari*,[3] the suit was brought under See. 27 of the Specific Relief Act, 1877 (corresponding to Sec. 19 of the Specific Relief Act, 1963) which shows against whom a contract for specific performance may be enforced.

The ordinary rule is that in a suit for specific performance of a contract, persons other than the parties to the contract, meaning the strangers, are not necessary parties. Specific performance of a contract cannot be enforced against persons who are not parties to the contract and who do not fall within the purview of Cls. (*a*) to (*e*) of old Sec. 27 of the Specific Relief Act. That is the general rule, The general rule is, however, subject to the recognized exceptions, which are in conformity with the practice of the Court of Chancery. In cases where it is desirable to avoid multiplicity of suits and where interest of persons who are in actual possession of the property in question might be affected, strangers to the contract can be sued upon.[4]

According to Fry's *Specific Performance of Contracts*, 6th Ed., p. 90, paras. 208 and 209 :

> "A stranger to the contract may so mix himself up with it by setting up a claim to some benefit resulting from it, as to render himself liable to be made a party to proceedings for the conforcement of the

1. (1968) 1 M. L. J. 437 : A. I. R. 1968 Mad. 383.
2. Vomisetti Paparao *v.* Jonnadda Venkataramana, (1970) 2 Andh. W. R. 280 at pp. 283-84.
3. A. I. R. 1964 Tripura 16 at p. 17.
4. Bai Devkabai *v.* Shah Shamji Mulji, A.I.R. 1971 Guj. 256 at p. 258.

contract.....In some cases where a portion of the relief claimed might affect the person in actual possession of the property, that person may properly be made a party to an action for the specific performance of the contract....."

In *Mamidala Suryakantamma* v. *Thummala Venkatachalam*,[1] there was an allegation in the plaint that the second defendant obtained, collusively from the first defendant, an agreement to sell the suit property to himself in order to defeat the plaintiff's rights under the agreement to sell dated 25th February, 1959, executed by the first defendant. This allegation really brings the case under Sec. 27 (*b*) of the Specific Relief Act, 1877, which states that specific performance of a contract may be enforced against any other person claiming under him by a title arising subsequently to the contract, except a transferee for a value who has paid his money in good faith and without notice of the original contract. There can be no doubt that specific performance can be asked for and granted against any subsequent transferee with a notice of the prior contract. The claim made by the plaintiff in the present instance against the second defendant is one such case under Sec. 27 (*b*) of the Specific Relief Act, 1877. Thus the suit is essentially one for specific performance not only against the first defendant but also against the second defendant and it is property valued and proper court-fee is paid as prescribed under Sec. 39 of the Andhra Court-fees and Suits Valuation Act.

Every essential test of mutuality is satisfied, where the document of sale and its counterpart (agreement) are interpreted as one transaction, each obligation corresponding to a right, and characterized by full consideration between the parties. In such cases, this is not a mere unilateral contract to keep the offer open, and the right to obtain a reconveyance is assignable and enforceable between the original parties and successor.[2]

8. **"Any other person claiming under him".**—The concept of joint Hindu family property is that each of the coparceners is entitled to the same right as the other and they all hold together the coparcenary property and that when a partition is effected all that happens is, not a transfer of interest from one to the other, but only release of the interest of one coparcener in favour of the other in specific immoveable property allotted to the latter as and for his share. In such circumstances, it is doubtful whether there is any occasion to apply Sec. 26 (*b*) [corresponding to new Sec. 19 (*b*) of the Specific Relief Act, 1963] for, in such a case, there is no room for applying the language "any other person claiming under him". A sharer on partition does not derive title to his share from any one else and, therefore, it cannot be said that he is claiming under somebody for the purpose of the application of the section. Even assuming, therefore, that the compromise decree was collusive, it is not possible to apply Sec. 27 (old) to a case like this.[3]

9. **Section 48, Registration Act and Sec. 27 (b), Specific Relief Act.**—The doctrine of notice cannot be confined to actual notice, but extends to constructive notice as well. In this case it is not disputed that the plaintiff was in actual possession of the property in suit on the relevant date and the appellant was aware of it.[4] It follows that the 4th defendant having had knowledge of the

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1. A. I. R. 1966 A. P. 110 at pp. 111-12 : (1965) 1 Andh. W. R 417 : (1965) 1 Andh. L. T. 229.
2. Vazhakulangaravil Safiya Bi *v.* Ariyur Abdul Shukoor Sahib, A. I. R. 1967 Mad. 375 at p. 381.
3. K. Appa Rao *v.* Balasubramania Gramani, A.I.R. 1976 Mad. 70 at p 72.
4. Parthasaradhi Iyer *v.* Subbraya Gramani, A. I. R. 1924 Mad. 67; Ibrahim *v.* Yusuf, A. I. R. 1938 Lah. 39.

actual possession of the plaintiff cannot be said to be a person who purchased the property without notice of the agreement in favour of the plaintiff.

The Legislature does not intend by enacting Sec. 48, Registration Act, to nullify the provision of Cl. (*d*) of Sec. 27 (old), Specific Relief Act. There is no conflict between Sec. 27 (*b*) (old), Specific Relief Act, and Sec. 48, Registration Act. Section 48, Registration Act, does not govern a case which is covered by Sec. 27 (*b*) (old), Specific Relief Act, the underlying principle of the former section being that a registered document should prevail over an oral transaction and it does not affect cases where a subsequent purchaser obtains a registered document in fraud of the right created in favour of a third party under the oral agreement.

Held that as the appellant could not be treated as a purchaser without notice of the prior agreement in favour of the plaintiff the plaintiff's oral agreement prevails over the appellant's registered instrument.[1]

10. Applicability.—This clause lays down the first exception to the general rule enunciated in Cl. (*a*) that as a rule it is only the party to the contract who can be sued. It contemplates representatives who are legally or equitably bound by the contract.[2] They may be either heirs and legal representatives or subsequent transferees, e. g. there may be a contract for sale of certain immoveable property by a certain date. If the vendor dies without performance before the specified date, the vendee may by his suit compel his heir to convey the estate.[3] Under Sec. 27 (old) of the Specific Relief Act such a contract is enforceable against the promisor and every person claiming any interest in the subject-matter of the contract through the promisor unless such person is a transferee in good faith for valuable consideration and without notice. Ordinarily when a party claims exemption from a general provision of law the onus lies upon him to prove that he comes within the exception.[4]

The words "any other person claiming under him by a title arising subsequently to the contract," clearly include the heirs and legal representatives of a deceased party to a contract. The test is not whether they repudiate and wish not to be bound by the contract, which their predecessor-in-title had entered into, but it is whether they are, in fact, the heirs and legal representatives of such deceased party. If they are, the estate of the deceased is vested in them and that vesting of title arose subsequently, namely, on death, to the contract in suit. They claim under him by operation of law, being his heirs and legal representatives. If the estate is unable to meet the legal obligations of the deceased, the law does not require them to do the impossible. No personal liability devolves upon them but the estate which has come into their hands is answerable for the liabilities of its deceased owner, and, as representatives of the latter, they must defray these liabilities so far as that estate will enable them to do so.[5] If on the other hand the

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1. Mummidi Reddi Papannagari Yella Reddy *v.* Salla Subbi Reddy, A. I. R. 1954 Andh. 20 at pp. 22-23.
2. Chota *v.* Purna, 21 C. L. J. 144.
3. Dr. Banerji's *Tagore Law Lecturers*, 2nd Ed., p. 480 ; Morse *v.* Faulkner, (1792) 1 Aust. 11.
4. Himmatlal *v.* Vasudco. I.L.R. 36 Bom. 446 : 16 I. C. 680 : 14 Bom. L. R. 634 , Tiruvenkatachariar *v.* Venkatachariar, (1914) 26 M. L. J. 218 : 23 I. C. 621 ; Naubat Rai *v.* Dhanulal Singh, I.L.R. 38 All. 184 : 32 I C. 953 : 14 A. L. J. 111 ; Dharamdeo *v.* Ram Prasad, (1918) 4 Pat. L. W. 152 : 44 I. C. 470 ; Hem Chandra De Sarkar *v.* Amiyabala De Sarkar, A. I. R. 1925 Cal. 61 at p. 62 : 40 C. L. J. 184.
5. U. Dun Htaw *v.* Maung Aw, A. I. R. 1929 Rang. 274 at p. 274.

vendor sells away the estate to a third person, the vendee cannot get specific relief against the former, as he has no longer the estate to convey.[1] This principle is not varied where the registered sale-deed in favour of the third party actually comes into existence subsequent to the suit contract provided the sale-deed is in pursuance of a contract of sale prior in date to the date of the suit contract.[2]

Where there was an agreement to sell certain immoveable property in favour of the defendant and subsequently the vendor executes an agreement to sell in favour of the plaintiff in respect of the same property but execute the sale-deed and get it registered in favour of the defendant, it was held that the plaintiff could claim no equities against the defendant and could not in law enforce his agreement and the fact that the plaintiff had no knowledge of the earlier agreement in favour of the defendant would make no material difference to the case.[3] But if the subsequent transferee has given no consideration and is a mere volunteer he has no equity against the first promisee.[4] So also if he has either actual or constructive notice of the prior contract, his conscience is affected by the notice of the prior contract, and he is compellable in equity to execute the necessary conveyance in favour of the original vendee.[5] Under this clause a contract may be enforced against the promisor and every person claiming any interest in the subject-matter of the contract through the promisor unless such person is transferee in good faith for valuable consideration and without notice.[6]

Specific performance of a contract may be enforced against any other person claiming under either party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The question of notice is, therefore, of importance.[7] When such transferee is in a position to fulfil the contract in its entirety, he is a proper party to the suit and the contract can and must be enforced.[8] The test of the liability of the heirs and legal representatives of a deceased party to the contract is not whether they repudiate and wish not to be bound by the contract, which their predecessor-in-title had entered into, but it is whether they are, in fact, the heirs and legal representatives of such deceased party. No personal liability devolves upon them, but the estate which has come into their hands is answerable for the liabilities of the deceased owner and as representatives of the latter they must defray these liabilities so far as that estate will enable them to do so.[9] Section 19 (*b*) of the Specific Relief Act, 1963, lays stress upon the payment of money by the transferee without notice and in good faith and does not go further and requires registration of the document without notice. It contemplates a transferee who has got the document executed and paid money in

1. Dr. Banerji's *Tagore Law Lectures*, 2nd Ed., p. 409.
2. Mst. Fatma Bibi *v.* Saadat Ali, A. I. R. 1930 P. C. 99 at p. 100 : 58 M.L.J. 123: 121 I.C. 240 : 51 C. L. J. 117 : 32 Bom. L. R. 485 : 1930 M. W. N. 326 : 31 L. W. 580.
3. *See* Sampat Ram *v.* Baboolal, A. I. R. 1955 All. 24 at p. 25.
4. Bhuramal *v.* Gukul Narain, I. L. R. (1952) 2 Raj. 1.
5. Taylor *v.* Stibbert, (1794) 2 Bes. 437.
6. Hem Chandra De Sarkar *v.* Amiyabala De Sarkar, A. I. R. 1925 Cal. 61 at p. 62 : I L.R. 52 Cal. 121 : 40 C.L.J. 184, *see* also B. Shahzad Singh *v.* Mst. Jiachha Kunwar, A. I. R. 1933 All. 452 : I. L. R. 54 All. 966, Mst. Bana Bai *v.* Mst. Chandrabhaga, A.I.R. 1931 Nag. 61 (a *bona fide* transferee for value without notice is protected); also Gaffur *v.* Bhikaji, I. L. R. 26 Bom. 159 at p. 162; Harnandan *v.* Jawad Ali, I. L. R. 27 Cal. 468 at p. 472.
7. Nasir Khan *v.* Tara Chand, A. I R. 1927 All. 357 at p. 357 : 25 A.L.J. 294.
8. Ramulu *v.* Venkata Subba Rao, A.I.R. 1944 Mad. 554 at p. 555 : (1944) 2 M.L.J. 103 : 1944 M.W.N. 743.
9. U. Dun Htaw *v.* Maung Aw, A. I. R. 1929 Rang. 274 at p. 274; Venkaiah *v.* Guraviah, A. I. R. 1926 Mad. 757 at pp. 758-9 : 96 I. C. 290.

good faith and without notice and who gets the document registered in accordance with law, giving retrospective effect to the transaction from the date of the execution. Thus where a buyer paid full money before the date of execution of the deed, in good faith, and before the receipt of a notice of the contract of sale from a prior buyer he is protected, he is a transferee in law from the date of execution of the conveyance within the meaning of Sec. 19(*b*) of the Specific Relief Act, 1963. Section 27(*b*) (old) of the Specific Relief Act lays stress upon payment of money by the transferee and their Lordships were not unmindful of not ignoring the importance of this last word "transferee" without notice and in good faith and does not go further and require registration of the document without notice. There is also no difficulty in reconciling this view with either Sec. 40(2) of the Transfer of Property Act or Sec. 91, read with Sec. 95 of the Indian Trusts Act, which appear to be cognate or allied statutory provisions. The three statutes, read together, may well mean and contemplate a transferee, who had got the document executed and paid money in good faith, without notice, and who, eventually, gets the said document duly registered, thus giving it effect retrospectively from the date of its execution under Sec. 47 of the Indian Registration Act. This latter provision is enough to make such a transferee, a transferee in law from the date of execution of the particular document and thus "a transferee who has paid his money in good faith without notlce" or "a transferee who has acquired the property in good faith without notice"[1] or "a transferee for consideration without notice", as mentioned in Sec. 4(2) of the Transfer of Property Act, and reconciles all the said statutes with the equities of the situation as expounded in the leading case of *Blackwood* v. *London Chartered Bank of Australia.*[2] Their Lordships do not, accordingly, find any sufficient reason to deviate from the said equitable rule or principle for giving effect to any of the aforesaid statutory provisions.

It may be added that a "transferee" from the date of execution of her *kobala*, which was subsequently registered, is well supported by authorities[3] where Sec. 47 of the Indian Registration Act was applied to over-ride, *inter alia*, attachments and *lis pendens*.[4] If, then, she had paid the full price or consideration money before that date and before getting any notice of the plaintiffs contract she would, undoubtedly, be protected transferee under any of the above quoted statutory provisions.[5]

11. "Essentials of" of the section.—Under new Sec. 19(*b*) of the Specific Relief Act four things are required to be established, (1) that the transfer is for value, (*2*) that the money has been paid, (*3*) that the purchase was made in good faith, and (4) that the purchase including the payment of money was without the notice of the original contract. The first two elements are positive and the last two are negative in character. The onus of proving that the subsequent purchaser had no notice of a prior claim is ordinarily discharged by denial. In *Ram Chander Singh* v. *Bibi Asghari Begum*,[6] it was observed, "very little evidence and in certain circumstances a mere denial, regarding want of knowledge of the plaintiff's contract would discharge this onus and shift the onus on the plaintiff". In *Kanshi Ram* v. *Ishwar Das*,[7] it was held "where

1. *Vide* Sec. 91 of the Trusts Act.
2. (1874) 5 P. C. 92 : 43 L. J. P. C. 25.
3. *Vide*, e.g. Jadunandan Prosad Singh *v.* Seo Narain Singh, 16 C. W. N. 612; Nabadwip Chandra *v.* Lokenath Ray, I.L.R. 59 Cal. 1176 : A. I. R. 1933 Cal. 212; Faiyazuddin Khan *v.* Mst. Zahur Bibi, A. I. R. 1938 Pat. 134 and Sadei Sahu *v.* Chandramani Dei, A.I.R. 1948 Pat. 60,
4. *Vide* also Mina Kumari Bibi *v.* Bijoy Singh Dudhuria, 44 Ind. App. 72 : A. I. R. 1916 P. C. 238.
5. Satya Manadalini *v.* Sahadur Mondal, A. I. R. 1962 Cal. 40 at p. 42.
6. A. I. R. 1957 Pat. 224 at p. 225.
7. A. I. R. 1923 Lah. 108 at p. 113.

the consideration is paid in full and the vendee is ignorant of the original contract, good faith must be presumed in the absence of the contract to the contrary. As regards good faith, J. K. Misra, J., in *Dhadi Dalai* v. *Basudeb Satpathy*,[1] observes : "The expression 'good faith' has not been defined in the Specific Relief Act. In the General Clauses Act under Sec. 3(22) it is provided that a thing shall be deemed to be done in 'good faith', where it is in fact done honestly whether it is done negligently or not. No doubt the Specific Relief Act was an Act passed earlier to the General Clauses Act, and as such the definition in the General Clauses Act would not expressly apply to the terms in the Specific Relief Act but several judicial authorities have applied the definition in the General Clauses Act to the Specific Relief Act on grounds of equity and good concience.[2] Apart from that in *Oxford English Dictionary,* Vol. IV, p. 52, col. 2, under item 11 'good faith' means fidelity, loyalty, honesty of intention in entering into engagements, sincerity in profession, *bona fides.* So honesty of intention is the essence of the expression 'good faith'. If a purchaser in Cuttack town, where it is a notorious fact that the lands are not easily available for purchase or where an intended purchase, if disclosed would invite hot competition, takes the risk of not procuring the previous permission, from the Khas Mahal authorities and proceed to in hot haste with the purchase he cannot be accused of acting with any dishonest intention. If he does not take care to have his neighbours as attessting witnesses to the sale-deed, but depends upon strangers procured by the purchaser for the purpose, he might be doing a foolish act for taking a risk on himself but he cannot be said to have acted dishonestly. Similarly, also after knowing the fact of possession and after making necessary enquiries from the registration office if he makes no further enquiries about any undisclosed types of encumbrance, which do not strike his mind, he cannot be said to have acted without honesty."

12. What is good faith ?—The expression "good faith" has not been defined in the Specific Relief Act. In the General Clauses Act under Sec. 3(22) it is provided that a "thing shall be deemed to be done in good faith, where it is in fact done honestly whether it is done negligently or not." It is no doubt true that the Specific Relief Act was passed earlier to the General Clauses Act. As such the definition given in the General Clauses Act will expressly govern the terms used in the Specific Relief Act. But the courts in India have adopted the definition of "good faith" given in the General Clauses Act to the term used in the Specific Relief Act.[3] In the *Oxford English Dictionary*, Vol. IV, p. 32, col. 2, under item 11 "good faith" has been defined to mean "fidelity", "loyalty", especially honesty of intentions in entering into engagements, sincerity in profession, *bona fides*. In short, honesty of intentions is the essence of "good faith".[4]

13. When subsequent transferee is liable to perform the contract at the suit of purchaser.—A subsequent transferee is liable to perform the contract at the suit of the purchaser or intended lessee in either of the following events : (*i*) where the tranrferee takes as a volunteer (without consideration) ; (*ii*) where the transferee takes with notice of the prior contract, i. e. of an existing obligation; (*iii*) where the transferee has acquired only an equitable

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1. A. I. R. 1961 Orissa 129 at pp. 130-31.
2. *Vide* Moithensa Rowthan *v.* Apsa Bibi, I. L. R. 36 Mad. 194 ; Narayan Aiyar B. Levai Sahib *v.* Ammeenammal, A. I. R. 1914 Mad. 107, and Kalyan Ji *v.* Ram Din Lala, A.I.R. 1925 Mad. 609.
3. Moithensa Rowthan *v.* Apsa Bibi, I. L. R. 36 Mad. 194 : 12 I. C. 444 ; Narayana Aiyer *v.* Sankaranarayan Aiyar, 24 I. C. 940 : A I.R. 1914 Mad. 107 ; Kalyan Ji *v.* Ram Deen Lala, A. I. R. 1925 Mad. 609.
4. Dhadi Dalai *v.* Basudeva Satpathy, A.I.R. 1961 Orissa 129 at p. 103.

title, and has no better equity than the purchaser or intended lessee.[1] Therefore, the coutract can be specificaily enforced against the dotiee under a subsequent gift deed.[2] But a *bona fide* transferee for value without notice is protected and the contract cannot be enforced against him. As the document gives the plaintiff an option to claim possession, but does not contain any condition that after delivery of possession the executant's liability for maintenance was discharged, it follows that the right in the field was not transferred to the plaintiff. In respect of the field it was only an executory agreement to be enforced specifically in case the plaintiff exercised her option to take possession of the land. In view of this courts have to see whether specific relief is the only remedy. The circumstances that the respondent has paid full value and without notice of the plaintiff's claim, that he has spent Rs. 900, as has been held by the courts below, on permanent improvements of the land, and also that he is willing to pay Rs. 175 every year, and that he has also paid interest at 2 per cent. by way of damages, are sufficient to justify a rejection of the plaintiff's claim for possession. This will be the result even on the assumption that the condition as to transfer of possession is valid and enforceable.[3]

Aulad Ali v. *Ali Athar*[4] is undoubtedly an authority that a contract of this kind not only binds the parties thereto but also their representatives. In that case one of the parties to the agreement was the defendant-transferor who obviously had knowledge. The transferee from him did not apparently plead want of notice, and this point was not pressed before the FullBench which accordingly did not decide it. The contract in dispute was entered into in 1874, before the coming into force of the Transfer of Property Act, but after the Contract Act had been passed. It is clear that the specific performance of the contract can be enforced only under Sec. 27 (old), Specific Relief Act, which section makes an exception in favour of a transferee for value who has paid his money in good faith and without notice of the original contract. No matter what principle or statute governs the obligation of the representatives, the provisions contained in Sec. 27 (old), Specific Relief Act, must apply, and the defendant, who is a transferee for value without notice, is protected and the contract cannot be enforced against him.[5] Where a person contracts to sell property already devised by him and dies before the sale is completed, the vendee can have the contract enforced against the devisee and obtain the instrument.[6]

14. Subsequent vendee, necessary party.—The decision of the Supreme Court in *Durga Prasad* v. *Deep Chand*[7] is certainly an authority for the position that the original owner by himself could not confer or convey any title in respect of the property, which he had already sold to a subsequent purchaser. These principles clearly show that the subsequent purchaser is a necessary party in a suit for specific performance and the decree should direct both the owner and the subsequent purchaser to execute the conveyance in favour of the agreement-holder. This was also the view expressed in *Premsukh Gulgulia* v. *Habib Ullah*.[8] The same view was expressed in a different way in

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1. Fry, Sec. 241; Nelson, *Specific Relief Act*, Sec. 27.
2. Bhuramal *v.* Gokul Narain, 1952 Raj. L. W. 382 : I.L.R. (1952) 2 Raj. 1.
3. Mst. Bana Bai *v.* Mst. Chandrabhaga, A. I. R. 1931 Nag. 60 at p. 62.
4. A. I. R. 1927 All. 170 : 100 I. C. 633 : I. L. R. 49 All. 527 (F. B.).
5. B. Shahzad Singh *v.* Mst. Jiachha Kunwar, A. I. R. 1933 All. 452 at p. 452 : I. L. R. 54 All. 966.
6. Gongu *v.* Shahram, 50 I. C. 796. But *see* Basdeo Rai *v.* Jhagru Rai, A. I. R. 1924 All. 400 at p. 406 : I.L.R. 46 All. 336.
7. 1954 S. C. J. 23 : (1954) 1 M. L. J. 60.
8. A. I. R. (1945) Cal. 355.

Krishnaswamy v. *Sundrappayyar*.[1] There it was argued that the subsequent purchaser is not a necessary party to the suit and when he was impleaded an objection was raised that the suit is bad for misjoinder of parties. Overruling this objection this Court held :

> "The cause of action, namely, the right to obtain a sale-deed and possession of the property purchased, concerns both the defendants and entitles plaintiff to relief against both."

This legal position is also recognized in Sec. 19 (*b*) of the Specific Relief Act, 1963, which enables the agreement-holder to enforce specific performance of the contract against any person claiming under a party to the contract by a title arising subsequent to the contract.[2]

15. Clause presupposes a valid contract.—The clause presupposes a valid contract and a mere offer is not sufficient to attract its application.[3]

16. Paid his money.—This expression includes payment partly in cash and partly by way of adjustment of an outstanding debt. In order that Sec. 19 (new) of this Act may be invoked, a notice has to be given before the money is paid. That is clearly the view taken in *Himmatlal* v. *Vasudeo*,[4] where the question arose whether the person in whose favour an agreement had been executed was entitled to enforce his agreement against the transferee, where the transferee had paid a part of the consideration and not the whole. The learned Judges held that the law in India was the same as in England on this point and that he could do so provided the whole of the consideration has not been paid. This section protects a transferee who has "paid his money". If he has not paid any money, then it is rather difficult to literally apply this section. If he has not paid the whole of the consideration as in *Himmatlal* v. *Vasudeo*,[5] it again cannot be said that he has paid his money; for he has paid only a part of it. Where, however, a portion of the consideration was in adjustment of an outstanding debt and the remainder was paid in cash, the transferee thereby paid to the transferor all that had to be paid under the contract and can therefore literally be said to have paid his money.[6]

In *Gauri Shankar* v. *Ramsewak*,[7] it is stated : "In cases where a vendee acting in good faith and without notice of previous contract of sale pays the whole sale consideration to the vendor whether before or at the time of the execution of the sale-deed, but before receiving notice of the previous contract, even though the document be not registered, it would be obvious that he may bring himself within the scope of the exception in Sec. 27 (*b*) [Sec. 19 (*b*) (new)], Specific Relief Act. On the other hand, where the vendee does not pay any part of the sale consideration at the time of the execution of the sale-deed and has to pay the whole of it at the time of the registration of the document, but before he makes the payment he is informed of the previous

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1. I. L. R. 18 Mad. 415 : 5 M.L.J. 164.
2. Chinna Vanan *v.* Alamelu, (1975) 1 M.L.J. 263 at p. 265.
3. Rama Krishna Reddiar *v.* K. Chidambara Swamigal, A. I. R. 1928 Mad. 407 at p. 412 : 108 I. C. 282 : 27 L.W. 322 : 1928 M. W. N. 185 : 52 M. L. J. 412 ; Gobindaswamy *v.* Doraiswamy, 1925 M. W. N. 609 ; Ramaswami Parrar *v.* Chinnan Asari, I. L. R. 24 Mad. 449 at pp. 456, 464-5.
4. I. L. R. 36 Bom. 446.
5. *Ibid*.
6. Marwadi Sumermal Jamatraj *v.* B. Thukkappa, A. I. R. 1944 Mad. 391 at pp. 391-92 : (1944) 1 M. L. J. 376 : 57 J. W. 277 : 1944 M. W. N. 336.
7. A. I. R. 1934 All. 1045 at p. 1045 : 1934 A. L. J. 871 : 152 I. C. 39.

contract there would be no doubt that he would not be acting in good faith, if in spite of such notice makes the payment in pursuance of the previous contract."

17. Plaintiff when cannot be deprived of his right.—Where the defendant is not a *bona fide* purchaser without notice of prior agreement in plaintiff's favour the plaintiff can be given relief against the defendant.[1]

18. Transferee for value in good faith and without notice.—The provision in Sec. 19 (*b*) of the Specific Relief Act, 1963, giving protection to a *bona fide* transferee for value and without notice is based on the English equitable rule which allows a later legal title to prevail over an earlier equitable title in such circumstances. "A legal title acquired in perfection of an equitable title obtained without notice of prior equities will oust those equities, even though its owner acquired legal title with notice of prior equities".[2] On the same point Lord Selbourne spoke thus : "There is nothing more familiar than the doctrine of equity that a man, who has *bona fide* paid money without notice of any other title, though at the time of payment, he, as purchaser, gets nothing more than an equitable title, may afterwards get in the legal title, if he can, and may hold it : though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself.[3] Where a vendor executed a contract of sale in favour of *A* receiving part of the consideration and three days later he executed another contract of sale in favour of *B* in respect of the same property and *A* later got the sale-deed executed in his favour paying the full consideration but with notice of second contract of sale, Lord Buckmaster of the Judicial Committee upheld the perfected sale in favour of *A* notwithstanding notice of the second contract of sale. Actual acquisition of a legal title for consideration in pursuance of a prior contract of title made all the difference.[4] But if, however, an equitable title is acquired with notice of prior equities the subsequent getting in of the legal title does not assist the holder because it is hit by Sec. 19 (*b*) (new) of the Specific Relief Act and the latter takes it subject to the prior equities.[5] The proviso to the clause enacts that a transferee for value in good faith without notice of the previous contract is protected and that contract cannot be enforced against him. Where a previous contract which is sought to be enforced by the plaintiff is established, the burden shifts to the subsequent transferee to prove that he is a *bona fide* transferee for value without notice of the previous contract. The subsequent transferee has to discharge the onus of showing (*i*) a valuable consideration flowing from him, (*ii*) good faith, and

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1. Damacharla Venkata Seshaiah *v.* Damacharla Venkayya, A. I. R. 1974 A. P. 193 at p. 200 : (1973) 2 Andh. W. R. 357.
2. Halsbury, Sec. 855, p. 604 ; Dodd *v.* Hills, (1865) 2 Hem. & M, 424 ; Blackwood *v.* London Chartered Bank of Australia, (1874) L. R. 5 P. C. 92 at p. 111.
3. Blackwood *v.* London Chartered Bank of Australia, *supra* ; *see* quotation in Lokenath Prasad *v.* Shah Wahib Hussain, A. I. R. 1930 Pat. 181 at p. 183.
4. Mst. Fatma Bi *v.* Saadat Ali, A. I. R. 1930 P. C. 99 at p. 99.
5. Sheffield (Earl of) *v.* London Joint Stock Bank, (1888) 13 A. C. 333 at pp. 341, 348 (House of Lords case).

(*iii*) absence of notice of the prior contract.[1] It is not at all necessary for the plaintiff to prove fraud. If the transferee gets a title to the property under a transfer subsequent to the date of the contract of the sale, with the knowledge of it, that would be quite sufficient to enable the plaintiff to enforce specific performance.[2] Where a subsequent purchaser is aware when he purchases the property that negotiations for the purchase of the property were already in progress between his vendors and the plaintiff and purchases the property without making necessary enquiries as to whether the agreement to sell has been concluded he cannot claim to the transferee without notice within the meaning of the proviso.[3] To attract the application of the proviso the Court should be satisfied that not only the transferee paid money in good faith and without notice of the original contract, but also the payment of consideration was made before the transferee had notice of the previous agreement.[4] In a suit for specific performance against a subsequent transferee the burden of proving good faith and lack of notice is on the transferee.[5]

Circumstances required to be established by subsequent transfer.

Under Sec. 27 (*b*) [(new) Sec. 19 (*b*)] of the Specific Relief Act, the circumstances which are required to be established by the subsequent transferee to successfully resist the claim of specific performance of a prior contract are, firstly, the transfer is for value; secondly, the money has been paid; thirdly, the purchase was *bona fide* and lastly, the

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1. Bhup Narain Singh *v.* Gokal Chand Mahton, A.I.R. 1934 P.C. 68 at p. 70 : I. L. R. 13 Pat. 242 (P. C.) : 147 I. C. 1134 : 1934 A. L. J. 291 : 36 Bom. L. R. 421 : 15 P. L. T. 67 : 1934 M.W.N. 206 : 66 M.L.J. 255 : 59 C.L.J. 139 : 8 C.W.N. 393 ; *see* also Debendra Nath Mitra *v.* Lalit Krishna Mitra, 42 C. W. N. 1090 ; Arunachala *v.* Madappa, 166 I. C. 852 : A. I. R. 1936 Mad. 949 ; Haroon Hasan *v.* Tahir Mohammad, I. L. R. (1940) Kar. 406 , Varden Seth *v.* Luckapatty, 9 M. I. A. 307 , Kanshi Ram *v.* Ishwar Das, 67 I. C. 887 : A. I. R. 1923 Lah. 108 : 5 L. L. J. 150 ; Mohan Lal *v.* Wadhava Singh, 123 I. C. 86 : A.I.R. 1930 Lah. 997: 12 L.L.J. 26 : Jiwan Das *v.* Lorind Chand, 96 I. C. 175 : A.I.R. 1926 Lah. 580 , Mohammad Sadiq Khan *v.* Masihan Bibi, A.I.R. 1930 Pat. 452 : I.L.R. 9 Pat. 417 : 125 I. C. 158 : 11 P. L. T. 439 ; Hamid Husain *v.* Bishen Sarup, 46 I. C. 659 : 137 P. W. R. 1918 ; Babu Ram *v.* Madhab Chandra, I. L. R. 40 Cal. 565 : 19 I. C. 9 : 18 C. W. N. 341 ; Himmatlal *v.* Vasudeo, I.L.R. 36 Bom. 446 : 16 I. C. 680 : 14 Bom. L. R. 634 ; Noubat Rai *v.* Dhaunkal, I. L. R. 38 All. 184 : 32 I. C. 953 : 14 A. L. J. 111, Binda Ban *v.* Bodh Raj, 69 I. C. 470 ; Hira *v.* Narain, 10 C. P. L. R. 107 ; Gopal *v.* Ganpat, 13 C. P. L. R. 172 ; Chandar Kanta *v.* Krishna Sundar, I.L.R. 10 Cal. 710 ; Vinayak *v.* Gyanoba, A.I.R. 1923 Bom. 13; Baba Sah *v.* Haji Mohammad Akbar, 73 I. C. 297 : A.I.R. 1923 Mad. 563 : 46 M.L.J. 157 ; Kanna *v.* Krishnan, I. L. R. 13 Mad. 324 ; Thiru Venkata *v.* Venkata, 23 I. C. 621 : 26 M.L.J. 218 ; Hem Chandra *v.* Amiyabala, I.L.R. 52 Cal. 121 : A. I. R. 1925 Cal. 61 : 40 C. L. J. 184 ; Ram Devi *v.* Gnmani, A .I. R. 1929 Pat. 300 ; Haman Singh *v.* Jawaddi, I.L.R. 27 Cal. 468 ; Gangu *v.* Khusal, 43 I. C. 99 ; Dharam Deo *v.* Ram Parshad, 4 P. L. W. 152 ; Mulji Seth *v.* McLeod, 5 Bom. L. R. 991 , Govindaswamy *v.* Doraiswamy, 1925 M. W. N. 609 ; Lekh Singh *v.* Dwarka Nath, A.I.R. 1929 Lah. 249 ; Gadda Sitayya *v.* G. Kotayya, A. I. R. 1932 Mad. 71 ; Harendra *v.* Nand Lal, A. I. R. 1933 Cal. 98, *contra* I. L. R. 2 Bom. 299 : A. I. R. 1923 Bom. 410 : A. I. R. 1944 Mad. 554.
2. Venkata *v.* Raghavalu, 85 I. C. 1054 : A. I. R. 1925 Mad. 492 ; Baba Sah *v.* Haji Mohammed Akbar, 73 I. C. 297 : A.I.R. 1923 Mad. 563 : 45 M.L.J. 157 ; Hira *v.* Narain, 10 C. P. L. R. 107 ; Gopal *v.* Ganpat, 10 C. P. L. R. 172 ; Dharam Deo *v.* Ram Prashad, 4 P. L. W. 152.
3. Harendra *v.* Nand Lal, A. I. R. 1933 Cal. 98.
4. Arunachala *v.* Madappa, 66 I. C. 852 : A. I. R. 1936 Mad. 949.
5. Shankar Lal *v.* New Mofussil Co. Ltd., 73 I. A. 98 : 224 I. C. 598 : 1946 Pesh. L. J. (P. C) 97 : 50 C. W. N. 603 : 59 L.W. 370 : 12 B.R. 596 : 48 Bom. L.R. 456 : 1946 A. L. J. 326 : 1946 M. W. N. 598 : 48 P. L. R. 450 : 1946 A. W. R. (P. C.) 160 : 1946 P. W. N. 338 : A.I.R. 1946 P. C. 97 : (1946) 2 M. L. J. 259 (P. C.).

purchase including payment of money was without notice of the prior contract. The first two elements are positive, while the last two are negative and inferential.[1]

"Good faith" has a special connotation and it has been so understood. Courts below have used the expression "*bona fide* purchaser" in the same sense. The defendant having been found that he had no notice of the previous contract and that he paid the consideration money to the vendor, he clearly comes within the exception provided in Cl. (*b*) of Sec. 19 (new) of the Specific Releif Act and the sued contract cannot be specifically enforced against him.[2]

In *Veeramalai Vanniar* v. *Thadikar Vanniar*,[3] the question was whether the defendants are entitled to invoke the provisions of Sec. 27 (*b*) (old) of the Specific Relief Act, as persons who have paid money in good faith and without notice of the original contract. It is simply amusing how, on the admitted facts, the learned Subordinate Judge felt that defendants 3 to 5 are transferees for value who have paid their money in good faith and without notice of the plaintiff's agreement of sale. He has not borne in mind the rudiments and the basic principles of law. The general rule is that no person can convey a better title than what he has, except where the statute provides exceptions to the rule like Sec. 27 (*b*) (old) of the Specific Relief Act. If a person, as the owner of the property, has entered into an agreement to sell the property, he cannot thereafter convey the same property to any other person, as after the prior agreement of sale, he cannot be said to be a free owner of the property. If he subsequently alienates the property he can alienate it only subject to the rights created under the prior agreement of the sale.

Thus the subsequent transferee can retain the benefit of his transfers by purchase which, *prima facie*, he had no right to get, only after satisfying the two conditions concurrently : (1) he must have paid the full value for which he purchased the property and (2) he must have paid it in good faith and without notice of the prior contract. Further, the burden of proof is upon the subsequent purchaser to establish these conditions in order that his rights may prevail over the prior agreement of sale. It will be sufficient to refer to the decision of the Privy Council in *Bhup Narain Singh* v. *Gokul Chand*[4] about the stringent nature of the conditions and the burden of proof under Sec. 27 (*b*) (old). In the instant case, admittedly the full price has not been paid at the time when controversy arose and even at the time when the suit was filed. The learned Judge was of the view that because the bargain as embodied in the three sale-deeds provided for the payment of the money in convenient instalments and as a substantial portion of the price had been paid, the defendant must be regarded as transferees who paid their money. This view is clearly erroneous. It is sufficient to refer to the leading decision in *Himmatlal Motilal* v. *Vasudeo Ganesh*[5] in which it was eld that in order to defeat the prior equity to which the plaintiff was entitled, the subsequent purchasers were bound to establish three things that (1) they were purchasers for value, (2) *bona fide* and (3) without notice; and that if the entire price had not been paid and a security had been given for the payment of the balance of the purchase price, the defendants cannot resist the claim for specific performance

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1. Dinesh Chandra Guha *v.* Satchidananda Mukherji, A. I. R. 1972 Orissa 235 at p. 238 : (1972) 1 Cut. W.R. 194.
2. Shankar Prasad *v.* Mst. Muneshwari, A.I.R. 1969 Pat. 304 at pp. 306-7.
3. A. I. R. 1968 Mad. 383.
4. 66 M. L. J. 255 : A. I. R. 1934 P. C. 68.
5. I. L. R. (1912) 36 Bom. 446.

(*vide* observations at page 451 of the above decision). Section 27 (*b*) (old) of the Specific Relief Act is only the statutory provision of the principles enunciated in the decisions in England to which reference has been made in this Bench decision of the Bombay High Court. The principle in this decision was referred to with approval in *Mohammed Haneef Sahib* v. *Board of Trustees, Jumma Masjid, Adoni*,[1] in which it was held that the words in Sec. 27 (*b*) (old) "who has paid his money" mean the transferee who has paid the whole of the consideration and not a transferee who has paid only part of it. Their Lordships' attention was also drawn to the decision of Justice Varadachariar, J., in *Arunachala* v. *Madappa*,[2] in which the learned Judge (Varadachariar, J.) called for a finding from the Trial Court as to the dates on which the subsequent purchaser paid and could be deemed to have paid the purchase price. A perusal of the judgment shows that the learned Judge was also of the view that the entire purchase money should have been paid before the subsequent purchaser obtained knowledge of the prior agreement of sale. In the instant case, even at the time when the first defendant gave evidence, there was admittedly a balance of Rs. 7,000 due under the three sale-deeds. The learned Judge has committed a serious error in thinking that the words "who had paid his money" in Sec. 27 (*b*) (old) are equivalent to "who has paid his money" (*sic*) or "who has agreed to pay his money". The Judge has overlooked that it is the actual payment of the money which alone confers the right so as to prevail over a prior agreement of sale.

The Trial Court has committed the same serious error in holding that the defendants are transferees without notice of the original contract under Sec. 27 (*a*) (old) of the Specific Relief Act. It has already been held that the defendants had actual knowledge of the plaintiff's prior agreement of sale when they took the sale-deeds, Exs. B-13 to B-15. Even if the defendants had no actual notice or knowledge of the agreement of sale, they must be deemed to have had constructive notice or knowledge on the admitted facts of the case. It is surprising how the learned Judge was persuaded to find this point in favour of the defendants despite the fact that his attention was invited to the decision in *M. R. P. Yella Reddi* v. *Subbi Reddi*[3] of the Andhra High Court which contains a reference to all the leading decisions in England and India and in particular to the decisions of this Court, the latest being the decision of Balakrishna Iyyer, J., in *Paravathathammal* v. *Sivasankara Bhattar*.[4] It only shows that the learned Judge has not carefully looked into the decisions referred to in his judgment. He says that no enquiry is necessary by the subsequent purchaser regarding the rights of the person who is already in possession, once it is found that that person originally got into possession as a lessee under the vendor. In other words, the learned Judge holds that if the subsequent purchaser knew that at some earlier point of time the person who relied upon the prior agreement of sale was already in possession as lessee, the subsequent purchaser need not make any enquiry as to whether the lessee was continuing in possession only as a lessee or in the assertion of any other right. It is this identical point which has been considered by the leading decisions in England and in India and the view has been uniformly taken in all the cases that it is the duty of the subsequent purchaser to enquire (of ?) the persons in possession as to the precise character in which he was in possession at the time when the subsequent sale transaction was entered into. In *Paravathathammal* v. *Sivasankara Bhattar*,[5] a usufructuary

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1. (1944) 1 M. L. J. 377 : A. I. R. 1944 Mad. 421.
2. A. I. R. 1936 Mad. 949.
3. (1954) 2 M. L. J. (Andh.) 6 : A. I. R. 1954 Andh. 20.
4. (1951) 2 M. L. J. 191 : A. I. R. 1952 Mad. 265.
5. *Ibid.*

mortgagee was in possession of the property and an agreement of sale was entered into by the mortgagor to sell the property to the usufructuary mortgagee in satisfaction of the mortgage and also for payment of some additional consideration. The contesting defendant was the subsequent purchaser and it was admitted that the latter did not make any enquiries of the usufructuary mortgagee in order to ascertain from him whether he had any rights in the property other than as usufructuary mortgagee. This identical argument which was accepted by the Trial Court in the instant case was advanced that once it was known that the property was in possession of a usufructuary mortgagee, there was nothing further that a prospective purchaser of the property need have enquired about. This argument was rejected in unambiguous terms. The learned Judge has referred to all the leading decisions and in particular had extracted the following statement of the law in *Barnhart* v. *Greenshields*[1] :

> "With respect to the effect of possession merely we take the law to be that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor and that the equity of the tenant extends not only to interests connected with his tenancy as in *Taylor* v. *Stibbert*,[2] but also to interest under collateral agreement, as in *Daniels* v. *Davison*,[3] *Allen* v. *Anthony*[4] the principle being the same in both classes of cases, namely that the possession of the tenant is notice that he has some interest in the lands and that a purchaser having notice of that fact, is bound according to the ordinary rule, either to enquire what that interest is, or to give effect to it, whatever it may be."

M. R. P. Yella Reddi v. *Subbi Reddi*[5] was a case in which the person in whose favour a prior agreement of sale was entered into was already in possession as a lessee but the property was subsequently sold to the contesting defendant. There too the same argument was advanced, that in view of the character of the plaintiff's possession at its inception as a tenant there was no duty cast upon the subsequent purchaser to make any further enquiry. This argument was not accepted. As this decision reviews the relevant cases on the topic it is unnecessary to burden this judgment by referring to all the cases. Reference may, however, be made to the following observations of the Lord Chancellor in the leading decision which has been followed in all subsequent cases in *Daniels* v. *Davison*[6] :

> "Where there is a tenant in possession under a lease, or an agreement a person purchasing part of the estate must be bound to inquire on what terms that person is in possession.....that a tenant being in possession under a lease with an agreement in his pocket to become the purchaser, these circumstances altogether give him an equity repelling the claim of a subsequent purchaser who made no enquiry as to the nature of his possession."[7]

For all these reasons, it has to be held that the defendants have failed to satisfy both the limbs of Sec. 27 (*b*) (old) of the Specific Relief Act (1) they have not paid the money and (2) they are not transferees in good faith and without knowledge of the prior agreement of sale. The plaintiff will be

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1. (1853) 14 E. R. 204 at p. 209.
2. (1794) 2 Ves. Jr. 437.
3. (1809) 16 Ves. Jun. 249.
4. (1816) 1 Mer. 282.
5. (1954) 2 M. L. J. (Andh.) 6 : A. I. R. 1954 Andh. 20
6. (1809) 16 Ves. Jun. 249 at p. 254.
7. *Vide* also 34 Halsbury's *Laws of England*, p. 366, para. 644 and 14 Halsbury's *Laws of England*, p. 546, para. 1024.

entitled to a decree for specific performance as against defendants 2 to 5 and 7. The sale-deed to be executed by them shall be on the lines indicated in the decision of the Supreme Court in *Durga Prasad* v. *Deepchand*.[1] As the plaintiff has deposited the balance of price at the time of the institution of the suit there is no question of the plaintiff being liable for mesne profits thereafter. From May, 1957 till 8th June, 1960, for three years they, the defendants, will not be liable to pay interest on the balance of Rs. 8,000. So far as the period from May, 1957 to 1960 is concerned, the plaintiff has been in possession not as a lessee but only in pursuance of the agreement of sale. He will not be liable for any rent or damages for use and occupation nor for any mesne profits. The question is whether he could be held liable for interest on the balance of Rs. 8,000 from May, 1957 to 8th June, 1960. He was always ready and willing but neither defendants 3 to 5 nor the 6th defendant would receive the money and complete the transaction. On the other hand, the plaintiff was harassed by eviction proceedings and put to unnecessary expenses. In those circumstances, having regard to the fraudulent conduct of the first defendant, the plaintiff should not be made liable for interest. The result is that a sale-deed will have to be executed in favour of the plaintiff and the sum of Rs. 8,000 will have to be taken by defendants 3 to 5. Instead of the properties, their rights will be transferred to the balance, i. e. the sum of Rs. 8,000. In view of this conclusion, the question of the plaintiff's right to the site on which he has put up the building on payment of *paghudi* does not arise.[2]

19. Transferee with notice of prior agreement to sell.—In *Jhandoo* v. *Ramesh Chandra*,[3] the transferee had notice of the prior agreement to sell between the plaintiff and the vendor. The transferee after purchasing the property obtained possession of the land, demolished the dilapidated structure on it and built a new one in its place. The plaintiff stood by without objecting or giving any notice to the transferee for nearly three years until the transferee had invested a substantial amount in his construction on the land purchased. It was held that the conduct of the plaintiff had disentitled himself from obtaining any relief under old Sec. 27 (*b*) of the Specific Relief Act against the transferee. And of course no specific relief could have been granted against the vendor who had already parted with the property in favour of the transferee. The only course open to the courts was to pass a decree awarding compensation under Sec. 19 of the Specific Relief Act of 1877 as a substitute for specific performance.

20. Burden of proof.—Section 19 (*b*) (new) lays down a general rule that the original contract may be specially enforced against a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and it is clearly for the transferee to establish the circumstances which will allow him to retain the benefit of a transfer which, *prima facie*, he had no right to get.

The initial burden is always on the vendee to show that he had no knowledge of the agreement. But, the vendee has only to discharge this burden by leading a negative evidence. The negative evidence can only consist of his own statement denying the fact that he had knowledge of the same. As soon as the vendee denies knowledge of the notice, the burden is discharged

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1. (1954) 1 M. L. J. (S. C.) 60 : A. I. R. 1954 S. C. 75.
2. Veeramalai Vanniar v. Thadikar Vanniar, A. I. R. 1968 Mad. 383 at pp. 385-87.
3. A I. R. 1971 All. 189 at p. 191 : 1970 A. L. J. 969.

and then the burden shifts on the vendor to prove that the vendee had the notice of the earlier agreement.[1]

It is one of the recognized canons of jurisprudence that he who seeks to take advantage of an exception has to prove affirmatively that his case falls within the scope of that exception.[2]

When there are two or more than two persons who have purchased the property the person who had the earlier contract for sale in his favour must prove that which of the persons who purchased the property in question had notice of the agreement for sale. If he is not able to prove this against one of the vendees, his suit would not succeed.[3]

The onus is upon the subsequent purchaser to prove that he is a transferee in good faith and without notice of the earlier contract so as to bring himself within the exception provided by Sec. 19(*b*) (new) of the Specific Relief Act.[4]

In *Radha Kamal* v. *Puri Municipality*,[5] the proposition advanced is that even if the plaintiff be held entitled to specific performance of the covenant for renewal of the lease he cannot sue in respect of only a part of the leasehold interest had been severed by agreement between the parties. Both the courts below appear to have accepted the above contention raised on behalf of the defendants relying on the case of *Secretary of State* v. *Volkart Brothers*.[6] In that case the lessees had sold their right, title and interest in the greater part of the demised lands and claimed a renewal in respect of the remaining lands in their possession. The Judicial Committee held that on a true construction of the covenant, the respondents were not entitled to claim renewal. Before considering the facts of that case, it is necessary to refer to another decision of the Judicial Committee reported in *William Graham* v. *Krushna Chandra*.[7] There the Judicial Committee has laid down that Secs. 14 to 17 (old) of the Specific Relief Act constitute, with regard to the specific performance of a part of the contract, a complete Code within the terms of which relief of that character must be brought if it is to be granted.

Section 14 (old) of the Act enables the Court to direct specific performance of so much of a contract as can be performed if the part which must be left unperformed bears only a small proportion to the whole or does not admit of compensation in money. Section 15 (old) deals with a case where the part which must be left unperformed bears only a small proportion to the whole in value and does not admit of compensation in money. In that case the party in default is not entitled to obtain a decree for specific performance. But the party not in default may claim specific performance, provided he relinquishes his claim to further performance and all rights to compensation.

1. Durga Prasad *v.* Smt. Lilawati, A.I.R. 1972 All. 396 at p. 398 : 1972 A. L. J. 945.
2. Kanhaya Lal *v.* Devi Das, A.I.R. 1931 Lah. 227 at p. 228 : I.L.R. 12 Lah. 328.
3. Durga Prasad *v.* Smt. Lilawati, A. I. R. 1972 All. 396 at p. 399 : 1972 A. L. J. 945.
4. Devendra Nath Mitra *v.* Lalit Krishna Mitra, 42 C.W.N. 1020; Haroon Hassan *v.* Sh. Tahir Mohammad Kassim, I.L.R. (1940) Kar. 406 ; Shankar Lal *v.* New Mofussil Co. Ltd., 73 I. A. 98 : 224 I. C. 598 : 1946 Pesh. L. J. (P. C.) 97 : 50 C. W. N. 603 : 50 L. W. 370 : 12 B. R. 596 : 48 Bom. L. R. 456 : 1946 A. L. J. 326 : 1946 M. W. N. 598 : 48 P. L. R. 450 : 1946 G. A. (P. C.) 160 : 1946 A. W. R. (P. C.) 260: 1946 P.W.N. 338 : A. I. R. 1946 P. C. 97 : (1946) 2 M. L. J. 259 (P. C.) ; Radha Kamal *v.* Puri Municipality, A.I.R. 1954 Orissa 110 at pp. 113-14.
5. A. I. R. 1954 Orissa 110.
6. A. I. R. 1928 P. C. 258.
7. A. I. R. 1925 P. C. 45.

Section 16 (old) contemplates a contract parts of which are separate and independent. If the contract is actually divisible and the Court enforces what is apparently a part, it really enforces the entire and complete contract. The expression "stands on a separate and independent footing" points to a limitation which would exclude any new bargain, and cannot be said performance of a part of a contract where the other parts have already been performed the Court is not introducing a new bargain, and Sec. 16 (old) is a statutory warrant for enforcing a part which can and ought to be performed.

The decision of the Privy Council in *Secretary of State* v. *Volkart Brothers*[1] did not turn on the construction of any of the provisions of the Specific Relief Act. The judgment of the High Court of Madras in that case is reported in *Secretary of State* v. *Volkart Brothers*,[2] and it gives the facts and reasonings of Krishnan, J., showing why Sec. 16 (old) of the Specific Relief Act was not applicable to the facts of the case.

His Lordship observed :

> "Section 16 also does not apply as we have not got here, in my opinion, part of a contract which stands on a separate and independent footing from the rest. If the suit contract could be divided up into two contracts, one with the respondents for their plot and the other with the Cochin Club for theirs, the section may apply. But I am unable to see what justification there is for holding that the lessees can by any means by their own unilateral act, without any reference to or consent of the lessor, split up into two his contract for a single lease to renew the whole plot as one plot. The United Company entered into a single contract to renew with reference to the whole of the land. I am unable to see how they can be compelled to perform that contract piecemeal."

In *Radha Kamal* v. *Puri Municipality*,[3] the suit contract has been divided up into four contracts not by unilateral action but by consensual authority. What was at one time a single contract to renew the lease of the whole of the land, has been split up into four leases piecemeal and, in the language of Sec. 16 (old), each of them "stands on a separate and independent footing" from the rest. It is well established that where a tenement is sub-divided, each tenant holds his share in severalty. Where there are tenants-in-common with undivided moieties there is only one tenement in the whole of which each tenant shares. Each tenant-in-common has an estate in the whole of the single tenement and there is privity of estate between him and the landlord ; and each is liable for the whole rent. But where the land has been divided, as well as the rents due on the separate parcels, as indeed is the case here, the covenant is divisible and the tenants are not in the same position as tenants-in-common. His estate does not extend over the whole of the land leased, and there is no reason why either on principle or on authority he should not be protected in his possession. The case of *Secretary of State* v. *Volkart Brothers*[4] is easily distinguishable on the facts as that was a case of tenants-in-common.

The ordinary rule is that a part of a contract shall not be specifically performed except in cases coming under one or other of Secs. 14, 15 and 16.

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1. A. I. R. 1928 P. C. 258.
2. A. I. R. 1927 Mad. 513.
3. A. I. R. 1954 Orissa 110.
4. A. I. R. 1927 Mad. 513.

Where the part which it is impossible to enforce has already been performed Court will decree specific performance of a contract.[1]

Where a contract to grant a lease also contained a covenant giving the option to purchase, the Court decreed performance of the contract of sale although the covenantee had forfeited the right to obtain a lease as the contract was separable.[2] In *Subramania Iyer* v. *Kalyanasundaram Iyer*,[3] Oldfield, J., observed that if the plaintiff could show that the portion of the property which he claimed can reasonably be enjoyed independently of the remainder specific performance would be decreed.

In *Shama Charan* v. *Kumed Dasi*,[4] the first defendant professed to enter into a contract on his own behalf as well as of the other members of his joint family. It turned out that his co-sharers were not willing to abide by the contract but the share of the first defendant was large enough for the purpose of compliance of the contract made by him with the plaintiffs. The Court ruled that specific performance could be granted to the plaintiff in respect of the first defendant's share of the property. But apart from authority the inclination is to uphold the plaintiff's claim as no injustice will be done to the Municipality by decreeing specific performance. It is obvious that the original lease was granted to a lady who did not have money enough to complete the whole of the building which she had undertaken to erect. To enable her to raise funds for the purpose the contract was made divisible and she was permitted to assign her leasehold interest to different persons. As soon as she put up the building she could enter into the market for raising money to enable her to complete the rest of the contract. If that was her right, is the plaintiff in any worse position ? The plaintiff did not take upon himself to put up a building on the plot purchased by him from Chandramoni Devi. No injury has resulted to the Municipality by treating the contract as separable. They have got a portion of the property leased out covered with a building. With regard to the remaining ground, in the occupation of the plaintiff, they still retain exactly the same right as they had under the original agreement, and that right is the right to enhance the rent. It is, therefore, idle to contend that the plaintiff must seek performance of the whole contract or none at all. *Held* that the contract in favour of the plaintiff stands "on a separate and independent footing" and is severable from the rest of the contract. The contention of the Municipality based on this ground, must accordingly be held to be untenable.

Section 27 (old) says that specific performance of a contract may be enforced against either party thereto, and against any other person claiming under him by a title arising subsequent to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The section throws the onus upon the transferee to establish that he had no notice of the original contract.[5]

21. Onus.—The position of law is well settled that in a suit for specific performance where a subsequent transferee wants to retain the benefits of the transfer in his favour, the onus rests on him to establish the circumstances mentioned in Sec. 27 (*b*) [new Sec. 19 (*b*)] of the Specific Relief Act.[6] In the

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1. Hope *v.* Hope, (1856) 52 E. R. 1143.
2. Green *v.* Low, (1856) 22 Beav. 625.
3. A. I. R. 1919 Mad. 374.
4. A. I. R. 1918 Cal. 889.
5. Radha Kamal *v.* Puri Municipality, A. I. R. 1954 Orissa 110 at pp. 112-13.
6. Dinesh Chandra Guha *v.* Satchidananda Mukherji, A. I. R. 1972 Orissa 235 at p. 238 : (1972) 1 Cut. W.R. 194.

decision reported in *Bhup Narain* v. *Gokul Chand*,[1] while dealing with this quesiton, the position of law was explained as follows :

> "Section 27 (Specific Relief Act) lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to that general rule not to the transferor, but to the transferee, and therefore, it is for the transferee to establish the circumstances which will allow him to retain the benefit of a transfer which *prima facie* he had no right to get".

In the decision reported in *Venkataravanappa* v. *Dasappa*,[2] while dealing with burden of proof, it was observed :

> "Where a person claims to be a purchaser for value without notice of the original contract, the burden lies on him to prove that he fulfils that character."

To the same effect are the observations in the decision reported in *Veeramalai* v. *Thadikara*[3] where it was held :

> "The burden of proof is upon the subsequent purchaser to establish these conditions in order that his rights may prevail over the prior agreement of sale."

The Orissa High Court in the decision reported in *Dhadi Dalai* v. *Basudeb Satpathy*[4] also expressed the same view. Thus, there can be no dispute about the legal position that in all such cases the initial onus rests on the subsequent transferee to prove the circumstances which will permit him to retain the benefit obtained under the sale.[5] The onus being on the defendant can only be discharged by evidence led in the case. In this connexion reference may be made to two Privy Council decisions in *Bhup Narain Singh* v. *Gokul Chand*[6] and *Shankarlal Narayandas* v. *New Mofussil Co. Ltd.*[7] In *Bhup Narain Singh* v. *Gokul Chand*,[8] Lord Thankerton who spoke for the Board while dealing with Sec. 27 (old) of the Specific Relief Act observed as under :

> "In their Lordships' opinion, the section lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and, in their Lordships' opinion, it is clearly for the transferee to establish the circumstances, which will allow him to retain the benefit of transfer which *prima facie* he had no right to get. Further the subsequent transferee is the person within whose knowledge the facts as to whether he has paid and whether he had notice of the original contract lie, and the provisions of Secs. 103 and 106, Evidence Act, 1872, have a bearing on the question. The plaintiff does not necessarily have knowledge of either matter. In a case in 1862, before this Board, *Varden Seth Sam* v. *Luckpathy Royjee Lallah*,[9] an equitable lien by deposit of title-deed

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1. A. I. R. 1934 P. C. 68.
2. A. I. R. 1955 Mys. 3.
3. A. I. R. 1968 Mad. 383.
4. A. I. R. 1961 Orissa 129.
5. Dinesh Chandra Guha *v.* Satchidananda Mukherji, A. I. R. 1972 Orissa 235 at p. 238 : (1972) 1 Cut. W.R. 194.
6. A. I. R. 1934 P. C. 68.
7. A. I. R. 1946 P. C. 97.
8. A. I. R. 1934 P. C. 68.
9. 9 Moo. Ind. App. 303.

was enforced against a subsequent transferee of the property. In delivering the judgment of this Board, Lord Kingsdown stated :

'Though both the third and the last defendants pleaded in effect, that they were *bona fide* purchasers for value without notice, yet they did not prove that defence though the plaintiff charged notice and collusion with defendant 1. And, later :

'The question to be considered is, whether defendants 3 and 6 respectively possessed the land free from that lien whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value, *bona fide*, and without notice of this charge, whether legal or equitable, would have had in these courts an equity superior to that of the plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this furnishes no such proof.'

"Although under Sec. 54, Transfer of Property Act, 1882, the appellants agreement for sale does not of itself create any interest in or charge on the property, their Lordships are of opinion that the rule of procedure stated by Lord Kingdown is applicable to the present case under Sec. 27 (*b*), Specific Relief Act. This view under the Specific Relief Act has been taken in a number of cases in India."

In view of the fact that there was not sufficient evidence led by the defendant to prove want of notice the plaintiff's suit for specific performance was decreed. In *Shankerlal's* case,[1] their Lordships referring to their previous decision in *Bhup Narain Singh's* case,[2] thought it unnecessary to consider the evidence which was produced on behalf of plaintiff to show that the defendants in fact had notice of the earlier contract.

It is not for the plaintiff to show that the subsequent purchaser had notice of the previous contract in favour of the plaintiff. The onus of such a negative issue of proving that the subsequent purchaser had no notice of a prior claim is ordinarily discharged by a denial and by a negative evidence. Very little evidence, and, in certain circumstances, a mere denial, regarding want of knowledge of the plaintiff's contract would discharge this onus and shift the onus on the plaintiff. But under no circumstance, the initial onus, which is on the subsequent transferee, shifts on the plaintiff at the first stage, even when, the plaintiff mentions in his plaint the reason why he is making the subsequent purchaser a party, and how he came to know that the person concerned was a subsequent purchaser. When the exception mentioned in Cl. (*b*) of Sec. 27 (old) clearly imputes a notice to the subsequent transferee of the prior contract of sale, it cannot be said, unless the plaintiff admits that the subsequent transferee had no notice, that the onus lies on the plaintiff to prove that the transfer in favour of the subsequent purchaser is without notice.

Each case will have to be examined on its own facts to find out whether the onus which rests on the defendant in view of Sec. 27 (old) of the Specific Relief Act is discharged or not.[3]

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1. A. I. R. 1946 P. C. 97.
2. A. I. R. 1934 P. C. 68.
3. Gurmukh Singh Vir Singh *v.* Sohan Singh Bela Singh, A. I. R. 1963 Punj. 470 at pp. 471-72.

22. Burden light.—As remarked by Harrison, J., in *Kanshi Ram* v. *Ishwar Das*,[1] the onus on the subsequent transferee being a negative one his task undoubtedly is difficult. Therefore as held by Sulaiman, J., in *Kartarnath* v. *Sripal Rai*,[2] he may discharge the burden by merely denying the factum of notice on oath, though Ashworth, J., was of the contrary opinion. There is, however, ample authority for the proposition that the burden on the subsequent vendee is a light one and very little evidence on his part, and in certain circumstances a mere denial regarding want of knowledge, would suffice to discharge this onus.[3]

In a suit for specific performance of a contract if the plaintiff proves his prior contract, the burden of proving a subsequent *bona fide* transfer for value without notice under Sec. 27(*b*) (old), Specific Relief Act, lies on the party alleging it. The same view was taken by the Calcutta High Court in *Hem Chandra De* v. *Amiyabala* [4] The learned Subordinate Judge was, therefore, right in throwing the onus upon the defendants to prove that they were transferees for value without notice of the original contract. Very little evidence on the part of the defendants of want of knowledge of the plaintiff's contract would have discharged this onus and shifted the onus on the plaintiff but in this case defendant 2 who gave his evidence does not even say on oath that he was not aware of the plaintiff's contract.

The plaintiff being admittedly in possession it was the bounden duty of defendants to inquire from the plaintiff as regards the nature of his possession before they could be held to be *bona fide* purchasers for value, and reference is made to *Faki Ibrahim* v. *Faki Gulam*[5] and also to observations of Jenkins, C.J., in *Baburam Bag* v. *Madhab Chandra*.[6] There is a good deal of force in this as well. A mere denial may, in the circumstances of a particular case, shift the burden of proof on the plaintiff in the matter of notice.[7]

23. Notice.—The definition of "Notice" is given in Sec. 3 of the Transfer of Property Act.

24. Notice, nature of.—The notice contemplated under Sec. 19 (new) must be one derived either as a result of *bona fide* and diligent inquiry on the part of the subsequent transferee or from various surrounding circumstances.[8]

A careful perusal of that definition would show that notice may be of two varieties, (*i*) actual notice, and (*ii*) constructive or imputed notice. Constructive notice falls under two distinct categories. In the first place notice of certain facts is notice of certain other connected facts. Thus notice of the fact that *A* is in possession of premises which *B* is conveying is notice of all rights which *A* has in the premises. Secondly, there are some cases in which notice to one person is deemed a notice to another. Thus notice to an agent is notice to the principal and notice to one partner is notice to all. To this may be added another class of constructive notice, i. e. registration of a document which is to be notice deemed to be of its execution and contents.

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1. 67 I. C. 887 : A.I.R. 1923 Lah. 108 : 5 L. L. J. 150.
2. 107 I. C. 254: A.I.R. 1928 All. 307.
3. Lekh Singh *v.* Dwarka Nath, A.I.R. 1929 Lah. 249; Mg Po Lwin *v.* Mg Sein Han. A.I.R. 1929 Rang. 93 ; Kanshi Ram *v.* Ishwar Das, A. I. R. 1923 Lah. 108 : 67 I. C. 887 : 5 L. L. J. 150, *per* Harrison J.;Ramdeni Singh *v.* Gumani Raut, A.I.R. 1929 Pat. 300 at p. 301 : 119 I. C. 7 ; Saukhi Sah *v.* Mahamaya Prasad Singh Bahadur, A. I. R. 1934 Pat. 518 at p. 521.
4. A.I.R. 1925 Cal. 61: I.L.R. 52 Cal. 121.
5. A. I. R. 1921 Bom. 459: I. L. R. 45 Bom. 910.
6. I. L. R. 40 Cal. 565 : 19 I. C. 9 : 18 C. W. N. 341.
7. Ramdeni Singh *v.* Gumani Raut, A.I.R. 1929 Pat. 300 at p. 301.
8. Khudrat Ali *v.* Hadu Mahaden, I.L.R. (1949) Cut. 534.

25. When notice does not matter.—"Notice of contract" said Shephard, J., "as required under Sec. 27 (corresponding to Sec. 19 of the present Act) must be a notice of an existing obligation. When a transferee, hearing of a contract, is also informed that the time for performance has long expired without anything being done the inference he would naturally draw is that the right has been waived or otherwise discharged.[1] So also, notice does not matter where the right to sue for specific performance is barred.[2]

26. Actual notice.—It may be defined as an actual knowledge of the fact. In order that an actual notice may be binding on the person who is fixed with it, it must be a definite information given by a person interested in the property in respect of which it is given and it must be given in the same transaction. Vague rumours from strangers or suspicious circumstances do not amount to such notice.[3] Notice to a purchaser in one transaction cannot be regarded as an effective notice in a subsequent independent transaction.[4] But if a person is aware of the fact that another person claims to have an interest in the property he is dealing with he is under obligation to make an enquiry as to what that interest is and if he fails to make such enquiry he will be deemed to have got constructive notice of the same, if not actual notice.[5]

27. Notice by post—Presumption.—When a notice is proved to have been posted it is presumed to have reached its destination and the presumption is still more strengthened if it is sent under registered cover.[6] Nor is the presumption rebutted by the fact that a receipt was signed by another person on behalf of the addressee.[7] Service of notice on one of joint contractors addressed to all, would be *prima facie* evidence that it has reached others as well.[8]

28. Notice through newspapers.—There is a practice of giving notice through the instrumentality of a newspaper. But in order that such a notification may amount to an actual notice it must be shown that his attention was drawn to that notification.[9] The case would be otherwise when a binding agreement between the parties or, in case of companies, articles of association provide for such a notification. When one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice. If he is guilty of fraud or even irregularity the Court will not draw the inference that he has fulfilled his duties. Where he omits to communicate because he fails to realize the importance of the fact and not because he considers that he owes no such duty, notice has to be implied.[10]

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1. *Per* Shephard, J., in Ramaswami *v.* Chinnan Asari, I. L. R. 24 Mad. 449 at p. 456.
2. *Per* Bhashyam Ayyangar, J., *ibid.*, at pp. 464-5.
3. Barnhart *v.* Greenshield, 9 Moo. P. C. 18 at p. 36.
4. Hamilton *v.* Royce, Sch. & Laf. 315; *cf.* Nixon *v.* Hamilton, 1 Isish Eq. R. 46.
5. Gibson *v.* Jugo, 6 Hare 126; Mildrew *v.* Maspons, 8 App. Cas. 874; Jones *v.* Smith, 1 Hare 43; Gobind Chunder *v.* Doorgapershad, 22 W. R. 248.
6. Harihar *v.* Ramshashi, I. L. R. 46 Cal. 458 (P. C.) : 45 I. A. 221 : 23 C. W. N. 77; Syed Bodardoja *v.* Ajij-ud-Din Sircar, 33 C. W. N 569.
7. *Ibid.*
8. Harihar *v.* Ramshashi, *supra.*
9. Bhairab Chandra *v.* Kali Dhan, 33 C. W. N. 569.
10. T. R. Pratt *v.* E. D. Sassoon & Co. Ltd., A. I. R. 1936 Bom. 62 at p. 81 : I. L. R. 60 Bom. 326 : 161 I. A. 120 : 37 Bom. L. R. 978.

29. **Notice before actual payment of purchase money or registration of sale-deed—Effect.**— Notice before actual payment of the whole purchase money even though it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice before the contract.[1] Where a defendant receives notice of the sale to the plaintiff before the registration of his own contract of sale is effected, he is affected by that notice.[2]

30. **Constructive notice.**—Constructive notice may be said to be knowledge which the Court imputes to a person from the circumstance of the case upon a legal presumption so strong that it cannot be allowed to be rebutted, that the knowledge must exist, though it may not have been formally communicated.[3] If a man has actual notice of circumstances sufficient to put a man of ordinary prudence on enquiry as to a particular point, the knowledge which he might by the exercise of reasonable diligence have obtained will be imputed to him. If a man abstain from enquiry where enquiry ought to have been made, it is immaterial that the neglect to make an enquiry may not have proceeded from any wish to avoid knowledge.

Meaning and effect of constructive notice explained.

"The Judicial Commissioner held that the appellants must have known on 3rd April, 1922, of the agreement which Mohammad Afzal had made with the plaintiff on 1st May, 1921. Their Lordships are not prepared to hold that the Judicial Commissioner's finding in this respect was wrong. There was evidence upon which he might arrive at that conclusion. However that may be, their Lordships upon consideration of the whole evidence, both verbal and documentary, are clearly of opinion that the circumstances connected with Mohammad Afzal's dealings with his property, which were unboubtedly known to the appellants, were such as to put the appellants upon inquiry, and that if reasonable inquiries had been made by the appellants before the transaction of 3rd April, 1922, they must have become aware of the agreement between the plaintiff and Mohammad Afzal of 1st May, 1921. The appellants therefore cannot predicate of themselves that they are transferees without notice of the original contract within the meaning of the exception in Sec. 27 (*b*), Specific Relief Act of 1877. The whole matter is before their Lordships on this appeal, and it is open to them to make the proper order in view of the above-mentioned conclusions. They are of opinion that the plaintiff should have a decree for specific performance of the agreement of 1st May, 1921, against the appellants as well as against Mohammad Afzal, subject to the appellants' right of pre-emption, which will be referred to hereinafter."[4]

Whatever is notice enough to excite the attention of a man of ordinary prudence and call for further enquiry, is in equity, notice of all facts to the knowledge of which an enquiry suggested by such notice and prosecuted with due diligence would have led. Notice of this kind is called constructive or imputed notice. Constructive notice as distinguished from actual notice is a legal inference from established facts and like other legal presumptions does not admit of dispute.[5] On this point, the modern tendency is to classify

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1. Himmatlal *v.* Vasdeo, I. L. R. 36 Bom. 446 ; Gudur *v.* Gunduala, 25 I. C. 973 : 1 L. W. 879.
2. Nihal Singh *v.* Sivaram, 40 I.C. 128.
3. Snell's *Equity*, p. 33 ; Epsin *v.* Pemberton, 3 De G. & J. 554 ; Jones *v.* Gordon, 2 App. Cas. 632.
4. Mohammad Aslam Khan *v.* Feroze Shah, A.I.R. 1932 P. C. 228 at p. 230 : 56 C. L. J. 330.
5. Hewit *v.* Loosemore, 9 Hare 455; Epsin *v.* Pemberton, 3 De G. & J. 554.

"notice" into three varieties—actual, constructive and imputed. It was suggested in *Wise* v. *Whitburna*[1] that notice might be *inferred*, i. e. where the purchaser receives notice of other facts from which he ought reasonably to infer the existence of the interest ; but this would seem to be an unauthorized invocation, which is strongly condemned by A.E. Randall in 40 L.Q.R. 84.

Notice is *actual* where a purchaser actually knows of the existence of the equitable interest. It is *constructive* where the interest would have come to his knowledge if he had made such inquiries as he ought to have made. Imputed notice covers actual or constructive notice to his agents as such in the transaction in question. A purchaser is under no legal obligation to investigate into his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business ; and a purchaser who wilfully departs from it in order to avoid acquiring knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way.[2] The question when it is sought to affect a person with constructive notice is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether his not obtaining it was an act of gross or culpable negligence. Therefore where mere want of caution is all that can be imputed to a man, the principle of constructive notice has no application.[3] "Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction in which the instruments containing recitals are not necessary to his title ; but he is charged constructively with notice merely of that which affects the purchase of the property in claim of title of which the papers form a link."[4] If a purchaser is informed that there are charges on the property he intends to purchase, he will be affected with notice of all other charges which he could have ascertained on inquiry. Where a purchaser of a certain village has specific knowledge of the fact that there are certain maintenance-holders, whose allowances are charge on that village, it is incumbent on him to make enquiry into the title of the vendor and to find out if the maintenance allowances paid to certain others are or are not a charge on that village. The omission by the purchaser to do so will amount to wilful abstention from enquiry and the purchaser would be affected with constructive notice of all other charges on that village which he would have discovered, had he chosen to make a proper investigation of title. The omission to make the enquiry would also amount to gross negligence so as to attract the consequences which result from notice.[5] A constructive notice has been held to be implied in England in the following case.[6]

31. Cases in which constructive notice has been held to be implied in England.—(1) Where there is notice of any fact which would put a reasonable man on such an enquiry as would lead to the discovery of defect in title.

(2) Notice of any deed, necessarily forming part of title.

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1. (1924) 1 Ch. 460.
2. Bailey *v.* Barnes, (1894) 1 Ch. 25.
3. Ware *v.* Egmont, 4 De G. M. & G. 460 ; Bailey *v.* Barnes, (1894) 1 Ch. 25 ; West *v.* Raid, 2 Hare 749 ; Wilson *v.* Hart, 2 H. & M. 551 ; Jones *v.* Smith, 1 Hare 43.
4. Bepin *v.* Priyabarat, 26 C. W. N. 46, *per* Mukerji, J.
5. Mohammad Yunus Khan *v.* Special Manager, Court of Wards, Balrampur Estate, 167 I. C. 962 : A. I. R. 1937 Oudh 301 : 1937 O. L. R. 188 : 1937 O. W. N. 438.
6. Harman Singh, *Specific Relief Act*, Sec. 27.
7. Agra Bank *v.* Barry, (1874) L.R. 7 H.L. 135 at p. 157.

(3) Such a negligence in making enquiries as to deeds of title as would be considered gross negligence by the Court.[1]

(4) Where there was a contract precluding investigation.

(5) Where there was a statute preventing investigation.

(6) Notice to solicitor or agent.[2]

It is a firmly established principle that the doctrine of constructive notice is not to be extended beyond its present limits.[3]

32. Necessity to investigate vendor's title.[4]—Maitland points out that quite apart from any equitable doctrine, a prudent purchaser of land will investigate his vendor's title.[5] In an "open contract" (i. e. a contract without special conditions) it is the duty of a vendor to show that he is entitled to sell, by demonstrating the vicissitudes of ownership through which the land has passed during the past thirty years. This period is laid down by Sec. 44 of the Law of Property Act, 1925. In order to do this he may, as North, J., pointed out in *Re Cox and Neve's Contract*,[6] have to go back considerably more than thirty years. A purchaser who buys without insisting on a good root of title[7] buys at his own risk and equity will fix on him constructive notice of latent equitable incumbrances. Under the law prior to 1926, a lessee was in an unfortunate position. For he had not then and has not now, the right to enquire into the title of his lessor. Equity, nevertheless, penalised him for his omission to do what he could not do, and fixed him with constructive notice of what he would have discovered if he had made this enquiry. This was known as the doctrine of *Patman* v. *Harland*.[8] Where the contract was made after 1925 it is no longer law, for by Sec. 44 (5) a lessee who is not entitled to call for the title to a reversion is not to be deemed to be affected with notice of any matter of which he might have had notice, had he been able to contract that such title should be furnished.[9] The benefit which this subsection confers on a lessee is shown by *Shears* v. *Wells*,[10] where a covenantee was suing lessor for the breach of an old restrictive covenant as to user of the land, and joined the lessee as co-defendant. It was held that the onus was on the covenantee to show that the lessee knew of the covenant, and this he had failed to discharge. It is also provided by Sec. 44 (8) that a purchaser shall not be affected with notice of any matter of which he might have received

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1. Jones *v.* Smith, 1 Hare 43.
2. 2 Wh. T. L. C. 204.
3. *Ibid.*; Allen *v.* Seckham, 11 Ch. D. 790.
4. Hanbury, *Modern Equity*, 5th Ed., 1949, pp. 36, 37.
5. *Equity*, 123.
6. (1891) 2 Ch. 109 at p. 118.
7. As to what constitutes a good root of title, *see* Cheshire, *Modern Real Property*, 5th Ed., 677. He defines it as "some document which deals with the absolute ownership, both at law and in equity, and which contains nothing to cast doubts on the title of the disposing party".
8. (1881) 17 Ch. D. 353.
9. *Se* an able article by D. W. Logan, in 56 L.Q.R. 361, which. it is submitted, effectively disposes of an ingenious argument in (1931) 75 Sol. J. 655, that the sub-section will not apply if there is a prior agreement containing an express provision that the lessee is not to investigate the title of the lessor. An agreement which simply implements the statutory provision of subsections (2),(3) and (4) of Sec.44, which preclude the lessee from calling for the lessor's title, must be merely otiose. Simonds, J., in White *v.* Bijon Mansions, (1937) Ch. 610 at p. 619, points out that Sec. 44 (5) must be read together with Sec. 198 of the Law of Property Act, 1925, and so a lessee is affected with notice of all those which are registered under the Land Charges Act (1925).
10. (1936) 1 All E. R. 832. The covenant was one of 1852, but the lessee of the second defendant began after 1925.

notice by making inquiries in regard to matters older than 30 years, unless he actually makes such inquiries. This provision underlines the danger, already pointed out by Maitland citing *Fared* v. *Clements*,[1] of making unnecessary inquiries.[2] The whole of Sec. 44 applies only if and so far as a contrary is not expressed in the contract.[3]

Constructive notice.[4]

It has always been regarded as impossible to frame a satisfactory definition of constructive notice,[5] but it is generally taken to include two different things[6]—

(1) The notice which is implied when a purchaser omits to investigate the vendor's title properly or to make reasonable inquiries as to deeds or facts which come to his knowledge.

(2) The notice which is imputed to a purchaser by reason of the fact that his solicitor or other legal agent has actual or implied notice of some fact. This is generally called "imputed notice".

Now the question is what ought a prudent, careful man to do when he is purchasing an estate ? The answer will afford us an insight into the equitable doctrine of notice, and at the same time will show us in what circumstances a purchaser takes an estate free from any trust or other equitable interests to which it may be subject.

It is not necessary to go back further that the Conveyancing Act, 1882 (45 & 46 Vict., c. 39, Sec. 3) now re-enacted by the Law of Property Act, 1925 [Sec. 199 (I) (*ii*)] which contained a section framed with a view to protecting purchasers against a doctrine that had been refined to the point of unfairness. The Act provided that no purchaser is to be affected by notice of any instrument, fact or thing unless he actually knows of it or unless he would have known of it had such inquiries and inspections been made as ought reasonably to have been made, or unless his solicitor, while carrying out that particular transaction, actually obtains knowledge of that instrument, etc., or would have obtained it had he made reasonable inquiries and inspections. What it comes to, then, is that a purchaser is deemed to have notice of anything which he has failed to discover either—

(1) because he did not investigate the title properly ; or

(2) because he did not inquire for deeds relating to the property.

These cases will be dealt with separately.

Nature of investigation of title.

33. Notice from not investigating title.—For centuries it has been regarded as essential that a man who is purchasing land should investigate the title of his vendor, that is to say, should insist upon the vendor producing evidence to show that the interest which he has contrasted to sell is vested in him. The investigation takes the form of requiring the vendor to "prove his title", i.e. to set out the history of the land with a view to showing how the interest he has contracted to sell became vested in him, and to prove

1. (1903) 1 Ch. 428.
2. *Equity*, 128.
3. Law of Property Act, 1925, Sec. 44(11).
4. Cheshire's *Modern Real Property*, p. 62 *et. seq.*
5. Sugden's *Vendor and Purchaser*, p. 71.
6. White and Tudor, Vol. II, p. 172.

that for a given number of years he and his predecessors have rightfully exercised dominion consistent with that interest over the land. The old rule both at law and in equity was that, if a vendor could in this way adduce evidence of ownership for a period of not less than 60 years, he had satisfied the obligation which lay upon him, and, unless anything appeared to the contrary, had proved a title which the purchaser was bound to accept. But there was no rigid rule about the length of this period, for it was useless to trace the title for 60 years unless the result was to show that the vendor was entitled to convey that interest which he had agreed to sell.[1] For instance, a vendor might very well show 60 years' possession in himself, but if this possession was held under a long lease, something more was obviously required to substantiate a right to sell the fee simple. The vendor's proof must always begin with a "good root of title", i.e. with some instrument transferring the interest that the purchaser now seeks to obtain.

Length of title.

The Vendor and Purchaser Act, 1874, provided that in an open contract of sale, that is, where no express stipulation had been entered into fixing a precise date from which title should be traced, 40 years should be substituted for the old period of 60 years. Thus under the law as it existed in 1925 a vendor who failed to persuade the purchaser to accept a shorter title was obliged to adduce evidence of acts of ownership stretching over a period of at least 40 years. This obligation was satisfied by the vendor showing what conveyances of the estate—whether *inter vivos* or as a result of death—had been effected, for, to take a simple illustration, if documents could be produced showing that 45 years earlier *X* had bought the estate for valuable consideration and then left it by will to the vendor, it was pretty clear that the latter could make a good title.

"If, then, on the sale of a freehold in fee, the vendor produces the title-deeds for the last 40 years, and these show that the fee simple in the land sold has been conveyed to him free from incumbrances, and if there be satisfactory evidence that the deeds produced relate to the land sold, and the vendor be in possession of the lands and the deeds, he has shown a good title to the land."[2]

The general obligations of a vendor are the same under the new law, except that the period for which title must be traced under an open contract has been further reduced from 40 to 30 years.[3]

34. Abstract of title.—The first duty of the vendor is to prepare an abstract of title, that is, a statement of the material parts of all deeds and other instruments by which the property has been disposed of during the period in question, and also of all facts, such as, births, deaths and marriages, which affect the ownership of the land. But in addition to producing this abstract the vendor is required to verify its contents by producing either the actual documents abstracted or the best possible evidence of the contents of those which he is not in a position to produce, and by proving facts, such as, births and deaths, which are material to the title.

One can now understand what is meant by constructive notice. One object of investigating title is to discover whether the land is subject to rights vested in persons other than the vendor, and the equitable doctrine of notice

1. Williams on *Vendor and Purchaser*, 1st Ed., p. 76.
2. *Ibid.*, p. 84.
3. Law of Property Act, 1925, Sec. 44 (1).

ordains that a purchaser who fails to investigate is bound by any right which he would have discovered had he made the ordinary investigations as sketched above. Moreover, if the vendor has imposed conditions requiring a purchaser to accept a shorter title than 30 years, the doctrine of notice is extended to rights which would have emerged had title been shown for the normal period. Suppose, for instance, that when the statutory period for proof of title was 40 years, land was put up for sale by auction in 1890 and a provision inserted in the conditions of sale that the title should begin with a mortgage executed 38 years before.

If the land had been sold to the vendor in 1850 and the deed of sale contained a covenant restricting the erection of buildings on the land, the purchaser of 1890 would be bound by that restrictive covenant.

With reference to such a case North, J., said :

> "He had agreed by the bargain contained in the conditions of sale to accept a title of less than 40 years. That cannot relieve him from all knowledge of the prior title, or it would come to this—that if a man was content to purchase property on the condition that he should not inquire into the title, he would acquire a title free from any existing restrictions and would not have constructive notice of any incumbrance."[1]

In general, then, it may be said that a purchaser will be bound by equitable interests of which he may in fact be ignorant but whose existence he would have discovered had he acted as a prudent man of business, placed in similar circumstances, would have acted.[2]

35. Notice from not inquiring for deeds.—As we have just seen, the conveyancing practice of this country demands that a person who is buying land should examine the vendor's deeds, in order both to ascertain whether a good title can be made and to ensure that no third person possesses rights which can be enforced against the land. It follows from this that, if a purchaser deliberately omits to call for the title-deeds, and allows them to remain in the possession of a third person, he will be deemed to have notice of any equitable claims which the possessor of the deeds may have against the land. The basis of this rule is that the failure to procure the deeds is evidence of a fraudulent intention to escape notice of the third person's claim,[3] and it follows therefore that the purchaser of a legal estate will take subject to equitable interests if he has shown something akin to fraud.

Omission to inquire for deeds may constitute notice.

Even where he takes a conveyance of the legal estate without actual notice of some equitable interest which is enforceable against the land, he will nevertheless be bound by that interest under the doctrine of constructive notice if he can be proved to have been guilty of gross negligence.[4]

Gross negligence does not mean mere carelessness, but means carelessness of so aggravated a nature as to indicate an attitude of mental indifference to obvious risks.[5]

If, for instance, a purchaser makes no inquiry for the title-deeds, he is postponed to the owner of an equitable interest, but he is not postponed if he

1. *In re* Cox and Neve's Contract, (1891) 2 Ch. 109 at pp. 117-8.
2. Bailey *v.* Barnes, (1894) 1 Ch. 25 at p. 35.
3. Northern Counties of England, etc. *v.* Whipps, (1884) 26 Ch. D. 482.
4. Oliver *v.* Hinton, (1899) 2 Ch. 264 at p. 274.
5. Hudston *v.* Viney, (1921) 1 Ch. 98 at p. 104.

has inquired for the deeds and has received a reasonable excuse for their non-delivery.

36. Notice to husband.—In a case under Sec. 3, Transfer of Property Act, it was held that in India notice to the husband could not be treated as notice to his wife where she is a *pardanashin* lady.[1]

37. Gross negligence.—What would be gross negligence in one case may not be so in another. It all depends upon the man's knowledge and the means of information which lay to his hands. Where it is incumbent on a person who was in possession of certain facts to inspect the registers omission to look into entries against the property in question and to look into them carefully, must be construed to be either due to wilful abstention or to gross negligence. Whether a person can be charged with the negligence or bad faith of his agent. It is now settled that he can. In spite of a Calcutta decision to the contrary, their Lordships of the Privy Council decided in *Mohori Bibee* v. *Dharmodas Ghose*[2] that the acts and knowledge of the agent were the acts and knowledge of his principal, and this accords with the principle that "he who acts through another is deemed to act in person". Were it otherwise "notice would be avoided in every case by employing agents". This principle has now been embodied in Expl. 3 to Sec. 3, Transfer of Property Act, but the amendment introduces no new law. It merely gives effect to the Privy Council decision as against the earlier Calcutta ruling in *Greender Chunder Ghose* v. *Makintosh*.[3] In these circumstances not only has the defendant not proved that he is a *bona fide* transferee without notice but he is in equity deemed to have had constructive notice of the charge. Consequently, it can be enforced against him.[4]

Whether there is gross negligence or not depends upon the fact of each case.

A reference to notes under the heading "Constructive Notice" at page 344 may be made.

38. Registration as notice.—There was at one time serious conflict of authority as to whether registration *per se* amounted to notice. The Bombay and the Allahabad High Courts answered the question in the affirmative,[5] while Calcutta, Madras and the Punjab High Courts[6] expressed the contrary view. The conflict was, however, set at rest by their Lordships of the Privy Council by their approval of the second view.[7] The definition of notice in Sec. 3, Transfer of Property Act, has been changed by Act XX of 1929.[8] The Legislature has by the new amendment changed the definition of notice in such a way as to make registration of an instrument affecting immoveable property, notice of such instrument. Hence in States to which the Transfer of Property Act applies registration *per se* is notice. The registration of a prior transaction is notice to a party entering into a transaction with respect to the same property on a subsequent date. The case of *Tilakdhari* v. *Khedanlal*[9] does not upset this view. Indeed there is much there to support

Registration *per se* is notice only in States where Transfer of Property Act applies.

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1. Qamar Jahan *v.* Munney Mirza, A.I.R. 1925 Oudh 613 at p. 615 (it is difficult to see how the wife being the *pardanashin* lady makes any difference).
2. I.L.R. 30 Cal. 539 : 30 I.A. 114 : 8 Sar. 374 : 7 C. W. N. 441 (P. C.).
3. I.L.R. 4 Cal. 897 : 4 C. L. R. 193.
4. Mst. Renukabai *v.* Bheosan Hapsaji Junghare, A. I. R. 1939 Nag. 132 at p. 136 : 1939 N. L. J. 129.
5. Janki Prasad *v.* Kishin Dutt, I.L.R. 16 All. 478 (F. B.) ; Matadin *v.* Kazim Husain, I. L. R. 29 Bom. 199.
6. Mohindra *v.* Trailokya, 2 C.W.N. 750 ; Rangaswami *v.* Annamalai, I. L. R. 31 Mad. 7.
7. Tilakdhari *v.* Khedanlal, I. L. R. 48 Cal. 1 (P.C.) : 25 C. W. N. 49.
8. As to definition of "notice", *see* Sec. 3 of the Transfer of Property Act.
9. A. I. R. 1921 P. C. 112 : I.L.R. 48 Cal. 1 (P.C.).

this view. All that their Lordships of the Privy Council held was that the registration of a subsequent transaction was no notice to the holder of a prior charge.[1] But the case is different in States to which that Act is inapplicable. In these States the decision of their Lordships of the Privy Council in *Tilakdhari* v. *Khedanlal*[2] is still good law.

39. Registration of sale-deed by the judgment-debtor is no notice to the decree-holder.—Even in provinces to which the Transfer of Property Act applies the registration for a sale-deed by a judgment-debtor cannot be regarded as giving the decree-holder attaching the property sold constructive knowledge of the sale, because no duty lies on the decree-holder to search the registers.[3]

40. Family settlement creating charge on an immoveable property.—A family settlement creating a charge on immoveable property is compulsorily registrable and hence the fact of its registration would amount *per se* to constructive notice to the purchaser of the property in respect of the charge created on the property sold.[4]

Registration is notice, however, only of registered documents and not of unregistered documents recited in the said deeds or under which the person deriving title under the registered deed holds.[5] "The register may be notice of the registered document which it contains, it would be pushing the doctrine of constructive notice beyond all bounds to hold that it is notice of the unregistered documents under which the holders of registered documents derive their title."[6] A person affected with notice of a lease is affected with notice of the covenants restrictive or otherwise therein contained.[7] Similarly, where deeds were deposited with a mortgagee, the contents of which and enquiry based thereon would have led to the discovery of a charge on the mortgaged premises, the mortgagee must be taken to have had constructive notice of the charge.[8]

41. Possession as notice.—Explanation II has been added to the definition of notice[9] given in Sec. 3 of the Transfer of Property Act by the Transfer of Property Amendment Act XX of 1929, whereby actual possession of a property by a person has been declared to be notice of his title in the property. Where a person is in possession of a property it is sufficient to put one dealing with the said property on inquiry as to the nature and extent of the interest by virtue of which he is in possession.[10] Thus where a tenant is in possession of land, a purchaser is bound by all the equities which the tenant can enforce

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1. Ram Lal *v.* Shiama Lal, A. I. R. 1931 All. 275 at p. 276 : I. L. R. 48 Cal. 1 (P.C.) considered.
2. I.L.R. 48 Cal. 1 (P.C.) : 25 C.W.N. 49.
3. Amolak Chand *v.* Ram Nath Ram Narain, 1936 A. M. L. J. 104.
4. Mohammad Yunus Khan *v.* Special Manager, Court of Wards, 167 I. C. 962 : A. I. R. 1937 Oudh 301 : 1937 O. W. N. 438 : 1937 O. L. R. 188 (142 I. C. 376 dist.).
5. Sharfuddin *v.* Govind, I.L.R. 27 Bom. 452, Chunilal *v.* Ram Chandra, I.L.R. 22 Bom. 213.
6. Chunilal *v.* Ram Chandra, *supra, per* Tarran, C.J.
7. English & Scottish Co. *v.* Brunton, (1892) 2 Q. B. 709; Patman *v.* Harland, L. R. 17 Ch. D. 353.
8. Bank of Bombay *v.* Sulaman Somji, 35 I. A. 139.
9. For definition of "notice" *see* Sec. 3, Transfer of Property Act.
10. Jugal Kishore *v.* Kartic, I.L.R. 21 Cal. 116 ; Khandiba *v.* Nana, I. L. R. 27 Bom. 408 ; Vinayak Moreshwar Nath *v.* Gyanoba Horibar Navala, A. I. R. 1923 Bom. 13 , Baba Sah *v.* Haji Mohammad Akbar Sahib, 73 I. C. 297 : A.I.R. 1923 Mad. 563 : 45 M.L.J. 157 : 32 M. L. T. 301 : 17 L. W. 541 : 1923 M. W. N. 280 ; Faki Ibrahim *v.* Faki Ghulam, A.I.R. 1921 Bom. 459 at p. 460 : I. L. R. 45 Bom. 910 : 60 I. C. 986 (mortgagee-in-possession).

against the vendor.[1] But there is no authority for the proposition that notice of a tenancy is a notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on.[2] This principle is based on the observations of their Lordships of the Privy Council in *Bernhart* v. *Greenshields*[3] to this effect : "In all the cases to which we have referred, it will be observed that the possession relied on was the actual occupation of the land ; and that the equity sought to be forced was on behalf of the party so in possession. There is no authority in those cases for the proposition that notice of tenancy is notice of the title of the lessor ; or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on." If a tenant was in possession with an agreement in his pocket to become the purchaser, those circumstances give him an equity repelling the claim of a subsequent purchaser who makes no enquiry as to the nature of his possession.[4] No purchaser can protect himself merely by registering his document of title against the title of a person in possession of the property, the subject-matter of his sale-deed, and if he ignores that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession of the suit property was found to have a title under an unregistered sale-deed which was not compulsorily registrable.[5] When a person about to take a mortgage finds some person other than intending mortgagor in possession, the fact of such possession is sufficient to put the would-be mortgagee on inquiry as to the title of such person, and if such person's title is that of prior mortgagee under a document not compulsorily registrable, the second mortgagee cannot by getting his mortgage registered obtain priority of the first mortgage.[6]

Notice of tenancy no notice of title to lessor.

42. Notice to agent.—Explanation III to Sec. 3, Transfer of Property Act, added by Amending Act XX of 1929 enacts that "a person be deemed to have had notice[7] of any such fact if agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material". But if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof against any person, who was party to or otherwise cognizant of the fraud. Where a man employs another to act as his agent the knowledge of his agent derived in the transaction must be imputed to him as though it were his own knowledge and it is immaterial that the notice was not in fact conveyed to the principal, provided it is not withheld from a fraudulent motive.[8] But if notice to the agent has to be taken as notice to the principal it must have been acquired actually or constructively in the same

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1. Bernhart *v.* Greenshields, 9 Moo. P. C. 18 ; Hunt *v.* Luck, (1901) 1 Ch. 428 : 50 W. R. 291 : 86 L.T. 68 : 18 T. L. R. 265 : 71 L. J. Ch. 239 ; Bahuram *v.* Madhab Chandra, I.L.R. 40 Cal. 569; Sitayya *v.* Kotayya, 134 I.C. 1211.
2. Bernhart *v.* Greenshields, *supra* ; Gummani Nath *v.* Bussant Kumari, I. L. R. 16 Cal. 414.
3. 9 Moo. P. C. 18; but *see* M.P. Yella Reddi *v.* S. Subbi Reddy, A.I. R. 1954 A. P. 20 at p. 22.
4. Daniels *v.* Davison, 16 Ves. 249 : 10 R. R. 171.
5. Kandiba *v.* Nana, I.L.R. 27 Bom. 408; Vinayak Moreshwar Nath *v.* Gyanoba Haribar Navala, A.I.R. 1923 Bom. 13 at p. 14.
6. Bhikirai *v.* Uditnarain, I.L.R. 25 All. 366 ; *see* also I. L. R. 27 Bom. 408; I.L.R. 6 Bom. 193 (F. B.) ; I. L. R. 16 Mad. 148 (F.B.).
7. For definition of "notice", *see* Sec. 3, Transfer of Property Act; M.Akshayalingam *v.* D. Ramayya, A. I. R 1929 Mad. 426 at p. 429.
8. Kennedy *v.* Green, 3 M. & K. 699; Cave *v.* Cave, 15 C.D. 644, T.R. Pratt *v.* E.D. Sassoon & Co., I.L.R. 60 Bom. 326 : 161 I.C. 120 : A. I. R, 1936 Bom. 62: 37 Bom. L. R. 978.

transaction. Consequently, a notice acquired before the commencement of the agency cannot be relied upon as notice to the principal.[1] Notice to the solicitor is notice to the client and where a purchaser employs the same solicitor as the vendor he is affected with the notice of whatsoever the solicitor had notice in his capacity as solicitor of either party in the transaction in which he is employed.[2] Where one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice. If he is guilty of fraud or even irregularity the Court will not draw the inference that he has fulfilled his duties. But where he omits to communicate because he fails to realize the importance of the fact and not because he considers that he owes no such duty, notice has to be imputed.[3]

Notice before commencement of agency is ineffective notice to solicitor.

43. Notice to acting partner is notice to firm.—Under Sec. 24 of the Indian Partnership Act, a notice to a partner who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm,[4] except in the case of a fraud on the firm committed by or with the consent of that partner. But this rule does not apply to corporations or companies. Thus a notice to a director does not affect the company unless it is proved that he had authority to act for the corporation in the particular matter in which the notice is given.[5]

44. Notice to some members of joint Hindu family.—Notice to some of the transferees who are members of a joint Hindu family is not notice to other members unless it is shown that they represented the others.[6]

45. Specific performance and possession.—In a suit for specific performance of a contract in respect of immoveable property the settled practice of courts in India, where the parties properly sued for specific performance are in possession of the property is to allow a prayer for possession to be added to the prayer for specific performance as such a procedure obviates the necessity for filing a fresh suit for possession to which there could be no defence. No doubt under Sec. 27 (old), Specific Relief Act, suits for specific performance of agreement to sell immoveable property would ordinarily be maintainable only against parties to such agreement, and against certain other persons who are specifically mentioned in the several clauses of that section. There is nothing in Sec. 27 (old), Specific Relief Act, which would prevent a person in the position of defendant 2, when made a party to a suit from having the whole matter agitated and adjudicated on finally in this very same suit, if he chose to do so. Having therefore joined issue on

Practice of making additional prayer for possession in suit for specific performance.

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1. Chhabildas *v.* Dayal, I. L. R. 31 Bom. 566 (P.C.): 4 A.L.J. 750 : 6 C.L.J. 674: 9 Bom. L. R. 1062.
2. Fuller *v.* Bennet, (1843) 2 Hare 394.
3. T.R. Pratt *v.* E.D. Sassoon & Co. Ltd., A.I.R. 1936 Bom. 62 at p. 81 : I.L.R 60 Bom. 326 : 37 Bom. L. R. 978 : 161 I. C. 126 [(1896) 2 Ch. D. 743 foll.].
4. Kanhayalal *v.* Devidas, A.I.R 1931 Lah. 227 at p. 229: I. L. R. 12 Lah. 238 (notice to a partner common to two firms).
5. *Re* Carew's Estate, 31 Beav. 45.
6. Janki Pershad *v.* Yehia Hossein, 13 I.C. 637 : 15 C. L. J. 119 ; Shafi-ud-din *v.* Govind, I.L.R. 27 Bom. 452; Nandu *v.* Trimmakha, 14 M.L.J. 477; Kandiba *v.* Nana, I.L.R. 27 Bom. 418 ; Bhikhi *v.* Udatnarain, I.L.R. 25 All. 366.

the merits of the controversy and having failed, it is not open to defendant 2 in these circumstances to raise for the first time in second appeal the point that the frame of the suit according to Sec. 27 (old), Specific Relief Act, ought to have been against defendant I only.[1]

But in a suit for specific performance a claim for possession against persons other than the vendor cannot be joined.[2] Consequently it has been held that in a suit for specific performance of a contract by a member of undivided Hindu family to sell his share it is not permissible to join the other members of the family as defendants merely with a view to obtaining partition and possession of the alleged vendor's share as against them.[3]

46. Subsequent suit for possession is in order.—It is, however, only for the sake of convenience and to avoid multiplicity of suits that a prayer for possession is allowed to be added in a suit for specific performance, otherwise a plaintiff is perfectly within his right to sue for specific performance first, and then subsequently to file a fresh suit for possession.[4]

47. Subsequent purchaser—When protected.—But such subsequent suit must be brought within the period of limitation against the vendor and the subsequent purchaser, otherwise the right to possession of the subsequent purchaser becomes perfected. This question actually arose in *Monoji Singh* v. *Sarat Lal*,[5] in which the prior purchaser Sarat Lal brought a suit against the vendor and the subsequent purchaser Manoji Singh but later withdrew his suit against the latter. He never brought the suit later. Then Manoji brought a suit for possession against the vendor and prior purchaser, on the basis of his registered sale-deed. It was found by the Court below that Manoji Singh took his sale-deed with notice of Sarat Lal's contract of sale. Yet the learned Judge decreed the suit for possession observing that as Sarat Lal withdrew his suit so far as the plaintiff's (Manoji Singh) *mokarrari* was concerned, and brought no fresh suit within the period of limitation allowed by law for doing so (three years from period fixed for performance) he cannot in his suit set up his contract as against the *mokarrari*. It may be noted that his principal would apply only to cases where the prior transferee under the contract of sale or lease is not in possession in part-performance of the contract.[6] But where, however, he has obtained possession of the property in part-performance of his contract of sale

Bar of subsequent suit.

Law after 1930.

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1. Jagannadha Rao *v.* Somu Lakshminarayana, A.I.R. 1930 Mad. 683 at p. 685: 58 M.L.J. 688 ; Rangayya Reddy *v.* Subramania, I. L. R. 40 Mad. 365 (F.B.) ; Ranjit *v.* Kalidasi, I. L. R. 37 Cal. 57 ; Madan Mohan *v.* Gaju Prasad. 14 C.L.J. 159; V. Ram Chandra *v.* V. S. Rangacharyulu, A. I. R. 1926 Mad. 1117 ; Donandan Prasad *v.* Janki Singh. 56 I.C. 322 : A.I.R. 1920 Pat. 266 : 5 Pat. L.J. 314: 11 Pat. L.T. 325; Bugata *v.* Changalawala, 1 M.W. N. 77; Krishanji *v.* Sangappa, 87 I.C. 132: A.I.R. 1925 181: 27 Bom. L. R. 42; K. C. Pal *v.* D. Bhattacharjee, A. I. R. 1952 Cal. 362 at pp. 363-4 ; Ranjit Sinha *v.* Kalidasi Debi, I.L.R. 37 Cal. 57 at p. 61 : 14 C.W.N. 527: 5 I.C. 205.
2. Rangayya Reddy *v.* Subramania, I.L.R. 40 Mad. 365 (F. B.) ; Bugata *v.* Changalawala, 1 M.W.N. 77; Narsingarow *v.* Ranga Swami, 2 M.W.N. 191.
3. Rangayya Reddy *v.* Subramania, *supra.*
4. Krishnaji *v.* Sangappa, 86 I. C. 132 : A.I.R. 1925 Bom. 81: 27 Bom. L.R. 42; Krishnammal *v.* Soundararaja, I.L.R. 38 Mad. 698 : 22 I. C. 912.
5. 4 C. L. J. 334 at p. 337.
6. (Mian) Pir Bux *v.* Mohd. Tahar, A.I.R. 1934 P. C. 235 at p. 237 : 61 I. A. 388 : I. L. R. 58 Bom. 650 : 67 M. L. J. 865 : 39 C. W. N. 34 : 1934 A. L. J. 912 912 : 115 I.C. 326 ; G. H. C. Ariff *v.* Jadunath, A. I. R. 1931 P. C. 79 at p. 82 : 58 I. A. 91 : I. L. R. 58 Cal. 1235 : 131 I. C. 762 ; Currimbhoy & Co. Ltd. *v.* L. A. Creet, A.I.R. 1933 P. C. 29 at p. 32 : 60 I. A. 297 : I. L. R. 60 Cal. 980 : 141 I. C. 209 : 64 M. L. J. 103.

or lease he can successfully resist a suit for possession against the vendor or subsequent purchaser, notwithstanding that he has allowed the period of limitation to expire without bringing a suit on the basis of his contract of sale or lease.

48. Subsequent transferee if necessary party.—A subseqent transferee is thus a necessary party to a suit for specific performance by the purchaser under a prior contract of sale whether or not the subsequent transferee is in possession. As he is a necessary party it could not be said that there would be any misjoinder of parties or of causes of action.[1] "The cause of action", said their Lordships in *Krishnasami* v. *Sundarappayar*,[2] "namely, the right to obtain a sale-deed and possession of the property purchased concerns both the defendants and entitles the plaintiff to relief against both the defendants". Even where the subsequent purchaser is not in possession the cause of action arises against him also in view of the recent Supreme Court decision,[3] according to which the subsequent purchaser must join with the vendee in the execution of the sale-deed in favour of the plaintiff—prior purchase under the contract of sale. It could not be said that by so adding the subsequent purchaser as a party that the nature of the suit would be altered.[4]

Section 19 (new) of the Specific Relief Aot says that the specific performance of a contract may be enforced against either party to the contract or any other person claiming under him by a title arising subsequently to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract. It is, therefore, necessary that having regard to the provisions of Sec. 27 of the Specific Relief Act (which corresponds to Sec. 19 of the present Act), the prior purchaser should implead a subsequent transferee as a necessary party in a suit for specific performance, because by a decree in favour of the prior purchaser the subsequent purchaser's right is affected, moreover the Court of Equity will grant decree to any person, particularly the relief for specific performance of contract when that relief was not likely to be effective which would be so, in such a case the subsequent transferee is not made a party and the prior purchaser is granted the relief for specific performance of contract, specially when the prior purchaser seeks the relief of possession in his suit. Besides this the prior purchaser has certainly a cause of action against the subsequent transferee, because the latter had purchased the same property subsequently to the purchase made by the prior purchaser by a registered sale-deed and therefore the prior purchaser is under these provisions of Sec. 27 (old) of the Specific Relief Act entitled to enforce specific performance of the contract against the subsequent transferee.[5]

49. Form of decree.—In a suit for specific performance where the defendant-vendor has after his contract for sale with the plaintiff sold the property to some other persons, who have also been impleaded as defendants, the proper form of the decree is to direct both the vendor and the subsequent purchaser

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1. Durga Prasad *v.* Deep Chand, (1954) 1 M.L.J. 60 at p. 68 (S.C.): A. I. R. 1954 S. C. 75 ; G. Ramulu *v.* K. Venkata Subbarao, (1944) 2 M. L. J. 103 : 1944 M. W. N. 743 ; K. P. Tewari *v.* Baiju, A. I. R. 1944 Mad. 554 at pp. 555-56 : I.L.R. (1952) 31 Pat. 269; Krishnasami *v.* Sundarappayar, I.L.R. 18 Mad. 415 at p. 417 ; Gumani *v.* Ramchandra, I.L.R. 1 All. 555 at p. 557.
2. I. L. R. 18 Mad. 415 at p. 417.
3. Durga Prasad *v.* Deep Chand, *supra.*
4. K.P. Tewari *v.* Baiju, *supra.*
5. *See* Ram Swarup Singh *v.* Mahabir Mahton, A.I.R. 1960 Pat. 235 at pp. 236-37.

to execute a sale-deed in favour of the plaintiff.[1] In *Kali Charan Singh* v. *Janak Deo Singh*,[2] the Allahabad High Court held that the decree should declare the second purchase as null and void and cancel it, and order the original promisor to carry out his contract by executing a sale-deed in favour of the plaintiff. Having referred to the recent Supreme Court case, *Durga Prasad* v. *Deep Chand*,[3] the Allahabad view cannot be accepted. Delivering the judgment of the Supreme Court, Bose, J., spoke thus : "In our opinion, the proper form of decree is to direct specific performance between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on his title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff.[4]

50. Receiver, appointment of.—In a suit for specific performance of a contract of sale, it is permissible to appoint a receiver.[5]

51. Clause (c)—Scope and construction.—The word "defendant" at the end stands in point of sense, for some such words as "original contracting party from whom that title is derived". The rule is a consequence of the equitable doctrine which regards a purchaser as acquiring as soon as the contract is complete, the rights of an owner against the vendor and all persons not being purchasers for value without notice of the contract, and not claiming under an independent title adverse to the vendors.[6] The clause applies to cases where suit is not brought against the contracting party but against another whose title has been displaced by the former. Where a title is liable to be displaced, it is immaterial that the title is antecedent to the contract and the plaintiff had notice of it. The contractual title prevails over the prior title *ex lege*, the case, therefore, strictly speaking, is not of specific performance.[7] The clause relates only to the rights to the specific performance of the contract against a third person claiming title and notice to the question of the right to bring a suit for recovery of possession against the persons not parties to the contract.[8] It undoubtedly applies to many cases in which a decree for specific performance has been given even against minor members of an undivided family, when the contract was for sale of the land for family necessity. In such a case the manager of the family has a right to displace the title of the other members in the family property when it is requisite to do so for purpose of family necessity.[9]

52. Contract.—So far, and only in so far, as the contract by the guardian embodies the personal Hindu law liability of the minor is it enforceable

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1. Kafiladdin *v.* Samiraddia, 129 I. C. 869: A. I. R. 1931 Cal. 67 : C. W. N. 691; Gaurishankar *v.* Ibrahim, A.I.R. 1929 Nag. 298; Madhawarappu *v.* Madhawarappu, A. I. R. 1935 Mad. 336: 1938 M. W. N. 185; Subiah Pillai *v.* Vellapa, 22 M. L. J. 124: 13 I. C. 176: 1911 M. W. N. 560; Gudar *v.* Gundala, 25 I. C. 973: 1 L. W, 879.
2. A. I R. 1932 All. 694 at p. 695.
3. (1954) 1 M.L J. 60 at p. 68: 1954 S.C.J. 23: A. I. R. 1954 S. C. 75.
4. Durga Prasad *v.* Deep Chand, (1954) 1 M. L. J. 60 at p. 68: 1954 S. C. J. 23 (Kafiladdia *v.* Somiraddin, 34 C. W. N. 698: A. I. R. 1931 Cal. 67 approved); Fry, p. 90, Sec. 207; Potters *v.* Sanders. (1816) 67 E. R. 1057 foll.; K. P. Tewari *v.* Baiju, I.L. R. (1952) 31 Pat. 269.
5. Chokalingam *v.* Pichappa, 22 L.W. 579.
6. Pollock and Mulla, 7th Ed., p. 717.
7. Collett, *Specific Relief Act*, Sec. 27.
8. Rangayya *v.* Subramania, I. L. R. 49 Mad. 365 (F.B.): 40 I.C. 429: 32 M.L.J. 575: 5 L.W. 797.
9. Bappu *v.* V. A. Annamalai Chettiar, A.I.R. 1923 Mad. 313 at p. 314 : 72 I.C. 42: 44 M. L. J. 226 : 17 L. W. 364: 1923 M.W.N. 218: 32 M. L. T. 253; *see* also Narayan Chetty *v.* Muthiah Chetty, I. L. R. 47 Mad. 692: 80 I. C. 658: A. I. R. 1924 Mad. 680 : 1924 M.W.N. 482: 46 M.L.J. 575 : 20 L. W. 103: 34 M.L.T. 350; Bhagwan Bhan *v.* Krishnaji, 58 I. C. 335 : 22 Bom. L. R. 997 : I. L. R. 44 44 Bom. 967.

against the minor and in so far as it goes beyond that it comes under the general rule that a guardian cannot bind his ward by a personal covenant. The principle is clear. By such a restricted covenant the guardian is not laying on the minor any greater burden that he already has to bear under his personal law and, therefore, to enforce the covenant by the guardians is merely to enforce a liability which the minor has *aliunde* to carry. Now in the present case, in which it is sought to hold the minor liable for specific performance of a contract by his guardian to sell his property, it is obvious that the covenant goes beyond the personal Hindu law liability for the minor. Hindu law does not compel him to discharge debts for necessary purposes by contracting to sell his property ; it merely compels him to discharge the debts ; it does not lay down the method in which he shall discharge or restrict him to any one method : it is not concerned with what method he adopts, provided the debts are discharged.

Section 27 (*b*) (old), Specific Relief Act, presupposes valid contract. But, if the original agreement itself is void and unenforceable against the minors, it follows, as held by the learned Judges of the Patna High Court in *Abdul Haq* v. *Mohammad Yahya Khan*,[1] that it cannot be enforced against the subsequent transferee from the guardian.[2]

53. Clause (d)—Principle.—The amalgamated company is not allowed to exercise powers acquired by means of agreements with its component companies, except upon the term of complying with those agreements, provided they are such as the amalgamated company would itself have been bound by, if it had entered into them.[3] The clause appears to ignore the accepted doctrine as to novation ; it does not say, however, that the original debtor company (which may survive a pretty long time for the purpose of winding up) is released without the assent of the creditor, which would indeed be a startling new departure.[4]

54. Clause (e)—Scope.—This clause is not intended to apply to contracts to take shares but only to contracts for the working purposes of the company such as would be contract for the supply of machinery for making ice.[5]

55. Ratified or adopted contract.—Mere acting on or taking benefit of *free incorporation* contract does not bind the company to fulfil an obligation.[6] But Sir Edward Fry's statement is that "the company itself after incorporation must either have taken the benefit of the contract or have otherwise recognized it as a contract binding on them", and "the contract must be for something warranted by the terms of the incorporation".[7] There is, however, nothing in law to compel a company to adopt promoter's contracts.[8]

A contract would be enforceable against a company if the company accepts the contract and signifies its acceptance to the other party to the contract.

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1. A.I.R. 1924 Pat. 81.
2. Ramakrishna Reddiar *v.* Kasivasi Chidambara Swamigal, A.I.R. 1928 Mad. 407 at pp. 408, 412 : 54 M. L. J. 412.
3. Lindsay *v.* G. N. Ry. Co., (1853) 10 Hare 664.
4. Pollock and Mulla, 7th Ed., p. 717.
5. Imperial Ice Manufacturing Co. *v.* Manchersaw, I.L.R. 13 Bom. 415.
6. Hardson *v.* Beliliss, (1901) A.C 118; *In re* Rotherham Alum Co., (1884) 25 Ch. D. 103.
7. Pollock and Mulla, Sec. 27, Secs. 250-255.
8. Preston *v.* Liverpool Ry. Co., 5 H.L.C. 605.

New

Discretion and Powers of Court

20. Discretion as to decreeing specific performance.—(1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so ; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance—

(*a*) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant ; or

Old

(*c*) *Of the discretion of the Court*

22. Discretion as to decreeing specific performance.—The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so ; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance ;

I.—Where the circumstances under which a contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

Illustrations

(a) A, *a tenant for life of certain property, assigns his interest therein to* B. C *contracts to buy and* B *contracts to sell that interest. Before the contract is completed* A *receives a mortal injury from the effect of which he dies the day after the contract is executed. If* B *and* C *were equally ignorant or equally aware of the fact,* B *is entitled to specific performance of the contract. If* B *knew the fact and* C *did not, specific performance of the contract should be refused to* B.

(b) A *contracts to sell to* B *the interest of* C *in certain stock-in-trade.*

New

(*b*) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff ;

(*c*) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or

Old

It is stipulated that the sale shall stand good, even though it should turn out that C's *interest is worth nothing. In fact the value of* C's *interest depends on the result of certain partnership accounts on which he is heavily in debt to his partners. This indebtedness is known to* A, *but not to* B. *Specific performance of the contract should be refused to* A.

(c) A *contracts to sell, and* B *contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment.* B *does not know of this circumstance, and* A *conceals it from him. Specific performance of the contract should be refused to* A.

(d) A's *property is put up to auction.* B *requests* C, A's *attorney, to bid for him.* C *does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer, and cease to compete. The lot is knocked down to* B *at a low price. Specific performance of the contract should bc refused to* B.

II.—Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

(e) A *is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to* B. A *forgetting the condition, contracts before the expiration of the twenty-five years, to sell the land to* C. *Here the enforcement of the contract would operate so harshly on* A, *that the Court will not compel its specific performance in favour of* C.

(f) A *and* B, *trustees, join their beneficiary,* C, *in a contract to sell thc trust estate to* D, *and personally agree to exonerate the estate from heavy encumbrances to which it is subjeet,*

New

improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Cl. (*a*) or hardship within the meaning of Cl. (*b*).

Explanation 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of Cl. (*b*) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

Old

The purchase-money is not nearly enough to discharge those encumbrances though at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(g) A, *the owner of an estate, contracts to sell it to* B, *and stipulates that he* (A) *shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be a part of it. Specific performance of the contract should be refused to* B *unless he waives his claim to the unknown property.*

(h) A *contracts with* B *to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that* A *cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to* B, *even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.*

(i) A, *a lessee of mines, contracts with* B, *his lessor, that at any time during the continuance of the lease,* B *may give notice of his desire to take the machinery and plan used in and about the mines and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specified performance of it should be refused to* B.

(j) A *contracts to buy certain land from* B. *The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to* B.

(k) A *contracts with* B *to buy from* B's *manufactory, and not elsewhere, all the goods of a certain class used by* A *in his trade. The Court cannot compel* B *to supply the goods; but if he does not supply them,* A *may be ruined, unless he is allowed to buy them*

New

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Old

elsewhere. Specific performance of the contract should be refused to B.

The following is the case in which the Court may properly exercise a discretion to decree specific performance.

III.—Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustration

A *sells land to a railway company, who contracts to execute certain work for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of* A.

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1. Legislative changes.—This section corresponds to previous Sec. 22. First paragraph of previous Sec. 22 has been reproduced and numbered as sub-section (1). The second paragraph of previous Sec. 22 has been reproduced and numbered as sub-section (2). Item I of previous Sec. 22 has been deleted and replaced by sub-section (2) (*a*) of the new Sec. 20. The language of Item II of the old Sec. 22 has been verbatim reproduced in sub-section (2) (*b*) of the new Sec. 20.

Sub-section (2) (*c*) of the present Sec. 20 and the Expls. I and II to sub-section (2) have been newly introduced.

Item III of the old Sec. 22 has been reproduced as sub-section (3) of the present Sec. 20. The words "in any case" have been inserted after the words "specific performance" and before the words "where plaintiff". Sub-section (4) has been newly added to the present Sec. 20.

Illustrations to Items I, II and III of the old Sec. 22 have been deleted.

2. Reasons for the change.—The Law Commission of India in its Report has pointed out with its characteristic lucidity : "Clause 1 of Sec. 22 (old), as it stands, is somewhat vague. If the circumstances mentioned in the clause are such as render the contract voidable, it is open to the party who has the option, to avoid it and no question of specific performance may thereafter arise. There are, however, certain circumstances in which a court of equity refuses to decree specific performance, on the ground of unfairness, even though in law the circumstances are not such as to render the contract voidable. Such unfairness may be due either to the terms of the contract or the conduct of the parties, or other circumstances, existing at the time of the contract. Thus, the Court will not decree specific performance to compel the defendant to perform an act which would inevitably subject him to some penal consequences, such as, an action for damages or to a criminal prosecution. Even if the performance of the agreement does not involve a breach of trust, a court of equity is always reluctant to enforce an agreement against trustees which may injuriously affect their interest or that of their beneficiaries. A contract of sale, therefore, made by trustees in an unbusinesslike manner will not generally be enforced, unless it is clearly established that the price was adequate. The general doctrine in regard to contracts the performance of which involves a breach of trust or an unlawful act applies not only to technical trustees but also to all persons

occupying a fiduciary relation or position of confidence towards others including agents, directors of corporations, assignees in bankruptcy and the like. We therefore suggest that the scope of Cl. (*i*) should be classified by providing that the unfair advantage referred to in this clause may be due to circumstances which may not be sufficient to render the contract voidable. It is not possible to exhaustively enumerate the grounds of unfairness or of hardship mentioned in Cl. (*ii*). As stated by Pomeroy,[1] 'the variety of forms of hardship and unfairness is infinite; the courts, therefore, in dealing with these subjects have wisely refrained from limiting themselves by special rules. In this particular field precedents are of comparatively little value.' There are however certain circumstances which, by themselves, have been held not to constitute an unfair advantage or hardship. Thus the fact that the contract is onerous to the defendant or improvident in nature,[2] or that there is inadequacy of consideration,[3] will not be circumstances falling within Cl. (*ii*). It would be advisable to add an explanation to the section making this position clear. It is not clear from Cl. (*ii*) at what point of time the circumstances causing the hardship must exist in order to be a ground for refusing specific performance. In England it has been established that as a general rule hardship, to operate as a ground of defence must have existed at the time of the contract, and not arisen subsequently from a change of circumstances.[4] In India, too, it has been held that circumstances which have subsequently arisen such as a rise in prices, owing to external circumstances, like war conditions,[5] or the results of litigation,[6] do not constitute 'hardship' which can be relieved against, under Cl. (*ii*). A subsequent change of conditions causing hardship may, however, be a ground for refusing specific performance where it has been brought about by the acts of the plaintiff.[7] We recommended that the foregoing principles be incorporated in an explanation to the section.

"It is not clear from the Act, to what extent if at all the doctrine of mutuality is applicable in India. The principle of mutuality of remedy is thus stated by Fry[8] :

> 'A contract to be specifically enforced by the Court must, as a general rule, be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is generally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.'

"The doctrine has been criticised both in England[9] and U.S.A.[10] According to Ashburner,[11] the doctrine of want of mutuality as formulated by Fry

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1. *Specific Performance*, p. 126.
2. Davis *v.* Maung Shwe Saha Goh, I.L.R. 38 Cal. 805 (P. C.); Ram Sunder *v.* K.N. Sen Choudhury. A.I.R. 1927 Cal. 889: 49 Am. Juris. p. 75.
3. Haywood *v.* Cope. (1858) 25 Beav. 140 at pp. 150-53; C.Narasingh Row *v.* Rangaswami Theran, 35 I. C. 871 ; Pichai Moideen Rowther *v.* Chaturbhuja Das Kaushal Das & Sons, A.I.R. 1933 Mad. 736.
4. Halsbury, 2nd Ed., Vol. 31, para. 420; Fry on *Specific Performance*, 6th Ed., pp. 199, 202.
5. S. V. Sankaralinga Nadar *v.* S. Ratnaswami Nadar, A. I. R. 1952 Mad. 389 at p. 393.
6. S. Ramalinga Pillai *v.* G. R. Jagdammal, A.I.R. 1951 Mad. 612; Shib Lal *v.* Collector of Bareilly, I.L.R. 16 All. 423.
7. Halsbury, 2nd Ed., Vol. 31, para. 3, p. 420: 49 Am. Juris. p. 78.
8. *Specific Performance*, 6th Ed., p. 219.
9. Ashburner, *Equity*. 2nd Ed., p. 405.
10. 49 Am. Juris., Sec. 35. p. 49; Williston on *Contracts*, Secs. 1439, 1440.
11. *Equity*, 2nd Ed., p. 405.

'appears to be an unfortunate invention of Lord Redesdale and although it has often been spoken of with respect it does not appear to form the *ratio decidendi* of any line of cases'. He points out that the illustrations given by Fry in support of his proposition do not support him. In an illuminating article on the subject, Ames[1] strongly criticizes the rule as generally stated, and sets out not less than eight propositions, each one of which is at variance with the statement just quoted. In India, it was at one time thought[2] that the doctrine of mutuality had been rejected by the Indian Legislature on the ground of its artificiality. But the Privy Cauncil applies it in *Mir Sarwarjan* v. *Fakruddin Mohammed*,[3] and observed that since it was not within the competence of a manager or guardian to bind the minor or his estate by a contract for the purchase of immoveable property, the minor also could not enforce such a contract, after attaining majority, because there was not want of mutuality. In the aforesaid decision their Lordships of the Judicial Committee[4] did not examine the provisions of the Specific Relief Act or consider the question whether there was any reason for applying the doctrine of mutuality under it. After this decision, the question has come up for consideration before the High Courts on several occasions, particularly with reference to contracts for the purchase or sale of immoveable property entered into by guardians on behalf of minors. The decisions are, by no means, uniform and the attempt of the courts has, of late, been to avoid as far as possible the application of the doctrine. In cases governed by the Hindu law after a later decision of the Judicial Committee,[5] it is settled that a guardian is competent to alienate the property of a minor for purposes of legal necessity or for the benefit of the estate and that, accordingly, such a contract is specifically enforceable both by and against the minor.[6] The Full Bench of the Andhra High Court has extended this doctrine to contracts for purchase of property entered into on behalf of a Hindu minor, though the Court conceded that 'It may perhaps be more difficult in the case of a purchase by a guardian on behalf of a minor to sustain it on the ground of necessity or benefit . . . .'

"In any event, where the personal law of a minor enables a valid contract to be made by a guardian on behalf of the minor, no question of mutuality really arises, for the contract is binding on both parties. The position is the same where such a power is conferred by or under other law, e.g. the Guardians and Wards Act, 1890.[7] Now contracts made by the guardian of a Hindu minor, whether for purposes of legal necessity or not, have ceased to create any problem which might necessitate the application of the doctrine of mutuality, for the Hindu Minority and Guardianship Act, 1956 (XXXII of 1956), lays down the conditions under which only the guardian can bind the minor's property, and further enacts a specific prohibition that in no case can the guardian bind the minor by a personal covenant.[8] There exists no such provision in regard to persons other than Hindus. But even under the Mohammedan law, it has been held that a contract for the sale of a Mohammedan minor's property by his *de jure* guardian is enforceable both by and against the minor, if it is for the minor's benefit.[9] There is still however scope

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1. Mutuality in Specific Performance, 3 Columbia Law Rev. 1.
2. Whitley-Stokes, *Anglo-Indian Codes*, Vol. I, p. 931; Krishnasami *v.* Sundarappayar, I. L. R. 18 Mad. 415.
3. I. L. R. 39 Cal. 232 (P.C.).
4. *Ibid*. at p. 237.
5. Sri Kakulam Subramanyam *v.* Kurra Subba Rao, A.I.R. 1948 P.C. 95.
6. Sitarama Rao *v.* Venkatarama Reddiar, A. I. R. 1956 Mad. 261 (F.B.); Surya Prakasam *v.* Gangaraju, A. I. R. 1956 A. P. 33 at p. 40 (F.B.).
7. Babu Ram *v.* Saidunissa, I.L.R. (1913) 35 All. 499.
8. Section 8 (1).
9. Imambandi *v.* Haji Mutsaddi, A. I. R. 1918 P.C. 11.

for the application of the rule in *Sarwarjan*'s case,[1] in the case of contracts for the purchase of property on behalf of a minor which cannot be said to be for the benefit of the minor.[2] We do not consider it necessary to import the doctrine of mutuality into our codified law of specific performance to cover such cases. On the contrary, we would do away with the doctrine in *Sarwarjan*'s case[3] by inserting in Sec. 22, a provision embodying the law as stated in the American Restatement[4] as follows :

> 'The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party.'

"There will thus be no room for the application of the doctrine of mutuality in any suit for specific performance."[5]

"The doctrine that a contract to be specifically enforceable must as a general rule be mutual has no very little scope for applications in India. The doctrine is now being abolished and in its place, the following principle is laid down, namely, that the fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party. Sub-clause (4) gives effect to this new principle.[6]

3. **Applicability.**—This section gives some idea of the circumstances in which the discretion to grant specific relief should not be exercised. These circumstances do not exist in the case of an idol who is above all earthly hardship and against whom a decree for specific performance can be granted. Where in consideration of rendering personal services, by doing *pairvi* in a case, *K* promised to transfer on success in the case a portion of the property in suit to *B*, and *B* did the *pairvi*, and the case was won. It was held that *B* was entitled to get specific performance not only against *K*, but also against the idol in suit to whom, in order to defeat *B*'s claim, *K* dedicated the whole of the property in suit. There is nothing to show that a promise to afford future personal service is not good consideration. The mere fact that specific performance of such a contract cannot be enforced does not make the contract bad. Section 25 when it provides that a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, is not necessarily void, is stating an exception to the general rule that a promise made without any consideration coming from the other side is void. Obviously if the personal service had already been voluntarily performed, there is no consideration for the promise made at a subsequent date to reward it. That which has voluntarily been done in the past cannot be made consideration for a promise to do something in future. There must be another promise as consideration for that promise. *Basant Kumar* v. *Madan Mohan*[7] laid down no such general principle as appellant's learned counsel has tried to set up. It may be noted that there was in that case no promise at all on the part of the plaintiff to do anything at all in the future for the defendant. The defendant merely remarked that he might possibly do something in the future. Obviously there was no promise on the part of the plaintiff which could be consideration for the promise coming from the defendant.

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1. I.L.R. 39 Cal. 232 (P.C.).
2. Amir Ahmad *v.* Meer Nizam Ali, A.I.R. 1952 Hyd. 120 (F.B.).
3. I.L.R. 39 Cal. 232 (P. C.).
4. Contract, Sec. 372 (1).
5. Law Commission of India, Ninth Report (Specific Relief Act, 1877), pp. 22-27.
6. Notes on Clauses, p. 9.
7. 23 C.W.N. 639: A. I. R. 1919 Cal. 765: 46 I.C. 282.

The mere fact that in the nature of things one of the promisors is bound to perform his part of the agreement first does not invalidate the contract. So long as there is a promise coming from each side and each side promises a thing which can be done, and can legally be done there is consideration.[1]

This section applies only when the plaintiff sues for the specific performance of the contract, it matters little whether in such a suit he claims other alternative reliefs in his plaint; what is absolutely necessary in order to attract the provisions of this section is that the suit should essentially be of a specific performance of the contract. Thus where the plaintiff frames his suit for the recovery of damages, refund of money or the like, such a suit cannot be termed as a suit for specific performance of contract and is not covered by this section. This section also applies to those cases where the plaintiff initially claims specific performance of contract but at a later stage by seeking amendment he converts it into a suit for money or damages or for compensation by giving up his claim for specific performance of the contract altogether. But where the plaintiff initially frames his suit for damages for a breach of contract, but does not frame it as a suit for specific performance of contract and claims no relief in this regard, he subsequently cannot by seeking amendment in the plaint and including the relief of specific performance of contract convert it to one for specific performance, and in such a case the provisions of Sec. 21 (new) have no application.

4 Scope.—Section 22 of the Specific Relief Act (which corresponds to Sec. 20 of the present Act) lays down at the outset that the jurisdiction to decree specific performance is discretionary. It then sets out the nature of such discretion. It says that the Court is not bound to grant such relief merely because it is lawful to do so. Such a discretion, however, is not to be arbitrarily exercised. It must be sound and reasonable and guided by judicial principles. Such exercise of discretion is capable of correction by a court of appeal. The section then specifies in three successive paragraphs circumstances under the first two of which the Court may properly exercise a discretion not to decree specific performance, whilst under the third, it may appropriately give a decree. It is, however, plain that the circumstances stated in the said three provisions are merely illustrative of the general principle embodied in the first paragraph of the section and are not intended to be exhaustive. It is well settled that it would neither be possible nor desirable to lay down any hard and fast rules regarding the principles on which discretion can be exercised. Nor it is possible to exhaustively define the circumstances in which the equitable relief could or could not be granted.

It is well to remember that there is a presumption that specific performance is the proper remedy on a contract to convey immoveable property. Usually specific performance is allowed in case of immoveable property. But such a presumption is not absolute and is liable to be rebutted. No one can claim this equitable relief as a matter of right. Nor the Court would grant it as a matter of course. Each case has to be considered in the light of its own facts and circumstances. One of the grounds on which this equitable relief sometimes is denied is delay. Where delay which does not act as a bar under any statute of limitation has been pleaded as a defence, its validity has necessarily to be tried on principles substantially equitable. In order to consider such a plea in defence, the pleading in that behalf must expressly state the

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1. Sri Mahadeoji *v.* Baldeo Prasad, A. I. R. 1943 Oudh 89 at p. 90 : 1942 O. W. N. 662.

facts necessary for making out a defence on the ground of delay. The principles stated in Sec. 22 have to be kept in view while considering the grant or refusal of this equitable relief. It may, however, be noted that laches or waiver is not one of the grounds mentioned in Sec. 22 as disentitling the plaintiff to specific performance. But in the exercise of the discretion the conduct of the plaintiff also is to be considered. If the delay is caused in taking suitable action which amounts to laches or waiver on the part of the plaintiff he would not be entitled to the equitable relief.

Now the doctrine of laches is not an arbitrary or technical doctrine. It is only where it would be practically unjust to give a remedy either because the party has by its conduct done that which might fully be regarded as equivalent to waiver of it or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, that the lapse of time or delay would be most material. In all other cases, where immoveable property is concerned ordinarily the relief should be granted. Two circumstances always important in cases are the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy in other words, delay has two aspects. It may lead to a change in the thing sold or it may imply acquiescence so as to bar a plaintiff's remedy. It is very important to keep these two things separate when the consequences of delay have to be considered in a given case.

The Supreme Court in *Satyanarayana* v. *Yelloji Rao*,[1] may say so with respect, tersely put the law as follows :

> "The result of the aforesaid discussion of the case-law may be briefly stated thus : While in England mere delay or laches may be a ground for refusing to give a relief of specific performance in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a court to refuse such a relief. But as in England so in India proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression 'waiver' in its legally accepted sense, namely, waiver is contractual and may constitute a cause of action, it is an agreement to release or not to assert a right.[2] It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be equitable to give him such a relief."

In *Yelloji Rao* v. *Satyanarayana*,[3] a Bench of the Andhra High Court was concerned with similar set of facts and the question of law relating thereto. Their Lordships held that contracts relating to immoveable property, where time is not of the essence of the contract, mere delay with nothing

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1. A.I.R. 1965 S. C. 1405.
2. *See* Dawson's Bank Ltd. *v.* Nippon Menkwa Kabushika Kaisha, 62 I. A. 100 at p. 108 : A. I. R. 1935 P.C. 79.
3. (1964) 1 Andh. W. R. 312.

more cannot prejudice the claim. It is necessary to note the length of delay and the nature of the acts done during the interval and motive behind both. If the delay was not unreasonable and if the acts done during the interval resulting in the change of circumstances are far from being honest the plaintiff's claim cannot be prejudiced.

In that case it was found that : "Even though on the evidence it is clear that the change in the *status quo ante* has flown from the plaintiff's word, deed or inaction, but is attributable to the rash act of the defendant who was not at all *bona fide* in raising the structure. There was no occasion for the Court below to exercise discretion in favour of the defendant. If the change in circumstances did bring any hardship on the defendant, it is his self-induced hardship and since he has taken his chances to build he must take the risk of its being pulled down."

The following decisions of the Andhra High Court are also to the same effect.[1] The sub-section of the present section first set out the general rule, while sub-section (2) specifies (1) circumstances under which the Court may properly exercise a discretion not to decree specific performance, under sub-section (3) of the present section the Court may appropriately give a decree. The circumstances so stated are merely illustrative of the general principle embodied in sub-section (3) of the present section and the enumeration is not exhaustive. Sub-section (4) says that the Court shall not refuse specific performance of a contract merely on the ground that the contract is not specifically enforceable at the instance of the other party as pointed out by Mr. Justice Story in his classical treatise on Equity Jurisprudence, it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases; and define exhaustively the special circumstances under which relief may properly be granted or withheld. It would be waste of time to attempt to limit the principles or the exceptions which the complicated transactions of the parties and the ever-changing habits of society, may at different times and under different circumstances, require the Court to recognize or consider.[2]

It seems, however, that there may be cases which cannot be brought within the four corners of any of the provisions of the Indian Contract Act as to the invalidity or voidability of agreements, but are nevertheless cases in which a court of equity may properly refuse to exercise its jurisdiction under this Act. Section 20 (new) of the Specific Relief Act itself shows that this is so and both principle and authority appear to point to the same conclusion. There are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of equality and fairness in the contract which are essential in order that the Court may exercise its extraordinary jurisdiction in specific performance. In judging of the fairness of a contract the Court will look not merely at the terms of the contract itself, but at all the surrounding circumstances and it is enough, generally speaking, to induce the Court to refuse performance, that there are any circumstances

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1. Butchiraju *v.* Sri Ranga Satyanarayana, A.I.R. 1967 A.P. 69; T. Venkata Subrahmanyam *v.* Viswanadharaju, A. I. R. 1968 A. P. 190 and M. A. H. Khan *v.* A. M. Khadri, A. I. R. 1972 A.P. 178; Damacharla Venkata Seshaiah *v.* Damacharla Venkayya, A.I.R. 1974 A. P. 193 at pp. 195-96: (1973) 2 Andh. W.R. 357.
2. Gaj Kumar Chand *v.* Lachman Ram, 14 C. L. J. 627 at p. 634.

about the making of the contract which render it not fair and honest to call for the execution.[1]

Clauses (*a*), (*b*) and (*c*) of sub-section (2) of this sectio.. contain cases in which the Court will properly decline to exer(ise its jurisdiction ; under Cl. (*a*) because to do so would result in an unfair or inequitable gain to the plaintiff in an unfair loss to the defendant. In England a party cannot call upon a court of equity for a specific performance unless he has shown himself ready, desirous, prompt and eager. It is true that this rule of a law is not in so many words expressed in this section but sub-section (2) of this section which gives the Court a judicial discretion must be read as implying and including it. Sub-sectiou (2) which points out the cases in which specific performance may not be decreed is not intended to be exhaustive but is merely illustrative of the general principle, which is embodied in sub-section (1).[2]

The two explanations based on case-law seek to explain in what cases unfair advantages or hardship shall not be presumed and with reference to what circumstances hardship should ordinarily be determined.

5. Discretionary.—The language of the section makes it absolutely clear that the jurisdiction of the Court to grant the specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. Such discretion, however, is not to be arbitrarily exercised but must be based on sound, reasonable an : judicial principles capable of correction by a court of appeal.[3] The discretion of the Court has to be exercised on sound judicial principles and not arbitrarily. It is well settled that the second Appellate Court is competent to interfere in the exercise of discretion under Sec. 20 of the Act, where the discretion has not been properly xercised. Where the Court granting decree of specific performance had not considered the question of applicability of Cl. (*a*) of sub-section (1) of Sec. 14 of the Act it was held that the discretion had not been properly exercised and it was a case in which the High Court should properly interfere.[4] As Story says, "In truth, the exercise of this whole branch of equity jurisprudence, respecting the rescission and specific performance of contracts, is a matter of discretion in the Court ; nor indeed, of arbitrary and capricious discretion, dependent upon the mere pleasure of the Judge, but of that sound and reasonable discretion which governs itself, as far as it may be, by general rules and principles ; but at the same time which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties.

Discretion has not to be exercised arbitrarily.

"It is not possible to lay down any rules and principles which are of absolute obligation and authority to all cases, and therefore, it would be a waste of time to attempt to limit the principles, or the exceptions which the

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1. Govinda Chandra Chakravarti *v.* Nand Kumar Das, 22 I.C. 910 : 18 C. W. N. 689.
2. Collett's *Specific Relief Act*, p. 201.
3. Sankaralinga Nadar *v.* Ratnaswami Nadar, (1952) 1 M. L. J. 44 at p. 50: A. I. R. 1952 Mad. 389 ; Rani Bai *v.* Kimji Hirji, A.I.R. 1951 Cut. 86 at p. 86; M. Vera Raghavish *v.* M. China Veeriah, A.I.R. 1975 A.P. 350 at 358 : (1973) 1 Andh. W. R. 394 ; Rajendra KumarBhandari *v.* Poosammal, A.I.R. 1975 Mad. 379 at p. 383: (1975) 2 M.L. J. 59—The exercise of discretion either in matter of grant or refusal of decrees for specific performance ou..ht to be made judiciously and judicially, and, as Sec. 20 (1) says it ought not to be arbitrarily or unreasonably exercised.
4. Dave Ramshankar Jivatram *v.* Bai Kailasgauri, A. I. R. 1974 Guj. 69 at p. 73.

complicated transactions of the parties, and the ever-changing habits of society may at different times, require the Court to recognize and consider. But from decided cases the following circumstances, conditions and incidents may be deduced to the factors to be taken into consideration 'the contract must be certain, unambiguous, mutual and upon a valuable consideration ; it must be perfectly fair in all its parts ; free from any misrepresentation, imposition or surprise ; not an unconscionable or hard bargain ; and its performance not oppressive upon the defendant ; finally it must be capable of specific execution through a decree of the Court'."[1]

Mere delay extending up to the period f limitation cannot possibly be a reason for the Court to exercise its discretion against giving a relief of specific performance.[2]

Sub-section (2) of Sec. 20 (new) enumerates a few illustrations where the Court may properly exercise discretion not to decree specific performance. Clause (*c*) thereof says that where the defendant entered into the contract under the circumstances which though not rendering the contract voidable makes it inequitable to enforce specific performance is one such instance.[3]

In the above-noted case, the vendor-father and his son constituted a joint family. The father entered into an agreement to sell the joint-family property to the purchaser. The purpose of the proposed sale was to discharge the debts and to acquire other properties. There was no evidence of any attempt of the father to acquire other properties. It was found that the majority of the debts were not true and that even the true debts were *avyavaharika* and not binding on the son. The plaintiff who was no other than the vendor's elder brother's son must have been in the know of the things. The agreement itself was antedated. It was held that it was a case where specific performance should be refused.[4]

In *Bikram Kishore Parida* v. *Benudhar Jena*,[5] in the prayer in the plaint plaintiffs asked for transfer of shares as resolved by the Board of Directors and approved by the Government. The transfer of shares was subject to the decision of the Board of Directors and also subject to the terms of memorandum of association. In the memorandum of association, it was provided that without the sanction of the Governor no share could be transferred and Government could not release its share only in favour of the entrepreneur.

6. Indian law.—The Indian law is to the same effect. Section 20 of the Specific Relief Act, 1963, provides that the discretion is one to be exercised on four judicial principles and capable of correction by a court of appeal.[6] It may be noted that laches is not one of the grounds mentioned in it as disentitling a party to specific performance.[7]

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1. Pomeroy, *Sp. Com.*. Secs. 36, 38.
2. Deenanath *v.* Chunnilal, A. I. R. 1975 Raj. 69 at p. 72: 1974 R.L.W. 383.
3. M. Veera Raghaviah *v.* M. China Veeraiah, A.I. R. 1975 A. P. 350 at p. 358: (1973) 1 Andh. W.R. 394.
4. *See* also Satyanarayana *v.* Yelloji Rao, A.I.R. 1965 S.C. 1405; Subbarayudu *v.* Tatayya, 1937 M. W. N. 1158 and K. Venkatasubbayya *v.* K. Venkateswaru, A.I.R. 1971 A.P. 279.
5. A.I.R. 1976 Orissa 4 at p. 8: I. L. R. (1975) Cut. 553.
6. Sankaralinga Nadar *v.* Ratnaswami Nadar, (1952) 1 M. L. J. 44 at p. 50: A.I.R. 1952 Mad. 389 ; Rani Bai *v.* Kimji Hirjee, A. I. R. 1951 Cut. 86 at p. 86.
7. Suryaprakasarayudu *v.* Lakshminarasimha, (1914) 26 M.L.J. 518 at p. 522.

Under Sec. 20 of the Specific Relief Act, 1963, the jurisdiction to decree specific performance is discretionary and that the Court is not bound to grant such relief merely because it is lawful to do so. But the discretion of the Court is not arbitrary but sound and reasonable guided by the judicial principles and capable of correction by a court of appeal. In Halsbury's *Laws of England*,[1] it is stated that "there may be independent covenants in the same contract or deed, non-performance of one of which does not prevent enforcement of the others". Applying the above principle, it was ruled in *S. Venkateswara Rao* v. *M. Subbayya*[2] that if in respect of the second contract a false claim was advanced it would not entitle the Court to dismiss the claim on the first contract which was proved to be true, valid and binding. It was not justified to dismiss the suit for specific performance on the ground that the plaintiff did not come with clean hands.

The old principle that the specific performance of a contract is discretionary relief is embodied in Sec. 20 of the Specific Relief Act, 1963. The latter part of this section enumerates certain principles which the Court has to take into consideration in exercising this discretion. Obviously, however, these instances are only illustrative and do not purport or intend to give an exhaustive list of the circumstances which have to be taken into consideration. The scope of variation in circumstances from case to case is almost infinite and it is well-nigh impossible to lay down any exhaustive rule as to the circumstances in which specific performance ought to be granted in the exercise of the Court's discretion. One principle that may be safely enunciated for the guidance of courts in such matters is the principle that in giving equitable relief, the Court ought not to act in an inequitable manner. If, therefore, on a consideration of all the circumstances in the case, the Court thinks that it will be inequitable to grant the relief asked for, it should not give the relief.[3]

Where Court may exercise its discretion by refusing specific performance.

The explanation to Sec. 10 of the Act provides that, unless and until the contrary is proved, the Court shall presume (*i*) that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money. Thus, the presumption which arises in respect of breach of a contract to transfer immoveable property, namely, that it cannot be adequately relieved by compensation in money, is a rebuttable presumption. Where the plaintiff claiming specific performance of an immoveable property on the basis of agreement to reconvey admittedly does not require the suit property for her own self but only wants to sell away the suit property the presumption is rebutted. In such a case the Court may not grant specific performance of the contract to transfer the immoveable property although there is a breach of such contract. The breach would be adequately relieved by compensation in money.[4]

7. Discretionary character of the remedy—Meaning and scope.—Wherever a contract is unenforceable at law, ordinarily it is unenforceable in equity. Such defences, as fraud, duress, mistake, illegality, which would be ground for a defence, either legal or equitable, to an action at law are *a fortiori* ground for refusing the equitable relief of specific performance. But, conversely, there are some contracts which though they may be enforceable

1. Second Edition (Hailsham Edition), Vol. 31, p. 391.
2. A.I.R. 1959 A. P. 99 at p. 100.
3. *See* Gostho Behari Sadhu Khan *v.* Omiyo Prosad Mullick, A. I. R. 1960 Cal. 361 at p. 368.
4. Dave Ramshankar Jivatram *v.* Bai Kailasgauri, A. I. R. 1974 Guj. 69 at p. 73.

at law, and may relate to a subject-matter of which equity ordinarily takes jurisdiction are denied equitable relief. For this reason the jurisdiction of equity is generally called discretionary. More exactly it may be said that wherever a contract though legally valid is grossly unfair, or its enforcement opposed to good policy for any reason, equity will refuse to enforce it, and though certain kinds of unfairness may be classified, equity declines to make an exact inventory of what amounts to such unfairness or impropriety as will preclude relief, but leaves a borderland where the Court can consider the particular facts of each case and deal with it on its merits. In certain cases, though the circumstances may be insufficient to warrant rescission or cancellation, the Court in its discretion may refuse specific performance. So, if the contract is unconscionable in its terms, equity will not enforce it. A provision for liquidated damages does not preclude specific performance, and even a provision for an invalid penalty or forfeiture, since it does not ordinarily invalidate the entire contract, would not necessarily prevent enforcement by equity.

The relief for specific performance is an equitable relief and Sec. 20 of the Specific Relief Act, 1963, itself says that the jurisdiction to decree specific performance is discretionary and the Court is bound to grant such relief merely because it is lawful to do so. Of course, this discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a court of appeal. But these principles are not exhaustive and the Court's discretion in order to grant specific performance is not confined to them. In special cases when there are some good and reasonable grounds for not exercising this discretion in favour of the plaintiff, the Court will not hesitate to exercise that function against the plaintiff.[1]

A contract by which the defendant contracts to part with his future means of livelihood is looked upon with disfavour and will not be specifically enforced. Not only where performance of the plaintiff's contract would involve a breach by the defendant of a contract with a third person, as the plaintiff was aware when he entered into the contract but even where the agreement of the defendant with the third person was invalid as a contract both at law and in equity for uncertainty, equity has refused to aid the plaintiff because his conduct violated good morals.

Specific performance may be denied also if the hardship to the defendant or to third person will be out of all proportion to the value of the performance to the plaintiff. Appreciation or depreciation in value or other events subsequent to the formation of the contract will not ordinarily afford ground for refusing enforcement by equity even though they make the performance of the two parties unequal. But if the plaintiff was in default or guilty of gross laches, and the value of the property has materially changed, specific performance may be denied, since otherwise a plaintiff might endeavour to take a speculative advantage of the changes in value. Even apart from such default if the subsequent events though not amounting to such impossibility as would excuse at law are, nevertheless, of a kind which not only greatly change the value of one performance or other, but also could not reasonably have been anticipated when the contract was made, specific performance has in some cases been denied. If such events, however, while producing hardships which make it inequitable to decree performance of all the terms of the

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1. Ram Swarup Singh *v.* Mahabir Mahton, A. I. R. 1960 Pat. 235 at p. 236

contract, nevertheless do not affect its primary object, equity may enforce it with such modifications as justice requires.[1]

Specific performance is by no means an absolute right, but one which rests entirely on judicial discretion and always with reference to the facts of a particular case. Where a Trial Court has exercised its discretion in one way, the Appellate Court will not interfere, if it is established that the discretion has not been exercised perversely, arbitrarily or against judicial principles.[2]

A party is entitled to be released from a bargain, if he could show that the selected arbitrator was likely to show bias or by sufficient reason to suspect that he would act unfairly or that he had been guilty of continued unreasonable conduct. It is equally clear that the Supreme Court took the view that under such circumstances, a court should refuse to stay the hearing of a proceeding before it in exercise of its discretion under Sec. 34 of the Act. The question that then arises is whether a party cannot be released of the bargain, in such circumstances, in a proceeding under Sec. 20 of the Act on the ground that the power under Sec. 20 is not a matter of discretion as it is under Sec. 34 of the Act The answer to that question must be in the negative. After all, the question really is whether the term of the contract regarding the reference to a particular nominated arbitrator is one which should be specifically enforced under the circumstances of the case or not. It cannot be contended that relief of specific performance of contract is not a matter of discretion. There is no reason why the principle underlying Sec. 22 (old) of the Specific Relief Act, be not pressed into service for doing justice in such a case. Section 22, Cl. II provides that where the performance of the contract would involve more hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, the Court is not bound to grant the relief of specific performance merely because it is lawful to do so and the Court had the discretion to refuse to enforce that contract between the parties. If it is possible to avoid a contract on that basis in its entirety, it should be possible to avoid a part of contract also on the same basis provided that part is not inseparable from the other part. The plaintiff in this case is not trying to avoid the arbitration clause as a whole but is only trying to ensure that the arbitration should be fairly and justly done. *Held* that in case the plaintiff has succeeded in establishing reasonable apprehensions that the General Manager of the defendant corporation or his nominee may not act fairly and justly as arbitrator he was entitled to be released from the bargain even in the instant case.

It would amount to denial of natural justice if in a case of this nature, the party is forced to submit to the arbitration of a person who has not only gone biassed and became prejudiced against that party, but who has also expressed his opinion on the merits of the case against that party. In fact it may be a farce to allow the dispute to be decided by an arbitrator against whom such charges have been made and substantiated. A court cannot be said to act without jurisdiction under such circumstances in a case where charges of the nature enumerated above have been substantiated in refusing to refer the dispute to the arbitration of the person named in the agreement itself. If the decision of the arbitrator even if has resulted in an award, can be avoided on the ground of misconduct of the arbitrator in relation to the proceedings as provided for under Sec. 14 of the Act, there is no reason why at the initial stage before reference is actually made, the question whether the

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1. Williston on *Contracts*, Sec. 1425.
2. Pujari Narasappa *v.* Shaik Hazrat, A.I.R. 1960 Mys. 59 at p. 64.

proposed arbitrator has become prejudiced and biassed and otherwise disqualified to act as such, should not be relevantly allowed to be raised.[1]

8. Parties contemplating a certain amount as liquidated damages in event of breach—Presumption contained in Sec. 10, if rebuttable.—Section 21 of the old Act, to which Sec. 14 of the Act of 1963 corresponds, enacts, *inter alia*, that "a contract for the non-performance of which a compensation of money is adequate relief" cannot be specifically enforced. It is not correct to say that, once the presumption contained in explanation to Sec. 12 is rebutted, by proof that the parties themselves contemplated a certain amount as liquidated damages for a breach of contract, the bar under Sec. 21 of the old Act must be given effect to because it must be deemed to be proved that the non-performance complained of can be adequately compensated by money. If the Legislative intent was that the mere proof that a sum is specified as liquidated damages or penalty for a breach should be enough to prove that a contract for the transfer of immoveable property could be adequately compensated by the specified damages or penalty. Section 20 of the old Act will certainly become meaningless. It is true that Sec. 20 of the old Act does not mention the case of an express contract giving an option to a promisor to either carry out the contract to convey, or in the alternative, to pay the sum specified, in which case the enforcement of the undertaking to make the payment would be an enforcement of the contract itself and no occasion for rebutting the presumption in the explanation to Sec. 21 would arise. In such cases the contract itself is specifically enforced when payment is directed in lieu of the conveyance to be made. It may be mentioned here that the principles contained in Sec. 20 of the old Act are re-enacted in Sec. 23 of the Act of 1963 in language which makes it clear that a case where an option is given by a contract to a party either to pay or to carry out the other terms of the contract falls outside the purview of Sec. 20 of the old Act, but, mere specification of a sum of money to be paid for a breach in order to compel the performance of the contract to transfer property will not do.

Section 23 of the Act of 1963 contains a comprehensive statement of the principles on which, even before the Act of 1963, the presence of a term in a contract specifying a sum of money to be paid for a breach of the contract has to be construed. Where payment is an alternative to carrying out the other terms of the contract, it would exclude, by the terms of the contract itself, specific performance of the contract to convey a property. The position stated above is in conformity with the principles found stated in Sir Edward Fry's *Treatise on the Specific Performance of Contracts*, 6th Ed., p. 65. It was said there :

> "The question always is : What is the contract ? Is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act ? Or, is it that one of the two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money ? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties ; if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

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1. Fertilizer Corporation of India Ltd. *v.* Messrs. Domestic Engineering Installation, A.I.R. 1970 All. 31 at p. 42.

"From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes :

(*i*) Where the sum mentioned is strictly a penalty—a sum named by way of securing the performance of the contract, as the penalty is a bond ;

(*ii*) where the sum named is to be paid as liquidated damages for a breach of the contract ;

(*iii*) where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.

"Where the stipulated payment comes under either of the two first-mentioned heads, the Court will enforce the contract, if in other respects it can and ought to be enforced, just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract."

Sir Edward Fry pointed out that the distinction between a strict penalty and liquidated damages for a breach of contract was important in common law where liquidated damages were considered sufficient compensation for breach of contract, but sums stipulated by way of penalty stood on a different footing. He then said :

"But as regards the equitable remedy the distinction is unimportant: for the fact that the sum named is the amount agreed to be paid as liquidated damages, is, equally with a penalty strictly so called, ineffectual to prevent the Court from enforcing the contract *in specie*."

The equitable principles which regulated the grant of specific performance by the separate Court of Equity which existed in England at one time have been given statutory form in India. It is, therefore, immaterial that the stipulated payment under the terms of the contract under consideration before the Court could be viewed as one for payment of liquidated damages. The question would still remain whether the courts are relieved by the agreement between the parties of the duty to determine, on the facts of a particular case, whether damages, specified or left unspecified, would really afford adequate compensation to the party which wants a convenience of immoveable property as agreed upon. A reference to Sec. 22 (Sec. 20, new) of the Specific Relief Act would show that the jurisdiction of the Court to decree specific relief is discretionary and must be exercised on sound and reasonable grounds guided by judicial principles and capable of correction by a court of appeal.

This jurisdiction cannot be curtailed or taken away by merely fixing a sum even as liquidated damages. This is made perfectly clear by the provisions of Sec. 20 (Sec. 23, new) of the Specific Relief Act so that the Court has to determine, on the facts and circumstances of each case before it, whether specific performance of a contract to convey a property ought to be granted.

The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is

proved". The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, it is nothing more than a piece of evidence. It is not conclusive or decisive.[1]

9. Agreement hit by rule of frustration.—The Court in a suit for specific performance of a contract for sale has to specifically enforce the contract, if possible. If it is not possible, the agreement would be hit by the rule of frustration and such a contract could not be enforced nor a decree passed on the basis of such a contract could be executed.[2]

Supposing *A* agreed to purchase plot *X* from *B*. Subsequently, on account of certain other intervening enactment, instead of plot *X*, *B* was allotted plot *Y* at a different place and *B* had the same interest in plot *Y* as he had in plot *X*. If *B* wants to enforce the contract asking *A* to purchase the same, it will really be unjust to enforce the contract in the changed circumstances. *A* had agreed to purchase a particular plot situate at a particular place which may have been important for him. He could not, subsequently, be compelled to purchase a plot at a different place which he never intended to purchase from *B*. The enforcement of such a contract by a court of law would be a substitute to the original agreement by another which is not permissible.[3]

10. Conduct of parties.—The relief by way of specific performance being within the discretion, it is necessary that the plaintiff should come into the Court with clean hands. Therefore a plaintiff who sets up a false case cannot expect a court of equity to grant him such relief.[4] Mere delay in suing may not be sufficient to deprive plaintiff of that relief of specific performance; but where a plaintiff has taken no steps to prevent the other party from entering into a contract with a third party in respect of the subject-matter of the contract, and the third party expends money, e.g. by improving the property and discharging an encumbrance on the property in respect of which a contract of sale is entered into, if the plaintiff institutes a suit for specific performance just when the period of limitation is about to expire, no decree for specific performance can be granted because that would be doing injustice to the third party.[5] The plaintiff who is guilty of delay and gross negligence is not entitled to a decree for specific performance.[6] Mere delay itself is no ground for refusing relief by way of specific performance. But where it raises the presumption of an abandonment of the plaintiff's claim or has caused a hardship to the opposite party or something to his prejudice the courts are entitled to exercise their discretion and refuse the plaintiff the relief prayed for.[7]

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1. M. L. Devender Singh *v.* Syed Khaja, A. I. R. 1973 S. C. 2457 at pp. 2459-62.
2. Mahendra Nath *v.* Smt. Baikunti Devi, A.I.R. 1976 All. 150 at p. 154: (1976) 2 A. L. R. 21.
3. *Ibid.*
4. Subbarayadu *v.* Tatayya, 1937 M.W.N. 1158; Srish Chandra *v.* Banomali Roy, I.L.R. 31 Cal. 584: 8 C.W.N. 594 at p. 600 (P.C.).
5. *Ibid.*
6. Khushi Ram *v.* Munshi Lal, A. I. R. 1940 Lah. 225 at p. 226: 189 I.C.418: 42 P.L.R. 194.
7. Rami Reddi *v.* Pattabhirami Reddi, A. I. R. 1937 Mad. 124 at p. 125: 179 I.C. 12: 44 L.W. 749 : 71 M. L. J. 599: 1936 M.W.N. 1238.

In *Pahunchi Lal* v. *Man Singh*,[1] the refusal of the Munsif to grant a decree for specific performance was based upon a misconception of law. He thought that the Court will have to apply for securing *bhumidhari* rights. The Munsif did not think it was possible in law that the defendant could be compelled by a decree of the Court to apply for securing *bhumidhari* rights in the *sirdari* plots agreed to be sold. It was held that the Munsif could not be said to have refused to grant a decree for specific performance as regards the *sirdari* plots in the exercise of his discretion. The Appellate Court was right in decreeing the plaintiff's suit in regard to the *sirdari* plots also and in directing that the defendant shall take steps and secure *bhumidhari* rights.

11. Party cannot approbate and reprobate.—Where a Hindu father having minor son, sold his property without necessity and subsequently sold it again to another person having notice of the previous sale and the first vendee wanted to enforce his agreement, it was held that the fact that if the decree were not awarded, the third party would remain in possession does not affect the question of the exercise of Court's discretion.[2]

In a suit for specific performance on a contract, the principle on which the Court will proceed is that a contract for the sale of property in one lot will generally be considered indivisible, and the Court will not, as a general rule, compel specific performance of the contract, unless it can execute the whole contract. .Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all.[3] It is true that there are exceptions to this rule which may be justly made in view of the circumstances of any particular case. Even in cases where the contract is plain and certain in its terms and obligatory on both parties, which cannot readily be said of the contract in the present case, the right to specific execution is not absolute and its enforcement must rest on the sound discretion of the Court, a judicial discretion, to be exercised according to the established principles of equity.[4]

There is no doubt that time was not of the essence of the contract in the sense that the plaintiff ought to have expressed his readiness and willingness within 15 days of obtaining of the sanction to transfer *sir* land without reservation of rights of occupancy, and that under Sec. 46, Contract Act, it could be performed within a reasonable time but that very provision says that it must be performed within a reasonable time. So if there is unnecessary delay on the part of one party it should be open to the other party to put an end to the contract, and that is the law which, however, requires the other party to give him notice before he terminates it. Their Lordships of the Privy Council remarked in *Jamshed Khodaram* v. *Burjorji Dhunjibhai*[5] :

> "But equity will not assist where there has been undue delay on the part of one party to the contract and the other has given him reasonable notice that he must complete within a definite time."

In that very case their Lordships further remarked that :

> "Their Lordships do not think that this section (Sec. 55, Contract Act, 1872) lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land."

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1. A. I. R. 1971 All. 444 at p. 448 : 1971 A. W. R. (H. C.) 338.
2. Gurusami *v.* Ganapathia, I. L. R. 5 Mad. 337.
3. Merchants Trading Co. *v.* Banner, (1871) 12 Eq. 18: 40 L. J. Ch. 515 : 19 W.R. 707: 24 L.T. 861.
4. Abdul Rahim *v.* Tufan Gazi, A.I.R. 1928 Cal. 584 at p. 586.
5. I.L.R. 40 Bom. 289 at p. 299 : A. I. R. 1915 P. C. 83.

The law has been summarized by Pollock and Mulla in their *Indian Contract and Specific Relief Acts*,[1] in the following words :

> "Either party's general right to have the contract performed within reasonable time according to the circumstance is, of course, unaffected by the fact of time not being of the essence; and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end; and where there has been inordinate delay on both sides, it may be inferred that the contract has been abandoned, although no such notice has been given."

At any rate in these circumstances courts are not bound to grant to the plaintiff the discretionary relief of specific performance as it would involve hardship on the defendant which she did not foresee. It seems from the agreement that she never thought at the time of entering into it that the plaintiff would delay the performance of his part of the contract for such a long time. It is no justification to say that the defendant had received the crops of the property during this period as the interest on the mortgage debt was increasing every day. She wanted to get rid of her petty debts early and to manage the cultivation of the little property that would be left with the balance. This is not possible now as the mortgagee has obtained a decree for Rs. 5,572 and with the payment already made by the plaintiff the total comes to Rs. 6,722, and the balance that would be left would amount to Rs. 278 only. The plaintiff, on the other hand, cannot complain of any hardship on him as it is he who is responsible for this long delay. Such cases would come under case II mentioned in Sec. 22, Specific Relief Act, 1877.[2]

Where parties had made a compromise comprising an agreement, the chief consideration for which was the execution of an *ekrar* by one party acknowledging the title (as adopted son) of the other party to the agreement and the former had subsequently by his conduct (in bringing a suit to set aside the adoption and alleging that the *ekrar* had been obtained from him by fraud) attempted and in a measure succeeded in depriving the latter of the benefit of the agreement, it was held by Lord Davy, in a suit by the heirs of the party who had so tried to rescind the agreement that there had been a failure of consideration and the conduct referred to was at variance with and amounted to a subversion of the relation intended to be established by the compromise; and that specific performance of the agreement could not be enforced.[3]

Where the plaintiff by his conduct has made it impossible for the Court to give effect to the contract in its entirety the Court will not allow specific performance of a part.

12. **Suit for specific performance by purchaser—Vendor cannot say that he had no title.**—In *Muni Samappa* v *Gurunanjappa*,[4] in a suit on foot of an agreement to sell a house impleading only the two executants, it was held that there was no necessity to determine the question of the vendor's title and the fact that the title which the purchaser may acquire might be defeasible

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1. 7th Ed. (1944), p. 303.
2. Dau Alakhram *v.* Mst. Kulwantin Bai, A.I.R. 1950 Nag. 238 at pp. 239-41.
3. Srish Chandra *v.* Banomali Roy, I.L.R. 31 Cal. 584 at pp. 596-9: 8 C.W.N. 594 (P.C.).
4. A.I.R. 1950 Mad. 90.

by the sons of defendant was no ground for refusing specific performance if the purchaser was willing to take such title as the vendors had.[1]

13. Multiplicity of suit.—A court may, with a view to avoid multiplicity of suits, in the exercise of its discretion, refuse to grant specific performance. Thus where one of the defendants to a suit for specific performance has a valid counter-claim against the plaintiff the Court will refuse to grant a decree for specific performance. Again, the same principle applies where the defendant has got a right to pre-empt. Thus in a suit by the plaintiff against *A* if *B* as vendee from *A* and his co-sharer acquired a right to pre-empt as against the plaintiff the Court can in the exercise of its discretion refuse specific performance to avoid multiplicity of suits.[2] Conversely, a court may deem it proper to pass a decree for specific performance to avoid a multiplicity of suits.[3]

14. "Parties to the suit".—Where there are several heirs to an original promisee, a single heir could not by himself institute a suit for specific performance of contract of reconveyance by making the remaining heirs as defendants to the suit. On the death of the original promisee, his heirs cannot become several joint promisee.[4] Banerjee, J., in *Smt. Katip Bibi* v. *Faqir Chandra Ghosh*,[5] quotes with approval the following passage from the observations of Iyanger, J., in *Ahimsa Bibi* v. *Abdul Kadir Sahib*[6] :

> "Whatever doubts may arise on the construction of an instrument as to whether a covenant in favour of two or more persons, parties to the instrument, whether in their character as tenants-in-common, co-heirs or otherwise, is joint, several, or several according to their respective interests and under the English law, unlike the civil law, a covenant in favour of two or more cannot be both joint and several, except perhaps in a single instance, which need not be referred to here[7] there can be no doubt that a single cause of action cannot be divided into several causes of action against the obligee without his privity, though two or more persons may have several interests in the right giving rise to the cause of action whether such persons be joint covenantees or the heirs of a single covenantee. Exceptions to this rule generally rest on statutory provisions and their nature has been already indicated. When a right accruing to a single person from a covenant in his favour devolves, on his death, on two or more of his heirs in several shares, no question can possibly arise as to whether the covenant was joint or several, and the only difference caused by the death of the covenantee is that the cause of action which resided in one person, is, by operation of law, transferred to a number of parceners, who, as observed by Tindal, C. J., in *Decharms* v. *Harwood*[8] constitute one heir. In other words, the claim which was possessed by one individual is now possessed jointly by a number of individuals, who are his legal representatives and all must therefore join in a suit to enforce that claim."

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1. Mir Abdul Hakeem Khan *v.* Abdul Mannan Khadri, A.I.R. 1972 A.P. 178 at p. 181.
2. Habibur-Rahman *v.* Ali Azhar, 98 I.C. 193: A.I.R. 1926 Cal. 1237: 44 C. L. J. 162.
3. Doherty *v.* Allman, 3 A. C. 709.
4. *Vide* Ahimsa Bibi *v.* Abdul Kadir Sahib, I.L.R. 25 Mad. 26 (relied).
5. A.I.R. 1960 Cal. 187 at p. 189.
6. I.L.R. 25 Mad. 26 at p. 35.
7. Keightley *v.* Watson, (1849) 3 Exch. 716 at p. 723; Slingsby's case, Coke's Rep., Pt. V, p. 18 (*b*); Eccleston *v.* Clipsham, 1 William's Notes to Saunder's Rep., pp. 162-68; Bradburne *v.* Botfield, (1845) 14 M. & W. 559.
8. (1834) 10 Bing. 526 at p. 529.

15. Gross negligence.—A suit for specific performance of contract cannot fail merely by incomplete description of the properties contracted to be sold especially when the property is identified and reasons for incomplete description are explained.[1]

16. Minority.—The general rule is that a contract to be specifically enforced by the Court must be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity to contract, or the nature of the contract or otherwise the contract is incapable of being enforced against one party, that party is generally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.[2]

17. Weight of authority is opposed to granting specific performance either in favour or against a minor.—In *Lumley* v. *Ravenscroft*,[3] Lindley, L. J., observed : "You cannot get specific performance against an infant." The doctrine has, no doubt, some limitations which it is not necessary to indicate here. The weight of authorities in India is opposed to the granting of specific performance in favour of or against a minor.

In *Fatma Bibi* v. *Debnath*,[4] Norris, J., following *Flight* v. *Bolland*,[5] held that a minor could not maintain a suit for specific performance of a contract entered into on his behalf by his guardian on the ground of mutuality. That view was not accepted by the Madras High Court in *Krishnasami* v. *Sundarappayyar*[6] in which it was held, following the opinion of Mr. Whitley-Stokes, that the doctrine of mutuality had no application in India. The same view was taken in *Khairunnessa* v. *Loke Nath*.[7]

In *Mir Sarwarjan* v. *Fakhruddin Mahomed*,[8] the Full Bench of the Calcutta High Court held that if a contract is validly entered into on behalf of a minor, and there is mutuality in such contract, it is capable of being specifically enforced. In that case, the manager of an infant's estate entered into an agreement to purchase certain property on behalf of the minor and the question was whether the minor on attaining majority could sue for specific performance of the agreement. The appeal was taken to the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed*.[9] Their Lordships approved of the application of the doctrine of mutuality but reversed the decision on the ground that it was not within the competence of the manager of a minor's estate to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and further that as the minor in that case was not bound by the contract there was no mutuality and that he could not obtain specific performance of the contract.

18. Whether minor is vendor or vendee does not make any difference.—Their Lordships of the Privy Council in the above mentioned case did not rest the non-enforceability of the contract on its being *ab initio* void but on the ground that the guardian's contract, valid or void in itself, did not affect the minor or the minor's estate. Their Lordships applied the doctrine of mutuality

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1. Janki Nath Sarkar *v.* Inniat-un-nessa Bibi, 57 I.C. 763.
2. Fry, ***Specific Performance***, 6th Ed., p. 219.
3. (1885) 1 Q. B. 683 : 64 L. J. Q. B. 441 : 14 R. 347 : 72 L. T. 382 : 43 W. R. 584: 59 J.P. 277.
4. I. L. R. 20 Cal. 508.
5. Russ. 298: 28 R. R. 101.
6. I.L.R. 18 Mad. 415: 5 M. L. J. 164.
7. I.L.R. 27 Cal. 276.
8. I.L.R. 34 Cal. 163 : 11 C. W. N. 34: 4 C.L.J. 431 (F.B.).
9. I. L. R. 39 Cal. 232 : 13 I. C. 331 : 39 I.A. 1: 16 C.W.N. 74 (P.C.).

notwithstanding that the contract sought to be enforced was advantageous to the minor. The rulings of the various High Courts[1] make no distinction in cases where the minor is a purchaser and in cases where he is the vendor.

19. Distinction between a conveyance and a contract should be considered.—In *Brahamdeo* v. *Harra Singh*,[2] Wort, J., of the Patna High Court appears to have adopted the criterion whether the sale of the minor's property was justified by legal necessity or benefit and acting on the principle that a guardian's alienation made for legal necessity or benefit of the minor is binding on the minor he decreed specific performance. With due respect, the learned Judge overlooked the distinction between a conveyance and a contract. When the minor's property is already alienated, the Court is required only to find whether the alienation is binding on the minor or not. In such a case no question of equity arises. The relief of specific performance is a relief in equity and the question which the Court is faced with is whether it should compel the minor to perform the onerous act of alienating his property in consequence of the contractual obligation incurred by his guardian. This was pointed out by Sundaram Chetti, J., in *Venkatchalam Pillai* v. *Sethuram Rao*.[3] With the exception of *Krishnasami* v. *Sundarappayyar*,[4] which was decided before *Mir Sarwarjan* v. *Fakhruddin Mahomed*,[5] the Madras High Court has consistently taken the above view. This principle was applied by the Lahore High Court in *Malla* v. *Muhammad Sharif*.[6]

20. Delay and laches.—A party cannot call upon a court of equity for a specific performance unless he has shown himself ready, desirous, prompt and eager. This is not in so many words expressed in this section but sub-section (1) of this section which gives a court judicial discretion must be .read as implying and including it.

If there was any delay on the part of the plaintiff to bring an action for specific performance of contract, and if it appears that the delay was unreasonable and that due to such delay, the defendant was put into some advantageous position or has acquired some right which would be frustrated or of which the defendant would be deprived if any decree for specific performance or contract is passed, in that case due to the delay of the plaintiff in filing the suit for his negligence, fault or carelessness or for some *mala fide* motive, the Court for ends of justice would be justified in refusing the relief in the form of specific performance of contract by using its judicial discretion so as not to disturb the circumstances created by such delay of the plaintiff or to deprive the defendant of the benefit which he has acquired in the meantime due to such delay.

The case of *Mademsetty Satyanarayana* v. *G. Yelloji Rao*[7] was decided by the Supreme Court and in that case the discretionary power of the Court as provided in Sec. 22 of the Specific Relief Act, 1877, was considered.

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1. Swarath Ram Ram Saran *v.* Ram Ballabh, A.I.R. 1925 All. 595: 89 I. C. 27: I. L. R. 47 All. 784 : 23 A. L. J. 625; Abdul Haq *v.* Yahiya Khan, A. I. R. 1924 Pat. 81: 78 I.C. 483: 4 P.L.T. 553; Niripendrachandra Sarkar *v.* Ekherali Joardar, A.I.R. 1930 Cal. 457: 127 I.C. 65: I.L.R. 57 Cal. 268: 34 C.W.N. 272.
2. A.I.R. 1935 Pat. 237: 157 I. C. 327.
3. A.I.R. 1933 Mad. 322 at p. 324: I.L.R. 56 Mad. 433 : 142 I.C. 315: 64 M. L. J. 354 (F. B.).
4. I. L. R. 18 Mad. 415 : 5 M. L. J. 164.
5. I.L.R. 39 Cal. 232: 13 I. C. 331.
6. A.I.R. 1927 Lah. 355 at p. 355: 99 I.C. 684: I.L.R. 8 Lah. 212: 28 P.L.R. 492.
7. A.I.R. 1965 S.C. 1405.

Several cases, both Indian and English, were discussed. Ultimately, the following decision was arrived at :

> "While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression 'waiver' in its legally accepted sense, namely, 'waiver' is contractual, and may constitute a cause of action ; it is an agreement to release or not to assert a right.[1] It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."

In the case of *Dr. Jiwanlal* v. *Brij Mohan Mehra*,[2] long delay in filing the suit for specific performance of contract, the Supreme Court went on to see whether the delay was such as would disentitle the plaintiff to the relief of specific performance of the .contract. In that connexion the Supreme Court referred to a passage from the judgment of the Privy Council in *Lindsay Petroleum Co.* v. *Hurd*,[3] which is quoted below ;

> "The doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as an equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

Ultimately in the case under consideration, the Supreme Court held that in the facts and circumstances of that case it could not be said that the specific performance of the agreement was likely to cause any prejudice to the defendant on the date of the institution of the suit and accordingly the suit was found not liable to be dismissed on account of delay.[4]

In *Sebag* v. *Abbidole*,[5] Lord Allenborough, C. J., defines laches as "A neglect to do something which by law a man is obliged to do." The law as to when and under what circumstances delay is a bar to a legal remedy is very clearly laid down in *Lindsay Petroleum Co.* v. *Hurd*[6] wherein the Judicial Committee of the Privy Council say (*per* Sir Barnes Peacock) :

> "Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give

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1. *See* Dawson's Bank Ltd. *v.* Nippon Menkwa Kabushihi Kaish, 62 I. A. 100 at p. 108 : A.I.R. 1935 P. C. 79.
2. A.I.R. 1973 S. C. 559.
3. 1874 L.R. 5 (P. C.) 221 at p. 239.
4. Manick Lal Seal *v.* K. P. Chowdhury, A.I.R. 1976 Cal. 115 at pp. 119-20.
5. (1816) 4 M. & S. 462.
6. (1874) L. R. 5 P. C. 221, followed in A.I.R. 1932 Cal. 496.

a remedy, either because the party has, by his conduct, done that which might fully be regarded as equivalent to a waiver of it, or, where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking the one course or other, so far as relates to the remedy."

Citing with approval these dicta of the Privy Council Lord Penzance in *Erlanger* v. *New Sombrero Phosphate Co.*[1] observes that delay has two aspects—it may lead to a change in the thing sold or it may imply acquiescence so as to bar a plaintiff's right—and it is essential "to keep these two aspects of it separate and distinct when the consequences of delay come to be considered in connexion with the circumstances of an individual case". In *Dalton* v. *Angus*,[2] Lord Penzance points out that "in all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent."

American view.—The American law is to the same effect. In *Galliher* v. *Caldwill*,[3] the law is put thus :

"Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." It has also been held that the doctrine comes into play where there is no statute fixing a period of limitation.[4] But where the delay was caused for speculation purposes and there was an increase in the value from £150 to £7,500, specific performance was refused.[5]

In India the law is to the same effect. Now, time may be classified under three heads :

(1) Essential, or
(2) Material, or
(3) Immaterial.

Where time is essential no question of delay arises, because the contract must be performed by the date fixed.[6] Where time is immaterial, no question

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1. (1878) 3 A. C. 1218.
2. (1887) 6 A.C. 74.
3. 145 U.S. 368 at p. 373.
4. Abraham *v.* Ordway, 158 U.S. 416 at p. 422.
5. McCorbe *v.* Mathews, (1895) 155 U. S. 550.
6. *See infra* under "Time Essence of Contract"; also Bhudar Chandra Goswami *v.* S.R.C. Belts, 33 I.C. 347 at p. 348 (relating to elephant for *kheddah* operations; time essence).

of delay again arises. It is only where time is material, that the question of delay becomes relevant.

Indian law.—The law on the point is well put by Banerji thus :

> "In India, there is a statutory period of limitation prescribed for suits for equitable relief like specific performance ; and so long as 1864, the Madras High Court held that lapse of time, as a defence to such suits, can only be relied upon when under the Act it has become a bar,"[1] and that when laches and indirect acquiescence "go merely to the remedy, it is .quite clear that the courts have no power arbitrarily to substitute an extinguishing prescription different from that determined by the Legislature".[2]

Mere delay will not excuse performance of specific contract, unless there were circumstances to show that the plaintiff claiming specific performance was responsible for it or had abandoned his right or on account of the delay there had been such a change of circumstances as would prejudice the defendants.[3]

Delay as a defence in a suit for specific performance should be specifically pleaded and if the point is not taken in the courts below it will not be allowed to be raised for the first time in second appeal.[4]

In *Gostho Behari Sadhu Khan* v. *Omiyo Prosad Mullick*,[5] Das Gupta, C. J., surveyed the entire case-law on the point of delay and its effect on the specific performance of the contract. In para. 31 of his judgment he quotes the following observations of Woodroffe, J., made in *Kishen Gopal Sadhaney* v. *Kally Prosonno Seth*[6] : "On the whole the tendency of the courts is to discourage the plea of laches, unless somebody has been damnified by it and as in this country the period of limitation enacted by the statutes is generally very short, there is the less need for the application of the equitable doctrine relating to delay.

> "In my opinion delay is not material so long as matters remain in *status quo*, and it does not mislead the defendant or amount to acquiescence. It must be shown that the delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted. When such is not the case any lapse of time short of the period allowed under the Limitation Act should not disentitle the claimant to relief, to which he is otherwise entitled. He also notes in his judgment the discordant note struck by the Allahabad High Court in *Nawab Begam* v. *A. H. Great*,[7] where the Court held : 'Great delay on the part of the plaintiff

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1. Rama Rau *v.* Raja Ram, (1864) 2 M. H.R.C. 114 at p. 116.
2. Peddamuthulaty *v.* Timmareddy, Hay 270 at p. 275; also Suryaprakasarayudu *v.* Lakshminarasimha, (1914) 26 M.L.J. 518 at p. 521; Jamadas *v.* Achmaram, I.L.R. 2 Bom. 133 at pp. 137-8; Kishen Gopal Sadhaney *v.* Kally Prosonno Seth, I. L. R. 33 Cal. 633 at p. 633; Kedar *v.* Manu, (1912) 16 C.W.N. 247.
3. Mst. Bibi Moliman Nissa *v.* Tafazul Karim, A.I.R. 1959 Pat. 132 at p. 133.
4. *Vide* Peer Mohomed *v.* Mahomed Ebrahim, I. L. R. 29 Bom. 234; Mokund Lall *v.* Chotey Lall, I. L. R. 10 Cal. 1061 ; Mir Abdul Hakeem Khan *v.* Abdul Mannan Khadri, A.I.R. 1972 A. P. 178 at p. 183.
5. A.I.R. 1960 Cal. 361 at p. 369.
6. I.L.R. 33 Cal. 638.
7. I.L.R. 27 All. 678.

in applying to the Court for specific performance of a contract of which he claims the benefit, is of itself, sufficient reason for the Court in the exercise of its discretion to refuse relief,' and then in *Mokund Lal* v. *Chhotey Lal*,[1] Piggot, J., observed : 'In this case, the time which was allowed to elapse was so long that under ordinary circumstances specific performance would not be granted by the Court.' In *Maharaj Bahadur Singh* v. *Suresh Chandra Roy*,[2] Sanderson, C J., and Richardson, J., referred to the difference between the view expressed by Woodroffe, J., quoted above and the views expressed by the Allahabad High Court in *Nawab Begum's* case[3] and *Mukand Lal's* case,[4] but did not themselves decide as to which of the two views was correct." After surveying the entire case-law, Das Gupta, C. J., in *Gostho Behari Sadhu Khan* v. *Omiyo Prosad Mullick*[5] states : "That mere delay does not by itself prejudice the plaintiff from obtaining specific performance if the suit is in time and that delay in order to defeat the claim for specific performance must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances, that the grant of specific performance would prejudice the defendant. This was the view taken by the Madras High Court in *S. V. Sankarlinga* v. *S. Ratnaswami Nadar*."[6] He summarises his conclusions thus : "On consideration of the authorities it seems to me reasonable to hold that it would be too much to say that mere delay, merely because of its length, would preclude a plaintiff from obtaining specific performance. I am unable to agree however that unless it is positively shown that the plaintiff has abandoned his right or there has been such a change of circumstances that the grant of specific performance would prejudice the defendants, the Court is bound to exercise its discretion in favour of the plaintiff. In my opinion, Sir Barnes Peacock in saying that lapse of time and delay are most material, where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted mentioned such cases only as illustrations and did not intend to give an exhaustive list. The principle that was being laid down by Sir Barnes Peacock appears to me clearly this that in deciding whether delay bars the grant of specific performance the Court should consider the balance of justice and in considering this should take into account the length of the delay and the nature of the acts done, during the interval which may affect such questions. In my opinion, even if the circumstances do not show a waiver but it appears that the plaintiff has come to the Court not merely with the motive of obtaining specific performance, but with an ulterior motive of taking advantage of money spent by a transferee it will be proper for the Court to take into consideration such conduct of the plaintiff in deciding whether discretion should be exercised in his favour or not."

Where the statute provides a definite period within which a litigant is free to come to the Court, delay within that period cannot be pleaded against him.[7] The observations of Sir Lawrence Jenkins in *Osmond Beeby* v. *Khithish Chandra Acharya Chaudhuri*,[8] lend support to the above view. The Court

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1. I.L.R. 10 Cal. 1061.
2. A.I.R. 1921 Cal. 179 : 34 C. L. J. 364.
3. I.L.R. 27 All. 678.
4. I.L.R. 10 Cal. 1061.
5. A.I.R. 1960 Cal. 361 at p. 369.
6. A.I.R. 1952 Mad. 389 at p. 391.
7. *See* Lindsay Petroleum Co. *v.* Hurd, (1874) 5 P.C. 221; Kishen Gopal Sadhaney *v.* Kally Prosonno Seth, I. L. R. 33 Cal. 633; Mst. Batulan *v.* Nirmal Das, 44 I. C. 244: A.I.R. 1918 Pat. 630.
8. I.L.R. 41 Cal. 771 at p. 790: A. I. R. 1915 Cal. 13.

cannot as a proposition of law arbitrarily apply a time-limit to non-suit a litigant who, under the statutory provision is entitled to seek the relief in a court of law within a prescribed period. If the circumstances of any particular case would indicate that the plaintiff has waived and abandoned his rights to which he was entitled long before he came to the Court, he may be non-suited but not otherwise.[1]

The reason is that no right should be allowed to be defeated. "Delay or no delay, a right should be respected and enforced, so long as supervening circumstances do not render such enforcement clearly and indubitably inequitable."[2]

It may be noted that as rightly pointed out by Seshagiri Aiyar, J.,[3] "Laches is not one of the grounds mentioned in this Act as disentitling a party to a contract, to specific performance."

Where there is a delay on the part of a party to a contract for sale to complete the execution of the sale-deed of the immoveable property in question it is not open for the other party to cancel the contract in question without giving reasonable notice and opportunity to the other party to perform his part of the contract within the specified time. The law is now well settled that without giving a reasonable notice to the other party to complete the contract within the specified time, the contract could not be cancelled at the sweet-will of the party. In *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai*,[4] their Lordships have observed :

> "The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance, may be excluded by any plainly expressed stipulation. But such stipulation must show that the intention was to make the rights of the parties depend on the observance of the time-limits prescribed in a fashion which is unmistakable."

Further on, their Lordships have said :

> "But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice, that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice."

Later on, it was observed that :

> "Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for purposes of specific performance time was not of the essence of the bargain.

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1. Jiwa Nundan Singh *v.* Siya Ram Prasad Singh, A. I. R. 1961 Pat. 347 at pp. 349-50.
2. Banerji's *Tagore Law Lectures*, 2nd Ed., p. 379.
3. Suryaprakasarayudu *v.* Lakshminarasimha, (1914) 26 M.L.J. 523.
4. A.I.R. 1915 P.C. 83.

"In *Florrie Edridge* v. *Rustomji Dhanjibhoy Sethna*,[1] their Lordships of the Privy Council observed as under :

> 'A wrongful repudiation by one party cannot, except by the election of the other party so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called *brutum fulmen*, that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent.'

> "In a contract of sale of immoveable property, time would not be regarded as of essence unless it is shown that the parties intended that their right should depend upon the observance of time as the essence of contract. It is open to one of the parties to make time of the essence of the contract by calling upon the other party who has been guilty of unreasonable delay to perform the contract within a stated time by giving him a reasonable notice."[2]

In *Mulla Badruddin* v. *Master Tufail Ahmed*,[3] the question arose whether delay or laches could be a valid ground for refusing the relief of specific performance. The Court said :

> "It has been urged that the plaintiff is not entitled to the relief of specific performance on the ground of inordinate delay and laches. It plainly appears from the facts of the case that the contract was not abandoned at any time by the plaintiff nor did he ever make the defendant believe that he would not enforce it. It is also clear that the defendant did not change his position by reason of any plea which could be said to have been introduced by the plaintiff. The rights of a third party have also not intervened. In these circumstances the position seems to be well settled that mere delay in the institution of the suit cannot affect the plaintiff's rights. The delay to defeat the rights of the plaintiff must be such that it may properly be inferred that the plaintiff had abandoned his right or on account of delay there must have been such a change of circumstances that specific performance would prejudice the defendant.
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> "We may usefully refer to the observation of Sir Barnes Peacock in *Lindsay Petroleum Co.* v. *Hurd*[4]:
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> > 'It would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material.'
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> "The case of *Dau Alakhram* v. *Mst. Kulwantin Bai*[5] is not an authority for the proposition that the relief of specific performance if otherwise found to be suitable should be refused on the mere ground that

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1. A.I.R. 1933 P.C. 233.
2. *Vide* Subayya *v.* Veeraya, A.I.R. 1957 A. P. 307 ; M. Badruddin *v.* Master Tufail Ahmed, A. I. R. 1963 M. P. 31 at pp. 32-33.
3. A.I.R. 1963 M.P. 31 at pp. 34-35.
4. (1874) 5 P.C. 221.
5. A.I.R. 1950 Nag. 238.

the suit was instituted many months after the breach having been committed by the defendant. From long delay alone without anything further an abandonment of rights cannot be inferred.

"In *Suryaprakasarayudu* v. *Lakshminarasimhacharyulu*,[1] the facts were that the agreement of sale was made on 4th November, 1904. Time for performance fixed was of one month. Disputes between the parties arose shortly after the month of January, 1905, as to the order in which reciprocal obligations were to be performed. The suit was instituted more than two years after on 2nd December, 1907. The Trial Court refused to grant a decree for specific performance as the plaintiff had brought his action long after repudiation by the defendant. The contract was taken to have been abandoned. The judgment of the Trial Court was, however, reversed on appeal and it was held :

> '. . . . as regards the finding of the Subordinate Judge that the laches itself amounts to a waiver or abandonment, I think it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to waiver or abandonment of the contract on the plaintiff's part. In this case, there are no such circumstances proved.'

"In *Sankaralinga* v. *Ratnaswami*,[2] a Division Bench of the Madras High Court after reviewing various authorities observed :

> '. . . . A contract which has been abandoned has no legal existence for any purpose and it cannot be the foundation for any relief whether it be specific performance or damages. The effect of waiving a contract is not merely to bar any purticular remedy under that contract but to extinguish it altogether and the right to any relief thereunder. The grant of relief to the plaintiff for return of the advance and for damages is inconsistent with the theory that the contract had been waived or abandoned. We are satisfied that in this case the plaintiff has not waived or abandoned his rights and that he is not disentitled to relief by reason of any laches or delay.'

"In *Maharaj Bahadur* v. *Suresh*,[3] a Division Bench of the Calcutta High Court observed there in the context of this fact that after the contract of sale, the tenants of the property had agreed to raise the rents because they did not want the purchaser to become their landlord and the suit was brought not after the first refusal by the landlord but considerably afterwards; that there was a change in the value of the property and it had occurred by reason of the delay, which was attributable to the plaintiff.

"It has been observed in *Jadu Nath* v. *Chandra Bhusan*[4] that:

> 'The English doctrine of delay and laches showing negligence in seeking relief in a court of equity cannot be imported into the Indian law in view of Art. 113, Limitation Act, 1887 (corresponding to Art. 54 of the Limitation Act of 1963), which fixes a period of three years within which a suit for specific performance should be

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1. 26 M.L.J. 518: A.I.R. 1914 Mad. 462.
2. A.I.R. 1952 Mad. 389.
3. A.I.R. 1921 Cal. 179.
4. A.I.R. 1932 Cal. 493.

brought. Except in mercantile and business contracts, time is not of the essence of the contract, but it may be material for the purpose of consideration whether in the circumstances of a particular case, specific performance should be granted. Though time not be essential, delay even within the time prescribed by law will affect the remedy. Absence of proof of plaintiff's readiness and earnestness to perform his portion of the contract will entitle the Court to exercise its discretion under Sec. 22 [Sec. 20 (new)], Specific Relief Act and refuse relief to the plaintiff which otherwise he would be entitled to secure. Mere delay is not a ground for refusing relief to the plaintiff if there has been no change in the *status quo* since the contract; but where the conduct of the plaintiff is such that though it does not amount to abandonment but shows waiver or acquiescence especially when inaction on his part induces the defendant to change his position, the plaintiff ought not to be allowed any relief.'

"In *Veettil Muhammad* v. *Abdarahiman Kutty*,[1] it was observed that:

'Plaintiff's cause of action for specific performance of a contract to sell immoveable property (in this case, a house) arises only when he has notice that performance is refused by the defendant. Where a suit for specific performance is filed within three years from the date of the contract to sell, but within one year of the date of defendant's refusal to execute the sale-deed, it cannot be said that there was inordinate delay on the part of the plaintiff in filing the suit.'

"In the same case, it was further observed :

'Mere delay in filing the suit for specific performance is not mentioned in Sec. 22 (old), Specific Relief Act, as a ground for not decreeing specific performance. Where an agreement to sell property does not fix any date for the performance, limitation commences to run from the date when performance is demanded or refused and delay to institute a suit for specific performance under such circumstances is not fatal to the suit, unless the delay has in any way prejudiced the defendant or a third party has acquired any interest in suit property after the date of the agreement and before the date of the filing of suit for specific performance. In such circumstances, therefore, it will not be proper to presume from the mere delay in filing the suit that there has been a waiver or abandonment of right by the plaintiff.'

"Futher on, it was said:

'The fact that the price of the building, the subject-matter of an agreement to sell it, has risen after the date of the contract and that the plaintiff will be getting an unfair advantage if specific performance is granted is not a consideration that should weigh with the Court in deciding whether specific performance should be granted or not'."

The Limitation Act prescribes a period of three years as limitation for specific performance of the contract. Ordinarily, therefore, one may think

1. A. I. R. 1953 T.C. 429

that mere delay on the part of the persons suing for specific performance of the contract will not disentitle him to the relief if the suit is filed within the period of limitation. No doubt, a relief for specific performance is an equitable relief and if there are laches on the part of the person suing for such a relief, it may be refused to him. The laches is not the same thing as mere delay. In Halsbury's *Laws of Englnad*, 3rd Ed., Vol. 36, para. 470 at page 324, the law on the subject is stated as follows :

> "Where time is not originally of the essence of the contract, and has not been made so by due notice, delay by a party in performing his part of the contract or in commencing or prosecuting the enforcement of his rights, may constitute such laches or acquiescence as will debar him from obtaining specific performance. The extent of delay whieh has this effect varies with circumstances, but as a rule must be capable of being construed as amounting to an abandonment of the contract."

In *Peer Mahomed Dewji* v. *Mahomed Ebrahim*,[1] as it appears from the report, Chandavarkar, J., at first dismissed the suit which was filed on 30th November, 1903, for enforcement of an agreement dated 29th June, 1901, on the ground that conduct of the plaintiff in not filing the suit earlier amounted to laches. He, however, granted review of that decree and ultimately decreed the suit. The learned Judge observed that while holding in his previous judgment that the plaintiff had been guilty of delay amounting to laches, he did not sufficiently appreciate the legal meaning of the term. The learned Judge pointed out that as defined by Lord Ellenborough, C. J., in *Sobag* v. *Abitbol*,[2] and approved by Abbot, C. J., in *Turner* v. *Hayden*,[3] laches means negligence to do something which by law a person is obliged to do and that when the Limitation Act prescribed a period for instituting such suits, only obligation cast upon the plaintiff by law was to institute the suit within that period. He then proceeded to examine whether there was any other aspect of laches sufficient to deprive the plaintiff of that suit of his right to specific performance and quoted the following dicta of the Judicial Committee in *Lindsay Petroleum Co.* v. *Hurd*[4] :

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or, where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of injustice in taking the one course or the other, so far as relates to the remedy."

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1. I.L.R. 29 Bom. 234.
2. (1816) 4 M. & S. 462.
3. (1825) 4 B. & C. 1 at p. 2.
4. (1874) 5 P.C. 221 at p. 239.

The learned Judge then held that laches must amount to waiver, abandonment or acquiescence to bar the plaintiff's right.

Another great Judge Mr. Justice Woodroffe in *Kishen Gopal Sadhaney* v. *Kally Prosonno Seth*,[1] held that delay which is short of the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right is no bar to suit for specific performance unless it is shown to have prejudiced the defendant. The suit was filed on 10th of July, 1903, for specific performance of an agreement dated 31st August, 1900. The learned Judge observed that, in his opinion delay was not material so long as matters remained in *status quo* and it did not mislead the defendant or amounted to acquiescence and that in order to defeat the plaintiff it must be shown that the delay had prejudiced the defendant.

In *Mst. Batulan* v. *Nirmal Das*,[2] Imam, J., held that mere delay in the institution of a suit for specific performance of a contract to sell land is not sufficient to defeat the claim, the delay must be of such a character as to give rise to an inference of the abandonment of the right or should disclose some prejudice to the defendant. In *Rustomji Ardesir Cooper* v. *Annasaheb Narandas*,[3] their Lordships of the Judicial Committee rejected the argument that the suit for specific performance should fail on the ground of delay as in their opinion the position of the purchaser had not been so prejudiced as to disentitle the plaintiff in respect of his relief for specific performance and that the Limitation Act allowed the plaintiff three years time to sue. In *Sampat Ram* v. *Baboo Lal*,[4] Malik, C. J., laid down that a contract to sell could be specifically enforced within three years if time was not the essence of the contract. In *Gomathinayagam Pillai* v. *Palaniswami Nadar*,[5] Bachawat, J., who was in minority, also held that mere delay, short of waiver and abandonment of the contract was no ground for refusing relief of specific performance of contract. There is nothing in the majority judgment to show that on this question the learned Judges took a different view from that of Bachawat, J., Shah, J., who spoke for the majority, dismissed the suit for specific performance of contract on the ground that before the plaintiff could be awarded a decree for specific performance of contract he had to prove his readiness and willingness continuously from the date of the contract till the date of hearing .of the suit and if he failed to do that his suit was liable to fail. In *Smt Gulabrani Choudarain* v. *Jagarnath Choudhary*,[6] a Bench of the Patna High Court referred to the aforesaid observation of Bachawat, J., and relied on it. In *R. C. Chandiok* v. *Chunilal Sabharwal*,[7] learned Judges of the Supreme Court after having found that time not having ever been made the essence of the contract and the plaintiff having not failed to perform their part of the agreement within a reasonable time, they were entitled to the relief for specific performance. The decree of the courts below were set aside by them and the suit decreed with the observation :

> "This relief is discretionary but not arbitrary and discretion must be exercised in accordance with the sound and reasonable judicial principles. We are unable to hold that the conduct of the appellants, which is always an important element for consideration, was such that it precluded them from obtaining a decree for specific performance."

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1. I.L.R. 33 Cal. 633.
2. A.I. R. 1918 Pat. 630.
3. A.I.R. 1930 P.C. 165.
4. A.I.R. 1955 All. 24.
5. A.I.R. 1967 S.C. 868.
6. 1969 B.L.J.R. 593.
7. (1970) 3 S.C.C. 140: A.I.R. 1971 S. C. 1238.

The suit was instituted on 4th December, 1956, for enforcement of the contract dated 18th July, 1955. In my opinion, it is well established on the authorities discussed above that a claim for specific performance of contract if filed within the period of limitation cannot be defeated on the mere ground of delay unless the delay amounts to an abandonment of the plaintiff's claim for specific performance of contract or circumstances have so changed that granting the relief for specific performance would prejudice the defendant.

Waiver, abandonment or acquiescence cannot be inferred merely from the period of delay. In some cases the laches may be inferred even from a delay of two months, in others they may not be inferred even if the delay is of 2 years and 364 days. It is not correct to say that delay of 12 months in all cases would prove fatal in a suit for a specific performance of an agreement. The Court, as a proposition of law, cannot apply arbitrarily a time-limit to non-suit a litigant who under the statutory provision is entitled to seek the relief in a court of law within a prescribed period though if the circumstances of any particular case would indicate that the plaintiff had waived and abandoned his right to which he was entitled long before he came to the Court, he might be non-suited. It cannot be laid down as a rule of law that where a relief for specific performance of contract has been refused by the courts below, the Patna High Court in exercise of its second appellate jurisdiction cannot interfere with the decree. The law appears to have been correctly laid down, if it is said so with respect, by their Lordships of the Supreme Court in *R. C. Chandiok* v. *Chunnilal Sabharwal*,[1] that though the relief is discretionary, it is not arbitrary and if the discretion is not exercised in accordance with the sound and reasonable judicial principles, it can be interfered with.[2]

It has been held in a series of decisions that mere delay will not preclude the plaintiff from obtaining specific performance, if his suit is otherwise in time. In *Jamshed Khodaram* v. *Burjorji Dhunjibhai*,[3] the Privy Council has referred to the principles that govern the construction of a document to find out whether time was of the essence of the contract. It is clear from the decision that, *prima facie*, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of the Court of law the contract has not been literally performed by the plaintiff as regards the time-limit specified. It is, however, pointed out in the decision that equity will not assist where there has been undue delay on the part of one party to the contract and the other has given him reasonable notice that he must complete within a definite time. In *Arjuna Mudaliar* v. *Lakshmiammal*,[4] a Bench of the Madras High Court has held that mere delay does not by itself preclude the plaintiff from obtaining specific performance, if his suit is otherwise in time and that the delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. In *Sankaralinga* v. *Ratnasami*,[5] the entire case-law has been reviewed and the above propositions are reiterated. It is also pointed out in the decision

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1. (1970) 3 S.C.C. 140 : A.I.R. 1971 S. C. 1238.
2. Mahabir Mahto *v.* Mst. Sanjha, A.I.R. 1974 Pat. 113 at pp. 114, 115, 116.
3. I. L. R. 40 Bom. 289 : A. I. R. 1915 P.C. 83.
4. A.I.R. 1949 Mad. 265.
5. A.I.R. 1952 Mad. 389.

It can, however, broadly be stated that there is a presumption that specific performance is the proper remedy on a contract to convey immoveable property. But it is only a presumption liable to be displaced. There is no absolute right to this remedy. The Court exercises a discretion in such case and directs specific performance unless, of course, the Court is satisfied that it would be highly unreasonable to do so. What incidents or consequences can be considered as highly unreasonable naturally would depend upon the facts and circumstances of each case. It can, however, broadly be stated that in cases where persons have voluntarily and without any fraud or mistake entered into contracts, the equitable relief should normally be granted. By this extent that specific performance will only be excluded for special reasons on a contract for the conveyance of the immoveable property. While declining to grant this equitable relief, it is necessary to give sound reasons. In the exercise of that discretion, the circumstances of the case, the conduct of the parties and their respective interest under the contract, are necessarily to be borne in mind.

It is true that this equitable relief can be refused on the ground of delay. Where delay not amounting to a bar by any statute of limitations pleaded as a defence to a suit for specific performance, the validity of that defence must be tried upon principles substantially equitable. It must, however, be remembered that such a pleading in regard to delay is necessary. If the point is not clearly raised in the written statement, it should not normally be permitted to be raised for the first time in the first or second appeal. It is true that specific performance may be refused on the ground of delay, even if the time is not the essence of the contract. Two factors, however, which are important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as related to the remedy. What amount of delay will constitute a bar to relief by way of specific performance where time is not the essence of the contract, depends on the circumstances of each case.

In this connexion, it is to be remembered that if delay in payment of the price has been acquiesced in by the vendor of the immoveable property and no notice terminating the contract has been given the Court will normally decree specific performance. What must follow is that in order to disentitle the plaintiff of its equitable relief, there should not only be an inordinate delay, but such delay must have so changed the conditions or have brought about such state of things that granting this equitable relief would be unfair and unjust. Mere delay without its adverse consequences on the defendant cannot be a ground to withhold the relief. Where no new rights and interests have in the meanwhile, come into existence or where the other party would not be unreasonably prejudiced by the grant of equitable relief, delay in such cases will in general be no bar to plaintiff's right to relief. Where the suit is within time and the delay does not amount to waiver, abandonment or acquiescence and which in no respect alter the position of the parties, does not disentitle the plaintiff to get the equitable relief of specific performance.

It is true that the Appellate Court should not lightly interfere with the exercise of the discretion by the Lower Court, except when such discretion has been exercised on palpably erroneous principles. It must, however, be remembered that whether on certain facts the equitable relief prayed for should or should not be granted, is a question of law.[1]

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1. Vuppalapati Butchiraju *v.* Rajah Sri Ranga Satyanarayana Ramachandra Venkata Narasimha Bhupala Bhalavayunim Varu, A. I. R. 1967 A. P. 60 at pp. 70-71.

that a waiver is not to be inferred merely from the delay in the institution of the suit.[1]

21. Delay in the institution of the suit, whether amounts to waiver.— Once it is held that the contract was rightly terminated by the vendor the further question as to whether the purchaser was ready and willing to perform the agreement need hardly be considered. Circumstances which justify termination of contract by one party cannot be compatible with readiness and willingness on the part of the other to perform it. This means that the plaintiff must allege and prove that he had taken all the essential steps which he was required to take under the agreement for sale when he filed his suit. "Readiness and willingness" has also to be considered from another point of view, namely, whether the plaintiff if a purchaser was in a position to pay the money and take the conveyance in terms of the contract. This however does not mean that the purchaser has got to put the money by and be able to show that he had command of the necessary finance throughout the life of the contract.

If the plaintiff can show that he was in a position to raise the money required at or about the time when the contract was to be performed he discharges the obligation of proving readiness and willingness so far as the financial aspect is concerned.

The delay in the institution of the suit by itself does not justify the dismissal of claim for specific performance.[2]

Here the defendant has not changed her position in any way after the contract was entered into and the facts are not such as to lead to the conclusion of waiver of the plaintiff's right by acquiescence. If the facts otherwise justified the plaintiff's claim it was not liable to be thrown out on the ground of delay in the institution of the suit.[3]

A close analysis of Sec. 20 reveals that it at the outset lays down a general rule that the jurisdiction to decree specific performance is discretionary. It then sets out the nature of such discretion. It says that the Court is not bound to grant such relief merely because it is lawful to do so. Such a discretion, however, is not to be arbitrarily exercised, but must be sound and reasonable and guided by judicial principles which exercise of discretion is capable of correction by a court of appeal. The section thereafter specifies in three successive paragraphs circumstances, under the first two of which, the Court may properly exercise a discretion not to decree specific performance, whilst under the third, it may appropriately give a decree. The circumstances stated in the three provisions are, however, not exhaustive. They are merely illustrative of the general principle embodied in the first paragraph of the section. It is neither possible nor desirable to lay down any hard and fast rules regarding the principles which can be of absolute obligation and authority in all cases. It is also not possible to define exhaustively the special circumstances under which relief may appropriately be granted or refused.

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1. Eswari Amma *v.* M. K. Korah, A.I.R. 1972 Mad. 339 at pp. 344-45 : (1972) 1 M.L.J. 218.
2. Kishen Gopal Sadhaney *v.* Kally Prosonno Seth, I.L.R. 33 Cal. 633.
3. Jitendra Nath Roy *v.* Smt. Maheswari Bose, A.I.R. 1955 Cal. 45 at pp. 49-51.

22. Illustrative cases in which delay has been held fatal.—(1) Defendant agreed to sell certain oil wells in Burma on 18th December, 1903. The defendant committed default in delivering three oil wells whereupon plaintiff came and demanded their delivery in 1904 and 1905. The plaintiff instituted the suit for specific performance on 22nd February, 1913. Dealing with cross-appeal, their Lordships of the Privy Council observed as follows : "So far as the cross-appeal is concerned it is an action for specific performance of this contract of 18th December, 1903. It certainly is rather startling to be told that nine years after a contract has been made which could have been satisfied within twelve months of its execution, a party to the contract is at liberty to take proceedings for specific performance. The rights of equity which prevail in British Burma are rights which are given to people who are vigilant and not to those who sleep, and, unless there can be clearly established some reason which threw upon the defendant the entire blame for the delay that had occurred, or unless, indeed, it can be shown that the real right of action had only accrued a short time before the proceedings were instituted, such a lapse of time would be fatal to any action for specific performance of a contract."[1]

(2) The agreement in plaintiff's favour was substituted on 26th November, 1932 and the suit was instituted in 1936 in spite of the fact that the previous tenants advocated the property in suit in 1934 and property demised to another person. It was held that the plaintiff was guilty of gross negligence and hence not entitled to a decree for specific performance.[2]

(3) The agreement by which the defendant agreed to execute a deed of relinquishment was dated 14th February, 1927. The suit for specific performance was filed in 1930 just before the expiry of a period of limitation and it was held that the circumstances in which the contract was made were such as to give the plaintiff an unfair advantage over the defendant and the delay raised the presumption of abandonment of the plaintiff's claim and had caused hardship and prejudice to the opposite-party. The suit for specific performance was dismissed.[3]

(4) The agreement to sell was dated 15th February, 1918. The suit for specific performance was brought on 19th February, 1921 and it was held that inordinate and unexplained delay coupled with change of condition was a sufficient ground for acquiescence of specific performance. It is sufficient to say that even if it be held that mere delay does not disentitle the plaintiff to claim specific performance, nevertheless delay is one of the factums to be considered in giving the discretionary relief.[4]

(5) The contract was dated the 16th of April, 1913. The month for completion expired on the 16th May, 1913. The suit was brought on 13th May, 1916. The limitation expired on 16th May, 1916, three days after the suit. *Held* that the plaintiff's conduct amounted to an abandonment of the contract. The matters at the time the suit was brought were not in *status quo* "they were at the time the contract was entered at". There was a change in the value of the property and it has occurred by reason of delay which was

1. Mashwemya *v.* Maung Mehnang, I.L.R. 38 Cal. 832 at p. 838 (P.C.).
2. Khusi Ram *v.* Munshi Lal, A.I.R. 1940 Lah. 225 at p. 226: 189 I. C. 418: 42 Punj. A.L.R. 194.
3. Rami Reddi *v.* Pattabhi Rami A. I. R. 1937 Mad. 124 at p. 125.
4. Lekh Singh *v.* Dwarka Nath, A. I. R. 1929 Lah. 249 at p. 251.

attributable to the plaintiff. *Held* that in these circumstances, specific performance was rightly refused.[1]

In *Dau Alakhram* v. *Mst. Kulwantin Bai*,[2] the agreement for sale was by the defendant of the husband's share in a certain *mauza*, for the discharge of pressing mortgage decree-debt, etc. The purchaser who, *inter alia*, was to discharge this pressing debt, to find the stamp, etc. not only did not do so but accumulated it to a heavy amount. He did nothing for two years and eight months notwithstanding three notices by the defendant to complete the transaction. It was held that the facts warranted an inference of waiver and it would work hardship on the defendant to specifically enforce the contract.

23. **Illustrative cases in which delay held not fatal—Discretion—Meaning.**—The cases falling under this class point out that the exercise of discretion does not mean that the Court ought to refuse relief of specific performance where the delay ought to be excused.

In *Sankaralinga Nadar* v. *Ratnaswamy Nadar*,[3] the plaintiff-appellant brought a suit for enforcing specific performance of an agreement to sell executed by the defendants 1 to 3, joint family members with the 1st defendant as manager, in respect of two godowns in Mathurai for Rs. 13,500. The time fixed for performance was one month. But the suit was nearly three years after the date of the agreement, by which time the price rose to Rs. 20,000 according to the plaintiff and to Rs. 30,000 according to the defendants. The question was whether the plaintiff became disentitled to relief on the ground of laches and delay. There was no plea in the written statement that the plaintiff had in any way brought any change in the situation of the defendants. It was held that long delay did not amount to abandonment and that abnormal rise in prices could not be taken as working hardship on the defendant because under Sec. 20 (*b*) of the present Act, the question of hardship must be judged as on the date of transaction and not in the light of subsequent events and because also the hardship should be one collateral to the contract and not in relation to a term of the contract such as the quantum of consideration.

In *Arjuna Mudaliar* v. *Lakshmi Ammal*,[4] the plaintiff and his family members sold certain properties to the contesting defendants in 1920 under a registered sale-deed for Rs. 300. On the same day the said defendants executed an agreement to re-convey the said properties on the vendors paying on any day the principal money with interest at 12 per cent. per annum. Treating these two transactions as a mortgage by conditional sale the plaintiffs brought the suit for reconveyance in 1942. No right of third parties had intervened. It was held that the plaintiffs could exercise the option of re-purchase notwithstanding long delay and that from long delay alone without anything further an abandonment of rights could not be presumed.

In *Dr. Jiwan Lal* v. *Brij Mohan Mehra*,[5] there was an agreement between the plaintiff and the defendant. It was concluded on 9th December, 1959. By the agreement the defendant agreed to sell premises in suit to the plaintiff.

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1. Baharaj Bahadur Singh *v.* Suresh Chand, A.I.R. 1921 Cal. 129.
2. A.I.R. 1950 Nag. 238 at p. 241.
3. (1952) 1 M. L. J. 44 at p. 46: A. I. R. 1952 Mad. 389; Suryaprakasharyudu *v.* Lakshminarasimha, (1914) 26 M. L. J. 518 at p. 521.
4. A. I. R. 1949 Mad. 265 at p. 267: (1948) 2 M. L. J. 271 : 61 L. W. 601: 1948 M. W. N. 624.
5. A.I.R. 1973 S.C. 559 at p. 563 : 1973 Jab. L. J. 1041.

Even after 29th April, 1960, the plaintiff was pressing defendant to execute a registered sale-deed. The plaintiff did not abandon his rights under the agreement. The prices of the properties started depreciating in or about October, 1962, when there was Chinese aggression on India. The suit was instituted after the Chinese aggression. It was held that it could not be said that the specific performance of the agreement was likely to cause any prejudice to the defendant. The suit could not accordingly be dismissed on account of delay.

24. Abandonment of case.—If abandonment of case of contract by plaintiff is proved, then the question of Court's discretion does not arise. The suit should fail on that account alone. Abandonment of the case of contract is no consideration for using discretion by the Court for refusing decree as it is by itself a ground for dismissal of the suit.[1]

25. Time is of the essence of contract.—Under Sec. 55, Contract Act, the parties to a contract must perform the contract within the time stipulated by the parties. But the Privy Council has engrafted the desirable English law principle of equity to the effect that in cases relating to sale of land it is not necessary to conform exactly to the date fixed but that it must be performed within a reasonable time thereafter.[2] The above discussion relates to cases where time is not of the essence of the contract.

But this does not mean that time is not the essence of contract in every agreement to sell land or that time cannot be made essence of a contract. Where time is of the essence of the contract, delay will bar a decree for specific performance.[3] If time is essential the stipulation of the contract must be exactly complied with ; not the delay but failure to perform it at the exact day cuts off the rights of the defaulting party.[4]

It is well settled that the mere fact that a date is mentioned in the contract for the performance of the agreement does not conclusively prove that time was intended to be of the essence of the contract.[5] Nor can such intention be inferred merely from the fact that the agreement provides that in case of default on the part of the purchaser the vendor is at liberty to cancel the agreement and forfeit the earnest money.[6]

26. Duty of Court to ascertain in each case whether time is of the essence of the contract.—The Court must ascertain in each individual case whether in fact performance of the contract by one party was meant to depend on the other party's promise fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time.[7] In cases where the question is whether the time is of the essence of the contract

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1. Manik Lal Seal *v.* K. P. Chowdhury, A.I.R. 1976 Cal. 115 at p. 121.
2. Jamshed Khodaram *v.* BurjorjiDhunjibhai, I. L. R. 40 Bom. 289 at p. 299 (P. C.).
3. Kaulas *v.* Bejoy, 23 C. W. N, 190; Harakh Singh *v.* Saheb Singh, 6 C. L .J. 176; Parks *v.* Eames Realty Co., 94 N. H. 454 (instalment contract).
4. Buckles *v.* Sniell, 38 I.C. 123; Pomeroy, 399, 401.
5. Hearne *v.* Tenant, 13 Ves. 287; Parkin *v.* Thorold, (1854) 16 Beav. 59; Parkhurst *v.* Lebanon Pub. Co., 294 S. W. (2) d. 241 (payable in instalments; six days delay in paying one instalment).
6. Jamshed Khodaram *v.* Bujorji Dhunjibhai, I.L.R. 40 Bnm. 289 (P. C.) : 43 I.A. 26: 22 I. C. 246 : 30 M.L.J. 186 : 23 C.L.J. 358: 14 A.L.J. 225: 20 C.W. N. 744: 19 M.L.J. 184 : 3 L.W. 230: 18 Bom· L.R. 163: 1916 M.W.N. 229; *see* also 24 C.W.N. 330.
7. Harakh Singh *v.* Saheb Singh, 6 C.L.J. 176.

or not, the test is whether the performance of the contract by one party, was made to depend upon the fulfilment of the promise by the other party, by a specified date, or whether the day named was only to secure performance within a reasonable time.[1]

27. **The question whether time is of the essence of the contract depends upon the intention of the parties.**—The question whether time is of the essence of the contract depends on the intention of the parties.[2] Although in ordinary cases time is not essential, yet it may be so and is essential whenever the intention of the parties as shown by the contract is clear that the performance of the terms should be accomplished punctually at the stipulated day,[3] for equity has never laid it down that a man can never be allowed to mean what he says.[4]

28. **Presumption in case of immoveable property that time is not of essence of contract but it is rebuttable.**—It is now well settled that ordinarily in a contract in respect of land time fixed for completion of the transaction is not considered to be of the essence of the contract. In such a contract the presumption is that though a specific time is mentioned within which compensation is to take place, the parties really and in substance did only intend that it should take place within a reasonable time. This presumption is, however, a rebuttable one.[5] Where the parties had agreed upon resale the time is to be deemed as of the essence of the contract.[6] The essentiality of time may also be implied from the surrounding circumstances connected in each case with the particular contract.[7] Where the thing sold be of greater or less value according to effluxion of time, it is manifest that the time is of the essence of the contract and stipulations as to time must be literally complied with in equity as well as in law. This is true in case of transactions relating to public stocks, shares in business corporations, trades, reversions and mines.[8] So also in case of repurchase of land for commercial purposes.[9]

Resale.

Transaction relating to public stocks, trades, reversions and mines.

29. **Mercantile transactions.**—The presumption in case of mercantile transactions is that the time is of the essence of the contract.[10] Where time is of the essence of the contract and the purchaser is in default, the vendor can rescind the contract and retain the earnest money.[11]

30. **Where no time for performance is fixed.**—Where no time is specifically fixed for the performance of the conduct the law demands that the parties should complete the transaction within a reasonable time.[12]

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1. Mahadeo *v.* Narain, 57 I. C. 121 : 30 C. L. J. 224: 24 C.W.N. 330.
2. Pomeroy, 382 ; Shankar *v.* Rattanji, A.I.R. 1923 Bom. 471.
3. Pomeroy, 382.
4. Shankar *v.* Rattanji, *supra.*
5. Jameshed Khodaram *v.* Burjorji Dhunjibhai, I.L.R. 40 Bom. 289 (P.C.): 43 I. A. 26 : 32 I.C. 246 : 30 M. L. J. 196: 23 C.L.J. 358 : 14 A. L. J. 225 : 20 C. W. N. 744 : 19 M L.J. 184 : 3 L. W. 30 : 18 Bom. L. R. 163 : 1916 M. W. N. 229 , *see* also 24 C.W.N. 330, Mahadeo *v.* Narain , *supra.*
6. Samarapuri *v.* Sudarsana, I. L. R. 52 Mad. 402 : 52 I. C. 590.
7. Fry, Sec. 1086 ; Jadunath Gupta *v.* Chandrabhusan Sur, A. I. R. 1932 Cal. 493 at p. 494 : 138 I. C. 498 : 36 C.W.N. 285 ; *see* I.L.R. 1933 Bom. 71.
8. Fry, Sec. 1079, Macbryde *v.* Weekes, 22 Beav. 533
9. Samarapuri *v.* Sudarsana, I. L. R. 42 Mad. 803: 52 I.C. 590.
10. Budhan *v.* Betts, 22 C. L. J. 566, Reuter *v.* Sale, 4 C.P. 239, Steedman *v.* Drinkle, (1216) 1 A.C. 275, Bowes *v.* Shand, 2 App. Cas. 455.
11. Abdul Rasak *v.* Brown & Co., 57 I. C. 415 : 1920 M.W.N. 290.
12. Binda Prasad *v.* Kishori Saran, A.I.R. 1929 P.C. 195 at p. 200 , *see* also Rustomji *v.* Dhairagwan, A.I.R. 1933 P.C. 165.

31. Notice fixing time.—Even in cases where time is not of the essence of contract, e. g. transaction relating to land, if one of the parties has been guilty of gross, vexatious, unreasonable or unnecessary delay or default in relation to it, the other party may serve upon him a notice limiting a time at the expiration of which he will treat the contract as at an end. In default of obedience to such notice the Court will not enforce specific performance but will leave the parties to their strictly legal rights. The reasonableness of time so limited is determined by the Court with reference not merely to what remains to be done at the date of the notice but all the circumstances of the case including the previous delay of the party in default and the attitude of the other party in relation to it.[1] The notice cannot be an arbitrary and sudden termination of the transaction. It cannot put an immediate end to a pending dispute or negotiation as to title. It must allow a reasonable length of time for the other party to perform and if it fails in any of these respects it may be disregarded.[2] The notice to engraft time into the contract must be distinct and unequivocal.[3]

Notice fixing time should be reasonable and cannot be arbitrary and sudden termination of transaction.

It is obvious from what is stated above that in order to close the contract after giving notice there must be gross delay on the part of the other party. Therefore, where time is not initially of the essence of the contract for completing the performance it will not be open to the vendor unilaterally to make it so in the absence of some impropriety on the part of the purchaser sufficient to entitle him to do so. Thus, in a recent English case, *Smith* v. *Hamilton*,[4] the contract was on the 26th of February for the purchase of a dwelling-house ; time for performance was fixed at two weeks. Only three weeks after the due date the vendor gave notice that unless the sale is completed before 19th April the deposit would be forfeited and the property resold. The vendor resold the house on the 21st April to another. On the 2nd of May the purchaser offered to complete then having the money. In a suit by the purchaser Harman, J., decreed specific performance pointing out that the vendor could not in the circumstances unilaterally make it the essence of the contract and that the forfeiture of deposit and resale were both illegal.

Closing contract when ?

32. Unfair contracts.—A contract may be perfectly valid in law, yet there may be want of equality and fairness about it justifying refusal to a grant of specific performance.[5] Specific performance of a contract being an equitable relief, within the discretion of the Court, he who seeks equity must come with clean hands. It is permissible to a debtor to give preference to one creditor over another and, therefore, though the agreement may amount to a

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1. Fry, Sec. 1092 ; Taylor *v.* Brown, 3 Beav. 180, Mahadeo *v.* Narain, 57 I.C. 121: 30 C. L. J. 224: 25 C.W.N. 330 , Karsandas Kalidas Ghia *v.* Chhotalal Motichand, I.L.R. 48 Bom. 279: A.I.R. 1924 Bom. 119 : 25 Bom. L. R. 1144; Abdul Majid *v.* Ballappa, A.I.R. 1925 Nag 58 ; Jamshed Khodaram *v.* Burjorji Dhunjibhai, A. I. R. 1925 Nag. 58 , Webb *v.* Hughes, L.R. 10 Eq. 281, Stickney *v.* Keeble, (1915) App. Cas. 386, Nokes *v.* Kilmorey, 1 De G. & S. M. 444, Patrick *v.* Miller. L.R. 2 C.P.D. 342, McAlister *v.* St. Joseph, 181 S.W. 54, Shamas-ud-Din Jajbhai *v.* Dadyabhai Maganlal, A.I.R. 1924 Bom. 357, *see* also Mussa Md. *v.* Motilal Itchalal, A.I.R. 1922 Bom. 14 at p. 16 [I. L. R. 40 Bom. 289 (P. C.) and Tillay *v.* Thomas, (1867) L.R. 3 Ch. 61 ref.], Maruda Nayagam *v.* Munuswami Pillai, 37 I.C. 776 at p. 777.
2. Pomeroy, Sec. 396.
3. Fry. Sec. 1908 , Reynolds *v.* Nelson, 6 Mad. 18.
4. (1950) 2 All E. R. 928 at pp. 933-5 : (1951) Ch. 174 ; 1950 W.N. 497.
5. Govind *v.* Nanda, 22 I.C. 910: 18 C.W. N. 680.

fraudulent preference of the plaintiff to the detriment of other creditors the validity of the agreement cannot be impeached. The specific performance of such an agreement, however, need not be decreed merely because it is lawful. Courts can take into consideration the conduct of the parties to the agreement and the circumstances attending its execution and can refuse to order specific performance in their discretion. Under Sec. 22 (old), Specific Relief Act, the Court may properly exercise a discretion not to decree specific performance where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there be no fraud or misrepresentation on the plaintiff's part. Where though a creditor is not a party to the agreement, its specific performance will be injurious to him as it will deprive him of the benefits of his attachment of the property in execution of his decree.[1] There are cases in which though there is nothing that actually amounts to fraud or misrepresentation, there is nevertheless a want of equality and fairness in the contract, which might induce the Court to refuse specific performance.[2] The general rule is that when a substantial defect is ascertained, the purchaser must exercise his right of repudiation or of seeking the aid of the Court for specific performance without undue delay. Also, as ruled in *Stickney* v. *Keeble*,[3] the prior delay of defendant must be taken into consideration in determining the reasonableness of the time fixed by the notice. The case was, therefore, one in which a short period for completion of the contract might reasonably be fixed.[4] There need not be any fraud or misrepresentation by the plaintiff. It is enough if there is inequality or unfairness due to any cause whatsoever, the Court refuses relief of specific performance if there are signs of distress in the party against whom it is sought. It is very cautious in such cases. The unfairness complained of may be in the terms of the contract itself, or it may be in other surrounding extrinsic circumstances, age, duress, mental weakness, etc.,[5] when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by non-disclosure of important facts, by trickery, by taking undue advantage of his position, or by any means which are unconscientious, or affected by any other such inequitable feature or when the enforcement itself would be oppressive or hard upon the defendant or would prevent the enjoyment by him of his own rights or would in any other manner work injustice.[6] Again, there may be circumstances to the position or mental state of the party against whom specific performance is sought such as to render it inequitable that he should be forced by the Court to perform his contract, e. g. intoxication, intimidation, duress, illiteracy, want of advice or similar circumstances appearing inconsistent with intelligent consent. In all such cases it need not be shown that the plaintiff was guilty of intentional unfairness.[7] But the mere fact that a bargain is onerous, cannot avail of as a defenee to a suit for specific performance unless it is established that it is also unconscionable or that the plaintiff has taken an improper advantage of his position or the difficulties of the defendant.[8]

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1. Jethalal Nanshah Modi *v.* Bachu, A I.R. 1945 Bom. 481 at p. 483.
2. Sheikh Ahmad *v.* Lallaram, 13 W. R. 426; Israr Husain *v.* Deonarain, A.I.R. 1929 All. 372 at p. 373; *see* also Abdul Rahim *v.* Yufen Gazi, A. I. R. 1928 Cal. 584 : A.I.R. 1928 Mad. 860.
3. (1915) A.C. 386 : 84 L. J. Ch. 259: 112 L.T. 664.
4. Karsandas Kalidass Ghia *v.* Chhotalal, Motichand, A.I.R. 1924 Bom. 119 at p. 124: 25 Bom. L. R. 1144.
5. Fry, 385, 387, 401, 406.
6. Pomeroy, Sec. 175.
7. Halsbury's *Laws of England*, Vol. 27, Sec. 63.
8. Davis *v.* Maung Shwe & Co., I. L. R. 38 Cal. 865 (P.C.) : 38 I.A. 115: 11 I.C. 801: 21 M.L.J. 1127: 15 C.W.N. 134: 4 Bur. L.T. 22?: 10 M L.T. 455: 13 Bom. L.R. 704: 14 C.L.J. 250: 8 A. L. J. 1193; Calianji *v.* Narsi, I.L.R. 18 Bom. 702; Ram Sundar *v*, Kali Narain, I. L. R. 55 Cal. 285.

Mere inadequacy of price is no ground for refusing specific performance although it is a circumstance which "will arouse the Sixth Sense of Equity". Where (1) the price is so inadequate as shocks the Court's conscience and (2) either by itself or in conjunction with any other circumstance such as illiteracy, oppression, etc., it evidences fraud or undue advantage was taken by the other side, the Court will refuse specific performance of a contract of sale, the agreed price was so grossly inadequate and the vendors were illiterate agriculturists who were heavily indebted to the plaintiff, it is a case where the provisions of Sec. 28(*a*) (old) of the Specific Relief Act are attracted. In order to apply the equitable principles laid down in Sec. 20 of the Specific Relief Act, 1963, it is not necessary that the case of the fraud or misrepresentation be made out by the plaintiff. It is enough if the transaction is grossly unfair due to any cause. If there are surrounding circumstances such as duress or intimidation or when the plaintiff obtained the agreement practising by unscrupulous acts, or by the non-disclosure of important facts or by trickery or by taking undue advantage of his position and the like, the Court has to look to such an agreement with caution and circumspection.[1]

33. **False plea of payment.**—It was held by a Division Bench of the Madras High Court in *Subbarayudu* v. *Tatayya*,[2] that where the plaintiff seeking the relief of specific performance puts forth a false plea, he would be disentitled to the equitable and justifiable relief of specific performance.[3]

34. **Inadequacy of the price no ground for the refusal.**—Mere inadequacy of price for which a property is agreed to be sold by itself, is no sufficient ground for refusing specific performance of the contract. The modern rule of refusal to decree specific performance of a contract for sale of immoveable property has been stated in Pollock and Mulla,[4] thus: "It is clear that the Court may exerice a discretion in granting or withholding a decree for specific performance and in the exercise of that discretion the eircumstances of the case, and the conduct of the parties and their respective interest under the contract are to be remembered." In *Lakshminarayana* v. *Singaravelu*,[5] it was stated: "Any contract which gives one party an unfair advantage must fall under the category of contracts which could not be specifically enforced."[6]

Thus in a case where the court-sale had taken place and the judgment-debtor had lost his title to his property which he could only recover on depositing the decretal amount within the time allowed by the law for setting aside the sale. The price which he received by the subsequent agreement to sell was just the same money necessary for Court deposit *plus* some sundry Court expenses, incidental thereto. It was held that the subsequent purchaser took advantage of the situation in which the judgment-debtor was placed, that the judgment-debtor was not on equal bargaining terms, that the subsequent purchaser got an unfair advantage over the judgment-debtor and got the property at a price which was far below the normal market price, and hence the specific performance of such contract was refused.[7]

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1. Manakchand *v.* Puran, A. I. R. 1963 M.B. 235.
2. 1937 M.W.N. 1158.
3. Kommisetti Venkatasubbayya *v.* Karamsetti Venkateswarlu, A. I. R. 1971 A.P. 279 at p. 280: (1971) 1 Andh. W. R. 125.
4. *Indian Contract Act* and *Specific Relief Act*; 8th Ed., p. 798.
5. A.I.R. 1963 Mad. 24 at p. 29.
6. *See* also Oxford *v.* Provand, (1868) 2 P.C. 135 at p. 138 and Jethalal Nansha Modi *v.* Bachee, A. I. R, 1945 Bom. 481 at p. 483: 47 Bom. L.R. 460.
7. Lakshminarayana *v.* Singaravelu, A.I.R. 1963 Mad. 24 at p. 29.

In *Sankaralinga* v. *Ratnaswami*,[1] it was held that a subsequent rise in prices is not a relevant ground for refusing specific performance.[2]

35. Unconscionable contract.—Where the parties to a contract of sale of land do not stand on the same or equal footing and the bargain is an unconscionable one, as at the time they entered into the contract one party had and the other had not the knowledge, notice, or information about a certain state of affairs as to the land and the title therein and the other party having subsequently come to know about the true state of affairs, did not carry out this part of the contract. In a suit by the plaintiff for the specific performance of such contract it was held that under the circumstances of the case, the parties did not stand on equal footing at the time of the bargain and the contract being oppressive and unreasonable and unfair, that it was not appropriate to insist upon the specific performance of the contract and the plaintiff was not entitled to a decree for specific performance of the contract in his favour.[3]

36. Champertous agreements.—Raju, J., in *N. Venkataswami* v. *K. Nagi Reddy*,[4] while discussing the validity of such an agreement says :

> "The important question for consideration, however, is with regard to the validity of the agreement, initially it may be observed that the English law in regard to champerty and maintenance does not apply to India for it has been laid down that the mere fact of an agreement being champertous is not of itself sufficient to render it void but it must be shown in addition that it is contrary to public policy. There is a long line of authority which establishes that a fair agreement to supply funds to carry on a suit in consideration of having a share in the property if recovered is not *per se* opposed to public policy and is not illegal. This was the view taken by the Privy Council as early as 1876 in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*"[5]

and then as pointed by their Lordships of the Privy Council in *Ram Sarup* v. *Court of Wards*[6] :

> "It is essential to have regard not merely to the value of the property claimed but to the commercial value of the claim. This is to be estimated by the parties in advance of the result; and where they have weighed the probabilities in a manner which has not operated unfairly, it is more reasonable to regard this as confirming their shrewd estimate of the chances, than to condemn the agreement outright as unfair, by reason only of the possibility that a great gain to the claimant would have to be shared with the financier—The uncertainties of litigation are proverbial; and if the financier must needs risk losing his money, he may well be allowed some chance of exceptional advantage.....
>
> "The jurisdiction to decree specific performance is discretionary and as provided by Sec. 22 of the Specific Relief Act (1877) which

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1. A.I.R. 1952 Mad. 389.
2. Mir Abdul Hakeem Khan *v.* Abdul Mannan Khadri, A. I. R. 1972 A. P. 178 at p. 184.
3. Ram Krishna *v.* Palaniappa, A. I. R. 1963 Mad. 17 at p. 18.
4. A.I.R. 1962 A.P 457 at p. 458.
5. 4 I.A. 23 (P.C.).
6. I.L.R. (1940) Lah. 1 at p. 12: A. I. R. 1940 P.C. 19.

corresponds to Sec. 20 of the present Act the Court is not bound to grant such relief merely because it is lawful to do so; but the only limitation is that the discretion of the Court should not be arbitrary but should be sound and reasonable, guided by judicial princplies and capable of correction by a court of appeal."[1]

37. Time of judging fairness of contract.—The use of the words "circumstances under which a contract is made" points clearly to the conclusion that whether the contract was one which should be aside as inequitable would depend upon the circumstances at the time when it was made and not upon the subsequent events.[2] Thus if at the time of making the agreement both parties had equal means of knowledge, the fact that their relative positions are subsequently discovered to be different from that supposed at the time does not affect the question.[3] Where at the time when the contract was made the plaintiff had an unfair advantage owing to the fact that defendant's faculties wore enfeebled the Court will refuse to grant specific performance.[4]

38. Order refusing specific performance should not be interfered with in appeal unless such order is perverse or contrary to any law.—The order declining specific performance is discretionary and, therefore, should not be interfered with on appeal, unless the discretion is shown to be perverse or contrary to any well-recognized principles or is unsustainable on the evidence. This point has been developed from several aspects. It is equally unnecessary to express any considered opinion on this point in this case. It may, however, be observed that the discretion has to be exercised on well-recognised principles and it is judicial and legal, not arbitrary, fanciful and absolute, though it does not run on a fixed set of iron rails. And then, it is worth noting that the appellate jurisdiction is statutory which imposes no limitation about appeals from orders involving discretion, though as a matter of practice it is considered undesirable normally to interfere with the exercise of the discretion of the Court below except on grounds of law or if on other grounds, the impugned decision would result in injustice being done; in the latter case, the appellate Court must be held to have both the power and the duty to remedy.

Besides in case of sale of immoveable property it may be remembered that usually specific performance is allowed.[5]

39. Circumstances from which inference could be drawn of waiver or abandonment of contract—Time-factor in performance of contract.—There was a delay of about nine months between the last extended time and the notice given by the plaintiff to the defendant calling upon the latter to execute a sale-deed. There was no correspondence during this period between the plaintiff and the defendant with regard to extension of time for completion of the contract and there is nothing to show that anything was done by the plaintiff to keep alive the agreement of sale. In the above circumstances inference is that there was a waiver or abandonment of the contract.

"Where the object of the contract is a commercial enterprise, the Court is strongly inclined to hold time to be essential, whether the contract be for the

1. N. Venkataswami *v.* K. Nagi Reddy, A.I.R. 1962 A. P. 457 at p. 459.
2. Ganga Baksh *v.* Jagat Bahadur, I L.R. 23 Cal. 15 (P.C.), Sher Singh *v.* Udham Singh, 72 I. C. 586 : 5 Lah. L. J. 307 ; Shib Lal *v.* Collector of Bareilly, I.L.R. 16 All. 423 : 1894 A. W. N. 161.
3. Shib Lal *v.* Collector of Bareilly, I.L.R. 16 All 423 : 1894 A. W. N. 161.
4. Sher Singh *v.* Udham Singh, 72 I. C. 586 : 5 Lah. L. J. 307.
5. Dr. Bal Saroop Daulat Ram *v.* Lt.-Col. Lakhbir Singh Kirpal Singh, A. I. R. 1964 Punj. 375 at pp. 380-88.

purchase of land for such purposes, or more directly for the prosecution of trade. This principle has been acted on in the matter of a contract respecting land which has been purchased for the erection of mills . . . . "

When time is provided for performanee, readiness and willingness on the part of the person seeking performance can only mean that on his part he has throughout the period kept the contract as a subsisting one with a preparedness to fulfil his obligation and accept performance when the time came. This does not mean that the purchase should besides show that he had command of the necessary finance throughout the life of the contract. Such an insistence will make the fixing of a time for performance meaningless.[1]

40. Decree for specific performance of contract.—The Specific Relief Act, 1963, is not an exhaustive enactment. It does not consolidate the whole law on the subject. As the preamble would indicate, it is an Act "to define and the amend the law relating to certain kinds of specific relief." It does not purport to law down the law relating to specific relief in all its ramifications. In *Ramdas Khatau & Co.* v. *Atlas Mills Co., Ltd.*,[2] it was held that the Specific Relief Act, 1877, was not exhaustive. In *Rahmath Unnissa Begum* v. *Shimoga Co-operative Bank Ltd.*,[3] the Court said that the Specific Relief Act, 1877, is founded on English equity jurisprudence and that it is permissible to refer to English law on the subject wherever the Act did not deal specifically with any topic.[4] Although a matter on which the Act defines the law it might generally be exhaustive, the Act as a whole cannot be considered as exhaustive of the whole branch of the law of specific performance.

It is settled by a long course of decisions of the Indian High Courts that the Court which passes a decree for specific performance retains control over the decree even after the decree has been passed. In *Mohammadalli Sahib* v. *Abdul Khadir Sahib*,[5] it was held that the Court which passed a decree for specific performance has the power to extend the time fixed in the decree for the reason that Court retains control over the decree, that the contract between the parties is not extinguished by the passing of a decree for specific performance and that the contract subsists notwithstanding the passing of the decree. In *Pearisundar Dassee* v. *Hari Charan Mozumdar Chowdhury*,[6] the Calcutta High Court said that the Court retains control over the proceedings even after the decree for specific performance has been passed, that the decree passed in a suit for specific performance is not a final decree and that the suit must be deemed to be pending even after the decree. The same view was taken in *Someshwar Dayal* v. *Widow of Lalman Shah.*[7] In *Anandilal Poddar* v. *Gunendra Kr. Roy*,[8] Ray, J., speaking for the Court said that the Court retains control over the matter even after passing a decree for specific performance and that virtually, the decree of a preliminary one. In *Tribeni Tewary* v. *Ramratan Nonia*,[9] it was held that the Court retains seisin of the case notwithstanding the fact that a decree for specific performance has been passed

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1. S. P. Narayanaswami Pillai *v.* Dharakoti Ammal, A. I. R. 1967 Mad. 220 at p. 222.
2. A. I. R. 1931 Bom. 151.
3. A. I. R. 1951 Mys. 59.
4. *See* also Firm Kishore Chand Shiva Charan Lal *v.* Budaun Electric Supply Co., Ltd., A. I.R. 1944 All. 66 at p. 77.
5. (1930) 59 M. L. J. 351.
6. I. L. R. 15 Cal. 211.
7. A. I. R. 1958 All. 488.
8. A.I. R. 1966 Cal. 107.
9. A. I. R. 1959 Pat. 460.

and that the decree is really in the nature of a preliminary decree. Fry in his book[1] states the law in England as follows :

> "It may and may not infrequently does happen that after judgment has been given for the specific performance of a contrect, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part, as for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchaser money . . . . . "

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in a proper case, avail himself :

> '(*i*) He may obtain (on motion in the action) an order apointing a definite time and place for the completion of the contract by payment of the unpaid purchase money and delivery over of the executed conveyance and title-deeds, or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects.
>
> '(*ii*) He may apply to the Court (by motion in the action) for an order rescinding the contract, On an application of this kind, if it appears that the party moved against has positively refused to complete the contract, its immediate rescission may be ordered : otherwise, the order will be for rescission in default of completion within a limited time' . . . . . "

In Halsbury's *Laws of England*,[2] the law is stated as under :

> "Ancillary relief may be obtained after judgment in the action for specific performance where such further relief become necessary.....
>
> "Either party may also obtain an order rescinding the contract in default of completion with in a fixed time."

As the Court retains control over the mater despite the decree, it is open to the Court, when it is alleged that the party moved against has positively refused to complete the contract to entertain the application and order rescission of the decree if the allegation is proved.[3]

A decree for specific performance was in the nature of a preliminary decree and the original Court kept control over the action and had full power to make any just and necessary orders therein, including in appropriate cases an extension of time. An application in the suit in which the decree for specific performance was made was held competent in that case. In *Akshayalingam Pillai* v. *Avayambala*,[4] it was held, relying on the authority of the

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1. Fry on *Specific Performance*, 6th Ed., p. 546.
2. Halsbury's *Laws of England*, 3rd Ed., Vol. 36, pp. 351-52.
3. Hungerford Investment Trust Ltd. *v.* Haridas Mundhra, A. I. R. 1972 S. C. 1826 at pp. 1832-33 : 1972 S. C. D. 378.
4. I.L.R. 56 Mad. 796 : A.I.R. 1933 Mad. 386.

decision of the Judicial Committee in *Ardeshir H. Mama* v. *Flora Sassoon*,[1] that the sections of the Specific Relief Act both as to substantive law and practice should be interpreted in the light of the principles recognized by the English courts, and if there is any express divergence, then the Act will be strictly adhered to whatever be the English law. Secondly, it was held that a decree for specific performance operates in favour of both parties. Thirdly, that the passing of the decree does not terminate the suit.

A decree for specific performance operates in favour of both parties and defendant in a suit for specific performance is as much entitled to enforce a decree as the plaintiff.[2]

41. Execution of decree for specific performance.—In *Heramba Chandra Maitra* v. *Jyotish Chandra Sinha*,[3] Rankin, C. J., speaking for the Court, said that a decree for specific performance operates in favour of both plaintiff and defendant and that the decree is capable of being executed by either.[4]

Order XXI, rule 30, provides for execution of a decree for money. That rule can possibly have no application to the execution of a decree for specific performance, *firstly* for the reason that a specific mode for execution of a decree for specific performance is provided by Order XXI, rule 32, and *secondly*, because no decree for money is passed in a suit for specific performance. Order XXI, rule 32, provides as follows :

"(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property or by both.

"(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporatien, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

"(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

"(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at

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1. 55 Ind. App. 360 : A. I. R. 1928 P. C. 208.
2. Anandilal Poddar *v.* Gunendra Kr. Roy, A. I. R. 1966 Cal. 107 at pp. 112-13.
3. A. I. R. 1932 Cal. 579.
4. *See* also Bai Karimabibi *v.* Abderchman Sayad Banu, A.I.R. 1923 Bom. 26.

the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

"(5) Where a decree for the specific performaace of a contract or for an injunction has not been obeyed. the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and be recovered as if they were included in the decree."

The execution of a decree for specific performance can only be in the manner prescribed by this rule; sub-rule (1) of the rule says that if a decree for specific performance is not obeyed, the decree is to be enforced by the detention of the party in default in the civil prison or by attachment of his property or by both. The detention in the civil prison of the party who failed to obey the decree and the attachment of his property are simply the means to compel him to obey the decree. That is made clear by sub-rule (3) which says that if the judgment-debtor has failed to obey the decree when the attachment has remained in force for one year, the property attached may be sold and out of the proceeds the decree-holder may be awarded such compensation as the Court thinks fit. Sub-rule (5) which provides that the Court may direct the act required to be done may be done by the decree-holder or some other person appointed by the Court can only refer to an act other than an act of payment of money.[1]

In the above-noted case the decree provided that the agreement relating to sale of shares of a company ought to be specifically performed. It was held that if the buyer refused to pay the purchase money there was nothing which prevented the seller from applying for recission of the decree.

42. Amendment of decree granting specific performance.—It is well known that the time for payment and the execution of the document are generally fixed in judgments and decrees for specific performance. The omission to do so is clearly an accidental slip or omission coming within the meaning of Sec. 152, Specific Relief Act.[2]

In the above-noted case, the respondent filed the suit on the foot of an agreement of sale for specific performance. It was decreed on 12th February, 1971 saying that on the payment of Rs. 15,000 the defendant should execute the re-conveyance document in favour of the plaintiff. It, however, omitted to fix the time before which such amount should be paid and the reconveyance deed should be executed. So, the defendant filed a petition, to amend the judgment and decree under Secs. 152 and 151 to rectify the defect as it arose out of an accidental slip or omission.

It was held that the very expression "specific performance" indicated that the performance of an agreement should be specific. Without the time fixed for its performance, the decree ceased to be specific. So, omission to fix the date for performance would be defeating the very decree and making it

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1. Hungerford Investment Trust Ltd. *v.* Haridas Mundhra, A. I. R. 1972 S. C. 1826 at pp. 1836-37: 1972 S.C.D. 378.

2. Nazeeruddin *v.* Ram Devi, A.I.R. 1976 A. P. 50 at p. 50 : (1975) 2 Andh. W.R. 59.

nugatory. Omission to mention the times for payment and execution was clearly an accidental slip or omission on the part of the Court. In any case, in view of the grave injustice that would be caused to both parties it was a fit case where the power of the Court under Sec. 151, C. P.C., could be properly exercised.

In *Sreerama Chengal Varayanaidu* v. *Ramaiah*,[1] Venkatrama Sastry, J., took the view that the Court has jurisdiction under Sec. 151, C. P. C. to fix a date subsequently for performance of the contract by the plaintiff though the application was filed under Sec. 152, C. P.C.[2]

43. Decree for breach of contract—Claim for damages.—Ordinarily, there cannot be two agreements subsisting at the same time in respect of the same subject-matter. A contract is ordinarily discharged by performance or by a new agreement. By such an express agreement the parties may agree that their contract shall be terminated and if the original contract is wholly or partially executory the consideration for discharging the agreement is the mutual release of liability.

To make a decree for damages for the breach of a contract which was not the subject-matter of the litigation would be to assume that there was a breach of the contract which had never been attempted to be specifically enforced and the principle upon which the Court refuses performance of the contract is equally applicable to claim for damages for breach of that contract. In other words, if there is no contract which is capable of specific performance *a fortiori* there is no contract which is capable of sustaining damages.

Readiness and willingness to perform the agreement, must be readiness, and willingness to perform not as the plaintiff wished it, nor in the way that the plaintiff evidenced it prior to the institution of the suit, nor in the way the plaintiff wanted to fashion it at trial but whether the plaintiff was really ready and willing to perform the real agreement between the parties. The words "real agreement" would mean either the agreement that the plaintiff and the defendant had between the parties or it would mean the real agreement which the Court finds it to be real agreement. The question of readiness and willingness however would assume different aspects in relation to the real agreement. If at the trial it transpires that the real agreement is not what the plaintiff alleges and the readiness and willingness which the plaintiff displayed was in relation to a different agreement, the plaintiff would be within the mischief of the doctrine of readiness and willingness.[3]

It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief for possession being inherent in the relief for specific performance of the contract for sale. It cannot, however, be disputed that in certain circumstances relief of possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession e. g., where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession over the share of the defendant. In a case where exclusive posses-

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1. (1961) 2 Andh. W. R. 54.
2. Nazeeruddin *v.* Ram Devi, A.I.R. 1976 A. P. 50 at pp. 50-51 : 2 Andh. W. R. 59.
3. Mohammed Ziaul Haque *v.* Calcutta Vyapar Pratisthan, A. I. R. 1966 Cal. 605 at p. 615.

is with the contracting party, a decree for specific performance of the contract of sale *simpliciter*, without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is found not only to execute the sale-deed but also to put the property in possession of the decree-holder.[1]

44. Relief of specific performance is discretionary and not arbitrary—Delay in filing suit for specific performance when to be sanctioned.—Under Sec. 20 (old) of the Specific Relief Act, relief of specific performance is discretionary but not arbitrary ; discretion must be exercised in accordance with sound and reasonable judicial principles. The case providing for a guide to courts to exercise discretion one way or other are only illustrative ; they are not intended to be exhaustive. As Art. 113 of the Limitation Act prescribed a period of three years from the date fixed thereunder for specific performance of a contract, it follows that mere delay without mere extending up to the said period cannot possibly be a reason for a court to exercise its discretion against giving a relief of specific performance. Nor can the scope of the discretion, after excluding the cases mentioned in Sec. 20 (old) of the Specific Relief Act, be confined to waiver, abandonment or estoppel. If one of these three circumstances is established no question of discretion arises, for either there will be no subsisting right or there will be a bar against its assertion. So, there must be some discretionary field unoccupied by the three cases, otherwise the substantive section becomes otiose. It is really difficult to define that field. Diverse situations may arise which may induce a court not to exercise the discretion in favour of the plaintiff. It may better be left undefined except to state what the section says, namely, discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. The expression indicates "waiver" in its legally accepted sense, namely, "Waiver is contractual, and may constitute a cause of action : it is an agreement to release or not to assert a right".[2] It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief.[3]

45. Plaintiff is to prove his readiness and willingness in a suit for the specific performance of contract.—It is well settled that in cases of specific performance of a contract it is for the plaintiff to prove readiness and willing-

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1. Gyasa *v.* Smt. Risalo, A.I.R. 1977 All. 156 at p. 157.
2. *See* Dawson's Bank Ltd. *v.* Nippon Menkwa Kabushiki Kaisha, 62 Ind. App. 100 at p. 108 : A.I.R. 1935 P. C. 79.
3. Mademsetty Satyanarayana *v.* G. Yelloji Rao, A.I.R. 1965 S. C. 1405 at pp. 1408-10 : (1965) 2 S. C. J. 678 : (1965) 2 S.C.W.R. 145 : (1965) 2 Andh. W. R (S.C.) 145 ; *see* also Tandra Venkata Subrahmanyan *v.* Vegesana Viswanadharaju, A.I.R. 1968 A. P. 190.

ness as a fact before he can succeed. This is a condition precedent to his success and the onus is heavily upon him.

It is also well settled that a plaintiff, in an action for specific performance of a contract for the sale of land must plead that he has been and still is ready and willing to carry out the contract ; and repudiation of the contract by the defendant does not relieve the plaintiff from the obligation.

In *Manick Lal Seal* v. *K. P. Chowdhury*,[1] there was no averment in the plaint that the plaintiff had always been ready and willing and was still willing at the time of the institution of the suit to perform his part of contract. The plaintiff did not say anywhere that even at the time of hearing, he was willing and ready or had been performing his part of the duty according to the contract. It was held that the suit was liable to be dismissed.

In *Saral Kumar Chatterji* v. *Madhusudan Auddy*,[2] the question was : has the plaintiff performed his part of the contract ; and whether readiness and willingness of the plaintiff have been established ?

The answer is....."No". Because law is well settled that in such a case the plaintiff has two remedies open to him. He might sue in equity for specific performance or he might sue at law for the breach. If he sues at law he thereby elects to treat the contract as at an end and himself as discharged from its obligations and no further performance by him is either contemplated or is to be performed. On the other hand, if he sues in equity for specific performance he treats and is so required by the Court to treat the contract as still subsisting. He has in that suit to allege and if the fact is traversed he is required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing to perform the contract on his part. Failure to make good that averment brings with it the inevitable dismissal of his suit.

That the purchaser is willing and ready to complete the transaction is in the first instance to be intimated by him is now well settled.[3]

The plaintiff has failed to establish his readiness and willingness to perform his part of the contract and having thus failed to made good the averment in his plaint, the suit is bound to fail.[4]

46. Joint family property ; agreement to sell by the manager without consulting family member ; breach of contract—No specific performance lies.— That for a transaction to be regarded as of benefit to the family it need not be of defensive character so as to be binding on the family. In each case the Court must be satisfied from the material before it that it was in fact such as conferred or reasonably expected to confer benefit on the family at the time it was entered into. Where there is not even an allegation in the plaint that the transaction was such as was regarded as beneficial to the family when it was entered into by Pindidas. Apart from that the fact that here the adult members of the family have stoutly resisted the plainttff's claim for specific performance and which they would not have done if they were satisfied that the transaction was of benefit to the family. It may be possible that the land which was intended to be sold had risen in value by the time the suit was instituted and

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1. A. I. R. 1976 Cal. 115 at p. 121.
2. A. I. R. 1964 Cal. 556 at p. 561.
3. *See* Prasanta Kumar Sur *v.* International Contractors, Ltd., A.I.R. 1955 Cal 101 at p. 103, 59 Cal. W. N. 675.
4. Saral Kumar Chatterji *v.* Madhusudan Auddy, A. I. R. 1964 Cal. 556 at pp. 560-62.

that is why the other members of the family are contesting the plaintiff's claim. Apart from that adult members of the family are well within their rights in saying that no part of the family property could be parted with or agreed to be parted with by the manager on the ground of alleged benefit to the family without consulting them. Here, as already stated, there is no allegation of any such consultation.

In these circumstances, *held* that the courts below were right in dismissing the suit for specific performance. Granting specific performance is always in the discretion of the Court and in a case of this kind the Court would be exercising its discretionary right by refusing specific performance.[1]

47. Section 20 (2) (b).—Section 20 (2) (*b*) of this Act deals with a case where the Court exercises its discretion by refusing specific performance where hardship is involved.

It is well-established doctrine of Court of Equity that it will not enforce the specific performance of a contract the result of which would be to impose great hardship on either of the parties to it, for the Court will not become the instrument of injustice or deprive a person of right which he is fairly entitled to have protected.[2] The oppressive nature of the performance may result from the situation or relation of the parties exterior to or unconnected with the terms of the contract itself or the circumstances of its conclusion.[3] In fact the use of the words "did not foresee" implies that the hardship must be a result, or obviously flowing from the contract and must apparently arise from something collateral, concealed and latent.[4]

The term "hardship on the defendant" is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on English law clearly show this and the term hardship is used in the same sense as it is used in English law. It is very desirable that persons in the position of defendant 1 firm should carry out their contracts and should not be allowed lightly by courts to .break their given word on the ground of mere technical pleas or imaginary hardship.[5]

It is well settled that the question of hardship must be judged as on the date of the transaction and not in the light of subsequent events and the hardship should be one collateral to the contract and not in relation to a term of the contract. The question of hardship of a contract is to be judged as at the time at which it is entered into. This is a general rule. It also contemplates an exception to the general rule in cases where events involving hardship have occurred subsequent to the contract due in some way to the party who seeks specific performance.[6]

48. Self-inflicted injury or hardship.—No doubt Cl. (*b*) of Sec. 20 (2) says that where the performance of the contract would involve some hardship on the defendant which he did not foresee whereas its non-performance would

1. Balmukand *v.* Kamlawati, A. I. R. 1964 S. C. 1385 at p. 1388 : (1964) 1 S. C. W. R. 494: 66 Punj. L. R. 897: 1964 S. C. D. 1016.
2. Gould *v.* Kemp, 2 My. & K. 308; Tobay *v.* County of Distol, 3 Story 800; Falcke *v.* Gray, 4 Drew 660; Gulla Mal *v.* Chunilal, 17 I. C. 732 : 10 A. L. J. 498.
3. Pomeroy, Sec. 185.
4. Pembroke *v.* Thorp, (1749) 3 Sw. 737 : 19 R. R. 254.
5. Pichai Moideen Rowther *v.* Chaturbuja Das Kushal Das & Sons, A. I. R. 1933 Mad. 736 at p. 742: 65 M. L. J. 491.
6. Dave Ramshankar Jivatram *v.* Bai Kailasgauri, A. I. R. 1974 Guj. 69 at p. 72.

involve no such hardship on the plaintiff. In order to attract this provision, it must firstly involve some hardship on the defendant. It is, however, necessary to bear in mind that such a hardship the defendant must not have foreseen. And secondly that non-performance would involve no such hardship to the plaintiff.

In *Yelloji Rao* v. *Satyanarayana*,[1] it is held that if the change of circumstances are brought about by defendants which changes are far from being honest, the plaintiff cannot be denied his claim. In *Haradhan Debnath* v. *Bhagabati Dasi*,[2] a Bench of the Calcutta High Court observed :

> "The subsequent transferee entered into an agreement to purchase the property with full knowledge of this prior agreement. He cannot consequently claim to be a *bona fide* purchaser for value without notice, and the plaintiff is entitled to have the contract specifically enforced not only against the vendor but also against the transferee."

It was argued before that court that there was delay in the institution of the suit and before its commencement the transferee had spent money for the improvement of the property and therefore the plaintiff should not be allowed specific performance. The Court rejected that contention.

It was also contended there that specific performance should be refused because in the terms of Sec. 22 (2) of the said Act the performance of the contract would involve hardship on the purchaser-defendant which he did not foresee whereas its non-performance would involve no such hardship on the plaintiff. Rejecting that contention, the Court said ;

> "This clause clearly contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances . . . . But where the hardship has been brought upon the defendant by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance."

Their Lordships further said that :

> "The position of the defendant who has taken with notice of the prior contract and who has omitted to make an effective enquiry from the plaintiff is no better than that of the vendor himself, and so far as the vendor is concerned, it is clear that if he makes permanent improvements the purchaser would be entitled to the benefit thereof without further payment . . . . The defendants consequently have not established any right to be reimbursed for the improvement made on the property."

In *T. Venkata Subramanyam* v. *Vishwanadha Raju*,[3] the Hon'ble Chief Justice, similarly held :

> "When both the Courts below have found that the second defendant was not a *bona fide* purchaser without notice and was aware of all the facts of the case, it was not possible to exercise the discretion in favour of such a person. The intervening interest which was brought into

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1. (1964) 1 Andh. W. R. 312.
2. I.L.R. 41 Cal. 852 : A. I. R. 1914 Cal. 137.
3. A. I. R. 1968 A. P. 190.

existence was deliberate and knowing fully that there exists an agreement in favour of the plaintiff which was not determined and that the contract was alive."

In *Damacharla Venkata Seshaiah* v. *Damacharla Venkayya*,[1] the defendants entered into an agreement to purchase the property with full knowledge of the prior agreement in plaintiff's favour and carried on constructions. It was held that the injury or hardship, if any, was self-inflicted. The defendants could not set up their own wrong against the plaintiff to defeat his claim. No discretion therefore in such a case could be exercised in favour of the defendants and against the plaintiff. Since the defendants had taken a chance of running up construction to defeat the plaintiff's claim, they must take the chance of pulling them down.

49. Unconscionable contract for sale.—The discretion of the Court cannot be exercised arbitrarily and must be exercised judicially where on the findings of the Court below to enforce performance of the contract of sale would be inequitable because the bargain was not merely improvident or for inadequate consideration but was definitely unconscionable.[2]

50. Section 20 (2) (c).—Under this clause the specific performance of the contract should be refused if the person against whom specific performance is sought entered into the contract under circumstances which though not sufficient to render the contract voidable makes it inequitable to enforce specific performance.

51. Section 20 (3)—Principle of.—The principle underlying this clause is that the defendant having permitted the plaintiff to treat the agreement as binding and to do positive acts based on that assumption, it would be a fraud in him to repudiate his undertaking and to set up the statute as an obstacle in the way of its completion.[3] Where an agreement has been performed in part a court of equity will even stretch a point to compel its complete performance.[4]

52. Section 20 (3)—Scope.—It is only where a contract is otherwise capable of specific performance and the plaintiff has done substantial acts pursuant to that contract that the Court would exercise its discretion in his favour.[5] The claim for a decree for specific performance under the terms of this section is not a matter of right. The section only gives a discretion to the Court in the circumstances contemplated to decree specific performance. That discretion is to be exercised on judicial principles. The Court is not to grant specific performance merely because it is lawful to do so. It will consider all the surrounding circumstances and the conduct and position of the parties and then consider whether in the exercise of its discretion it should grant the relief. It is an equitable relief, and he who seeks it must come with clean hands. There is no principle of law or justice by which the Court can hold that a mere agreement for sale of land even when untainted with any

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1. A. I. R. 1974 A. P. 193 at pp. 197-98 : (1973) 2 Andh. W. R. 357.
2. Sukumar Bysack *v.* Sushil Kanta Banerjee, A. I. R. 1972 Cal. 207 at p. 210 : 76 C. W. N. 116.
3. Pomeroy, Sec. 30 ; McManus *v.* Cook, (1887) 35 Ch. D. 681.
4. Shib Lal *v.* Collector of Bareilly, I.L.R. 16 All. 423.
5. Ramchandra Lalbhai *v.* Chinubhai Lalbhai, A.I.R. 1944 Bom. 76 at p. 83: 214 I. C. 42: 17 R. B. 55: 45 Bom. L.R. 1075.

suspicion of fraud should prevail over an attachment in execution of a decree.[1]

53. Section 20 (4).—The sub-section which was inserted as sub-section (4) to Sec. 20 is a new piece of legislation.

The Law Commission in recommending insertion of a clause in the codified law of specific performance observed as follows :

> There is still however scope for application of the rule in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhori*[2] in the case of contracts for purchase of property on behalf of the minor which cannot be said to be for the benefit of the minor. We do not consider it necessary to import the doctrine of mutuality into our codified law of specific performance to cover such cases. On the contrary we could do away with the doctrine in *Sarwarjan's* case by inserting in Sec. 22 (of the old Act) a provision embodying the law stated in the American Restatement as follows :
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> > "The fact that the remedy of specific enforcement is not available to one party is not sufficient reason for refusing it to the other party."

As a result the sub-section (4) as stated above was inserted to Sec. 20 embodying the above provision. In view of the express provisions of law there is thus no further scope for contending that the doctrine of mutuality will defeat a contract of specific performance.[3] The doctrine that a contract to be specifically enforceable must as a general rule be mutual has now very little scope for application in India. That doctrine is now being abolished and in its place, the following principle is laid down, namely, that the fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party.

Sub-clause (4) of this section gives effect to this new principle.

In *Radheyshyam Kamila* v. *Smt.Kiran Bala Dasi*,[4] a deed to reconvey the property was executed by the defendants in favour of the minors represented by their guardian mother. The contract for getting back the property was for the benefit of the minors. It was held that there was no scope for contending that the doctrine of mutuality will defeat the contract for specific performance.

54. Readiness and willingness.—There is no basis for the doctrine that a person who sues for specific performance should establish that he was always ready with money to pay the vendor. All that is necessary for the purchaser to show is that he was ready and willing to fulfil the terms of the agreement.

The purchaser need not establish that he had the required money with him or arrangements have been made for financing the transaction. What is required of him is to show that he was ready and willing to fulfil his terms of the agreement.

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1. Jethalal Nanshah Modi *v.* Bachu, A. I. R. 1945 Bom. 481 at p. 483 : 47 Bom. L. R. 460.
2. (1911-12) 16 C. W. N. 74 (P. C.).
3. Radheshyam Kamila *v.* Smt. Kiran Bala Dasi, A.I.R. 1971 Cal. 341 at pp. 344-345 : 75 C. W. N. 391.
4. A. I. R. 1971 Cal. 341 at p. 344 : 75 C. W. N. 391.

It is enough if it is made clear that he was continuously ready and willing to fulfil the terms of the contract. The judgment of the Bench of the Madras High Court in *Arjuna Mudaliar* v. *Lakshmi Ammal*[1] is an authority for the proposition that it need not be stated in so many words. There, it was decided that the averment that the plaintiff had no objection to perform the contract in accordance with the decision of a court was sufficient. This argument fails and there is no obstacle in the way of the 1st plaintiff getting the relief asked for.[2]

In the case reported in *Bank of India Ltd.* v. *J. A. H. Chinoy*,[3] in the context of the plaintiff being ready and willing to perform his part of the contract though it was stated by plaintiff No. 1 that he was buying for himself and that he had no sufficient ready money to meet the price and that no arrangements had been made for finding it at the time of repudiation but when it was further made clear that he was in a position to arrange the payment of requisite amount, it was observed by their Lordships :

> "But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact and in the present case the Appellate Court had ample material on which to found the view it reached."[4]

New	Old
21. Power to award compensation in certain cases.—(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.	**19. Power to award compensation in certain cases.**—Any person suing for specific performance of a contract may also ask for compensation for its breach, either in addition to, or substitution for, such performanee.
(2) If, in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.	If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

1. (1948) 2 M.L.J. 271 : A. I. R. 1949 Mad. 265.
2. Nannapaneni Subbayya Chowdary v. Garikapati Veeraya, A.I.R. 1957 A. P. 307 at pp. 313, 329-30.
3. A. I. R. 1950 P. C. 90 at p. 96.
4. M. Badruddin v. Tufail Ahmad, A.I.R. 1963 M. P. 31 at p. 33.

New	Old
(3) If, in any such suit, the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.	If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
(4) In determining the amount of any compensation awarded under this section, the Court shall be guided by the principles specified in Sec. 73 of the Indian Contract Act, 1872 (9 of 1872).	Compensation awarded under this section may be assessed in such manner as the Court may direct.
(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:	
Provided that where the plaintiff has not claimed any such compensation in the plaint the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.	
Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.	*Explanation.*—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.
	Illustrations
	Of the second paragraph—A *contracts to sell a hundred maunds of rice to* B. B *brings a suit to compel* A *to*

perform the contract or to pay compensation. The Court is of opinion that A *has made a valid contract and has broken it without excuse, to the injury of* B, *but that specific performance is not the proper remedy. It shall award to* B, *such compensation as it deems just.*

*Of the third paragraph—*A *contracts with* B *to sell a house for Rs.* 1,000, *the price to be paid and the possession given on the* 1st *January*, 1877. A *fails to perform his part of the contract, and* B *brings his suit for specific performance and compensation, which is decided in his favour on the* 1st *January*, 1878. *The decree may, besides ordering specific performance, award to* B *compensation for any loss which he has sustained by* A's *refusal.*

*Of the Explanation—*A, *a purchaser, sues* B, *his vendor, for specific performance of a contract for the sale of patent. Before the hearing of the suit, the patent expires. The Court may award A compensation for non-performance of the contract and may, if necessary, amend the plaint for that purpose.*

A *sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award* A *campensation for the non-performance.*

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1. Legislative changes.—This section corresponds to the old Sec. 19 of the repealed Specific Relief Act, 1877. Sub-clause (1) of the section re-enacts the law as contained in Cl.(1) of the repealed Sec. 19 with suitable variations. For the words "any person suing", the words "in a suit" have been substituted. The word "claim" has been substituted for the words "ask for" and the word "plaintiff" has been inserted before the words "performance of a contract". Sub-clause (2) of the section reproduces verbatim the language of para. 2 of the repealed Sec. 19 with this alteration that the word "such" has been inserted before the word "compensation". Sub-section (3) of the section reproduces the language of para. 3 of the repealed Sec. 19 while para. 4 of the repealed section has been substituted by the new sub-clause (4) of Sec. 21. Sub-clause (4) of the new section provides the mode and manner of determining the amount of compensation under this section. It lays down the principle which would govern the determination of the award of compensation under this section and enacts that the principle contained in Sec. 73 of the Contract Act would determine the amount of compensation. Under this section sub-clause (5) is new. It provides that the compensation under this section shall not be awarded unless the plaintiff has claimed it in the plaint. But there is an important rider attached to this sub-clause, which is to the effect that the Court shall, at any stage permit the amendment of the plaint so as to permit the plaintiff to include his claim for compensation on such terms, as the Court may deem fit. The explanation to the section re-enacts the language of the old explanation without any change. Illustrations have been deleted.

2. Reasons for the change.—The reason for recommending the changes have been given by the Law Commission of India, in their Ninth Report on the Specific Relief Act, 1877, at pages 17, 18 and 19 in the following words: They say: "There has been some difference of opinion among the High Courts as to the meaning of the word 'compensation' in Sec. 19 (old). The Calcutta High Court,[1] while interpreting Art. 116 (Art. 55, new) of the Limitation Act has observed:

> 'As Lord Esher observed in *Dixon* v. *Calcraft*,[2] the expression compensation is not ordinarily used as an equivalent to damages, although as remarked by Fry, L.J., in *Skinner's Co.* v. *Knight*,[3] compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation as pointed out in the Oxford Dictionary, signifies that which is given in recompense an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another.....'

"On the other hand, the Nagpur High Court[4] has held that the word 'compensation' used in Sec. 19 (old) of the Specific Relief Act should be understood in the sense of damages as contemplated in Sec. 73 of the Contract Act. The same conclusion might be said to follow also from the observation of the Privy Council in *Ardeshir's* case[5] that old Sec. 19 of the Specific Relief

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1. Mohd. Mozaharal Ahmad *v.* Mohd. Azimuddin Bhuinya, A.I.R. 1923 Cal. 507 at pp. 511-12.
2. (1892) 1 Q. B. 458.
3. (1891) 2 Q. B. 542.
4. Pratapchand *v.* Raghunath Rao, A.I.R. 1937 Nag 243; Dwarkaprasad v. Kathelon, A. I. R. 1955 Nag. 38.
5. I. L. R. (1928) 52 Bom. 597 (P. C.).

Act, with the exception of the explanation, embodies the same principle as Lord Cairns' Act, which enabled a suit or to claim both specific performance and damages for breach of contract in the same proceedings. But the Privy Council did not disapprove of the view expressed in the Bombay High Court,[1] by Macleod, C. J., that the word 'compensation' was used with the intent to emphasize the fact that the Court in awarding compensation was not bound to follow the ordinary rules with regard to damages for breach of contract and that the measure of damages was not necessarily the same as in a suit for damages for breach of contract. Later, however, the Privy Council in a case[2] under Sec. 19 (old) upheld a decree on the footing of 'damages' for breach of contract. In a Bombay case,[3] Chagla, J. (as he then was), has held that in deciding whether the plaintiff is entitled to compensation, the principle, which the Court must adopt, is the same as underlies Sec. 73 of the Contract Act, that is to say, the plaintiff is bound to prove some loss or damage. But there may be cases where the injury cannot be assessed in terms of money. In such cases, the Court would award nominal damages.

"In these circumstances, we think it is desirable to provide that compensation under the present section should be assessed on the same principles as are followed under Sec. 73 of the Contract Act.

"There has been a difference of judicial opinion as to whether the Court has power to award compensation in a suit for specific performance, where the plaintiff has not specifically prayed for it in the plaint. The Lahore[4] High Court has held that the Court has the power to award damages whether in substitution for or in addition to specific performance even though the plaintiff has not specifically claimed it in the plaint.

"The Madras[5] High Court has, however, held that the Court cannot award damages in addition to specific performance in the absence of a specific claim for damages and a proper pleading stating why the relief of specific performance would be insufficient to satisfy the justice of the case and the amount which should be awarded. The Madras view would appear to be based on the principle that there should be a proper pleading in every case. While it is proper that the Court should have full discretion to award damages in any case it thinks fit, one cannot, on the other hand, overlook the question of unfairness and hardship to the defendant, if a decree is passed against him, without a proper pleading.

"What we recommend is that in no case should compensation be decreed unless it is claimed by a proper pleading. It should be open to the plaintiff to have an amendment, at any stage of the proceeding, in order to introduce a prayer for compensation, whether in lieu of or in addition to specific performance."[6]

In Cl. 20 of the Notes on Clauses, which deals with Sec. 19 (old) and Sec. 21 (new) of the repealed Act it has been stated: "This is Sec. 19 of the existing Act (of 1877) with the following changes :

(*i*) sub-clause (4) (new) makes it clear that the compensation to be awarded is to be determined on the basis of Sec. 73 of the Indian Contract Act, 1872 ;

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1. Sassoon *v.* Ardeshir, A.I.R. 1926 Bom. 189.
2. Ramji *v.* Kishore, (1927) 117 I. C. 1 (P. C.).
3. Ramchandra *v.* Chinubhai, A.I.R. 1944 Bom. 76.
4. A. P. Pratinidhi Sabha *v.* Lahori, I.L.R. (1924) 5 Lah. 509.
5. Somesundram *v.* Chidambaram, A.I.R. 1951 Mad. 282.
6. Report of the Law Commission on the Specific Relief Act, at pp. 17-19.

(*ii*) it is provided in sub-clause (5) (new) that compensation has to be specifically asked for before it can be granted, and that the Court should allow the plaintiff to amend his plaint at any stage of the proceeding for the purpose.

Clause 21.—Clause 21 is new, Sec. 21 (new). Sub-clause (1) (*a*) (of present section) introduces a rule, now settled by judicial decisions, that in order to avoid a multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking the right to possession accrues only when specific performance is decreed.

In some cases it has been held that the Court may, in a suit for specific performance, direct a refund of earnest money while refusing specific performance if the facts disclose a case for such a refund. Sub-clause (*b*) (new) of Sec. 21 gives effect to this and also permits the plaintiff to claim any other relief.

It is, however, provided that any such relief will not be granted unless a claim in that behalf is made by plaintiff either initially or by an amendment at a later stage, but that does not prejudice his right to compensation under Cl. 20.

3. Scope of the section.—This section deals with the powers of the Court to award compensation. Sub-section (1) of the section prescribes that the plaintiff in a suit for specific performance of a contract, may also claim compensation for the breach of the contract either in addition to or in substitution of the specific performance. Sub-section (2) of this section enacts that the Court when it decides in a suit for specific performance of the contract that the conduct of the defendant is such that the plaintiff should be awarded compensation for the breach of the contract, it shall award such compensation, as the Court may decide. Sub-section (3) of this section says that in appropriate cases the Court shall, if it decides that the justice of the case warrants that the plaintiff is entitled to specific performance of the contract but merely decreeing the suit for specific performance is not adequate or sufficient to meet the ends of justice, it shall award compensation also.

Sub-clause (4) of this section lays down the principle which should guide the Court in determining compensation under this section. It enacts that the principle contained in Sec. 73 of the Contract Act should be the sole guiding factor in determining the amount of compensation. Sub-clause (5) of this section provides that unless the compensation has been specifically claimed on the plaint by the plaintiff in his suit for specific performance of the contract, the Court shall not grant him the compensation. The proviso permits the Court to permit amendment of the plaint, at any stage of the suit, so as to include the claim for compensation in a suit for specific performance of the contract although such relief was not claimed by the plaintiff at the earliest stage of the suit, in the plaint.

The explanation enacts that although the contract has become incapable of specific performance, it shall not preclude the Court from exercising his jurisdiction under this section.

The main object of enacting this section is that in order to do substantial justice between the parties, the Court should be armed with sufficiently wide powers and to prevent multiplicity of suits.

4. Liability under the section.—It is clear that the first part of Sec. 19 (new Sec. 21) only enables the person suing for specific performance to ask for compensation for its breach. He may do so either in addition or in substitution for such performance.

The next part of Sec. 19 (new Sec. 21) imposes a mandatory duty upon the Court to award compensation, whether it is asked for or not, provided three conditions are satisfied. They are: the Court must decide that specific performance ought not to be granted; there must be a contract between the parties which must have been broken by the defendant against whom the compensation is to be granted; and, the plaintiff must have proved his right to the compensation to be awarded. It seems to be obvious that this part of Sec. 19 (new Sec. 21) comes into play only when there is privity of contract between a party against which an order for compensation in lieu of damages for breach of contract can be passed. In fact, the compensation here spoken of is really the damage incurred by a party because the other contracting party has broken it. It follows that it should be awarded only against the party which has broken it A third party, which has not broken the contract, may place itself in such a position that the contract may be specifically enforced against it as though it had entered into the contract. Nevertheless, there is no corresponding provision which would transfer the damages to be paid as compensation for breach of contract from the shoulders of the party actually responsible for the breach on to those of the party which had merely taken the benefit of that breach. To make the subsequent purchasers liable to pay damages or compensation under Sec. 19 (new Sec. 21) of the Specific Relief Act would be nothing short of enforcing a charge upon the property purchased by them. This would be illegal.[1]

5. The main object of the section —The object of the section is to prevent a multiplicity of suits and to do complete justice between the parties.[2] A suit may be brought for specific performance of a contract or specific performance *plus* damages in substitution of such performance with an alternative claim for damages for breach of contract.[3] The plaintiff may pray for judgement directing the execution of the contract *in specie* and may in addition seek relief, the right to which springs out of the contract, e.g. possession of the property which the defen lant has agreed to convey to him.[4] The word "compensation" as used in this section should be understood in the sense of the damages contemplated in Sec. 73 of the Indian Contract Act. As Sec. 73 says, the damages are to be awarded as compensation for any loss or damages arising naturally in the usual course of things from the breach of the contract; where, therefore, on a breach of contract of sale by the vendor, the vendee as a result of the compromise with the subsequent purchaser obtains more than he deserves, the Court would be exercising its discretion rightly in refusing to award to him any more sum as damages as against the vendor, even though the contract with the vendee provides, for the return of the earnest money by the vendor besides damages.[5] Court can award damages in the suit for specific performance though not specifically prayed for. It ought to award where it

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1. Jhandoo *v.* Ramesh Chandra, A. I. R. 1971 All. 189 at p. 192 : 1970 A. L. J. 969.
2. 2 Wh. & T., 8th Ed., 455.
3. Calcutta Improvement Trust *v.* Surbornambala, 44 C. W. N. 541.
4. Fateh Chand *v.* Farsingh, 160 I. C. 988; Madan Mohan *v.* Gaxia Prasad, 14 C. L. J. 159 ; *see* also 4) P. L. R 1913 : 18 I. C. 239 ; 19 I. C. 907.
5. Pratap Chand *v.* Raghunath Rao, I.L.R. (1938) Nag. 283 : 169 I. C. 887 : A. I. R. 1937 Nag. 243 at p. 245 : I. L. R. 10 Nag. 29.

thinks that they should be awarded.[1] Damages are not to be awarded in addition to specific performance unless special damages is shown to have resulted from the delay in completing the contract.[2]

6. "Damages" and "compensation"—Distinction between.—The words "compensation" and "damages" are not identical terms. They have separate connotations and have different meanings. There is a great divergence of judicial opinion among the various High Courts as to the meaning of the word "compensation". In *Mohammad Mozaharal Ahmad v. Mohammad Azimuddin Bhuinya*,[3] Mukherjea, J., while delivering the judgment of the Court pointed out the distinction between "compensation" and "damages" in the following words: He says : "As Lord Esher observed in *Dixon* v. *Calcroft*,[4] the expression 'compensation' is not ordinarily used as an equivalent to damages, although as remarked by Fry, L. J., in *Skinner's Co.* v. *Knight*,[5] compensation may often have to be measured by the same rule as damages in an action for the breach. The term compensation as pointed out in the *Oxford Dictionary*, signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. The derivative meaning was familiar to the Roman Jurists and reappears in the modern codes founded on the Civil Law."[6] In *Dwarka Prasad* v. *Kathleen Florence Burns*,[7] it was stated : "Compensation is something which is intended to place the plaintiff in the same position he would have been, if the defendant had not committed the breach and agreement had been performed. The Act, however, does not provide for the measure of compensation. It is well settled that the word 'compensation' used in Sec. 19 (new Sec. 21), Specific Relief Act, should be understood in the sense of damages contemplated in Sec. 73, Contract Act."[8]

Regarding the actual measure of damages the Court said[9] : "The ordinary measure of damages is a difference between the contract price and the market price on the date of the breach". In *Pratap Chandra* v. *Raghunath*,[10] it was stated: "The word 'compensation' used in Sec. 19, Specific Relief Act, (1877) (which corresponds to Sec. 21 of the present Act) should, therefore, be understood in the sense of damages contemplated in Sec. 73, Contract Act, which has been held in India to apply to cases of breaches of contract to sell immoveable property." Now by enacting sub-clause (4) to this new Sec. 21 all the distinctions between "damages" and "compensation" have become useless.

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1. Arya Pradishak Pritinidhi Sabha *v.* Chaudhri Ram Chand, A. I. R. 1924 Lah. 713 at p. 716 : I.L.R. 5 Lah. 509 : 83 I. C. 1047 ; *see* also I.L.R. 19 Bom. 764 at p. 770: A.I.R. 1925 Lah. 132: 80 I. C. 712 ; 51 I. C. 908 : 9 L. W. 471 : 1919 M. W. N. 714 ; Krishna Aiyar *v.* Shamanna, 17 I. C. 497 : 23 M. L. J. 610.
2. Chinok *v.* Marchioness of Ely, 34 L. J. Ch. 399.
3. A.I.R. 1923 Cal. 507 at pp. 511-12.
4. (1892) 1 Q. B. 458 at p. 463.
5. (1891) 2 Q. B. 542.
6. Sohm, *Institutes of Roman Law*, 3rd Ed., pp. 458-63.
7. A. I. R. 1955 Nag. 38 at p. 40.
8. *See* Adi Kesavan Naidu *v.* Gurunatha Chetti, A. I. R. 1918 Mad. 1315.
9. Dwarka Prasad *v.* Kathleen Florence Burns, A. I. R. 1955 Nag. 38 at p. 41.
10. A. I. R. 1937 Nag. 243 at p. 245.

Because in all suits for breach of contracts whenever the plaintiff claims monetary equivalent of the loss suffered by or the injury caused to him by such breach he claims the money which he thinks would recompense his losses or make up the injury and it is a matter of no consequence to him whether such monetary recompense is termed "compensation" or "damage" in legal phraseology. The Legislature has now by incorporating sub-clause (4) to the present section set at rest the judicial controversy in this regard.

7. Applicability of the section.—It is clear that the first part of Sec. 19 (Sec. 21 of the new Act) only enables the person suing for specific performance to ask compensation for its breach. He may do so either in addition or in substitution for such performnnce.[1]

This section applies only when the plaintiff sues for the specific performance of the contract, it matters little whether in such a suit he claims other alternative reliefs in his plaint; what is absolutely necessary in order to attract the provisions of this section, is that the suit should essentially be of specific performance of the contract. Thus where the plaintiff frames his suit for the recovery of damages, refund of money or the like, such a suit cannot be termed as a suit for specific performance of contract and is not covered by this section. This section also applies to those cases where the plaintiff initially claims specific performance of contract but at a later stage by seeking amendment he converts it into a suit for money or damages or for compensation by giving up his claim for specific performance of the contract altogether. But where the plaintiff initially frames his suit for damages for a breach of contract, but does not frame it as a suit for specific performance of contract and claims no relief in this regard, he subsequently cannot be seeking amendment in the plaint and including the relief of specific performance of contract convert it to one for specific performance, and in such a case the provisions of Sec. 21 (new) have no application.

This section does not apply to cases in which the Court is forbidden under the law to grant specific performance of the contract. Where the plaintiff entered into agreement with the defendant on 7th January, 1941, to purchase the property in question for Rs. 1,400, out of this sum Rs. 200 were to be paid as part of the purchase money and the balance was to be paid in monthly instalments of Rs. 15, the entire amount being payable by the end of December, 1947; that the plaintiff having paid a sum of Rs. 200 and irregular monthly instalments and the defendant accepting the same, in a suit by the plaintiff for the recovery of the suit property, it was held that by the act and conduct the defendant had waived the rights to insist upon regular payments and the plaintiff was lulled into the belief that she need not pay the instalments of Rs. 15 regularly but that if she paid the full sum by the end of December, 1947, the defendant would be content and convey the property to her, and that the defendant could not now say that the plaintiff had committed breach of the agreement and that it was no longer enforceable by her. It was further held that by his conduct the defendant clearly waived the defaults of the plaintiffs in the regular payments of the monthly instalments, that in addition to the stipulation regarding payment of instalments, there was the express agreement that the full purchase money was to be paid before the end of December, 1947, the defendant, having not issued any notice or otherwise intimated to the plaintiff of the intention to cancel the agreement before disposing of the suit property to defendant No. 2, that the contract was still

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1. Jhandoo *v.* Ramesh Chandra, 1970 A. L. J. 969 at p. 972

subsisting and enforceable; that as the plaintiff herself was negligent and irregular in making payment and the defendant was lenient towards her in accepting irregular payments and waiving the right to enforce the agreement, the plaintiff was not entitled to seek enforcement of the contract, that award of compensation for the breach of the contract was the adequate relief that could be appropriately granted to her.[1]

In *Killer* v. *British Columbia Orchard Lands, Ltd.*,[2] the facts were these: "The respondent company agreed to sell some lands in British Columbia to the appellant under an agreement, which provided that the purchase money was to be paid by specified instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payments at an appointed date, the agreement was to be null and void, all payments already made were to be absolutely forfeited to the vendor and the vendor was to be at liberty to resell the property immediately. The first instalment was duly paid but the second was not paid on the day fixed for payment and the date was extended by three weeks to 7th July, 1910. On the 8th of July, 1910, the appellant wrote to the company explaining the circumstances which prevented his paying money on 7th, but promising to pay positively on the 12th. On the 9th the company sent him a telegram saying that the deal was off and brought the action to enforce their rights according to the strict letter of the agreement. The appellant counter-claimed and asked for specific performance after paying the balance purchase money into the Court. It was held by the Privy Council that by the law of British Columbia as well as by the English law the condition of forfeiture was in the nature of a penalty from which the appellant was entitled to be relieved on payment of the purchase money and they accordingly decreed specific performance on the counter-claim. Lord Macnaghten said that in such a case the penalty stipulated in the agreement if enforced according to its letter becomes more and more severe as the agreement approaches completion and the money liable to confiscation becomes larger."

In *Steedman* v. *Drinkle*,[3] the facts in short were these : "James Campbell White, agreed by writing, dated 9th December, 1909, to sell 160 acres of land in the province to one Loveridge for 16,000 dollars of which 1,000 dollars were paid on signing the agreement and the balance was payable in anunal instalments on 1st December in each year. Loveridge entered into the agreement on behalf of the respondent, John C. Drinkle, who along with one Hair was the real purchaser. In January, 1910, the insterest of Hair under the agreement was acquired by the respondent W.R. Drinkle and on 24th January, 1910, Loveridge assigned the agreement to the respondent. Just before this date, White died intestate. On 18th April, 1910, Letters of Administration to his estate were granted to Steedman, the appellant, in the Province of Ontario and on 25th May, 1911, the grant was re-sealed in the Province of Saskatchewan on 22nd July, 1910 : the appellant as administrator purported to approve the assignment. The material provisions of the agreement in addition to those already stated, were that the instalments of purchase money and interest thereon were payable at Hamilton, in the Province of Ontario : that the purchaser would cultivate the land in manner specified, and would pay the instalment as they fell due on the days mentioned. It was further provided that on any default the whole of the principal and

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1. Rahmath Unnisa Begum *v.* Shemoga Co-operative Bank Ltd., A. I. R. 1951 Mys. 59 at pp: 61, 62 and 64.
2. (1913) A. C. 319 : 92 L. J. P. C. 77.
3. A. I. R. 1915 P. C. 94 at pp. 94 to 96 : (1916) 1 A. C. 275.

interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor. On payment of the sums of money mentioned with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments.

"It was further agreed that in case the purchaser should make default in any of the payments to be made vendor should be at liberty, without notice, to cancel the agreement and declare it void and to retain any payments made on account of it as and by way of liquidated damages; and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges, and expenses to be borne by the purchaser. In case the vendor thought fit to declare the contract void under these provisions, he might make a declaration by notice to the purchaser addressed to a post office mentioned. It was also provided that time was to be considered as of the essence of the agreement. No assignment was to be valid unless approved by the vendor or his agent.

"The first deferred instalment, falling due on 1st December, 1910, was not paid. The appellant thereupon, by his solicitors, gave notice cancelling the agreement. The respondent W. R. Drinkle thereupon, on 21st December, tendered the amount due, but the appellant declined to receive it, and repeated this refusal whereupon another and formal tender was made a few days later.

"The respondents then brought the action in which this appeal arises, claiming specific performance, and in the alternative relief from forfeiture under the terms of the agreement. Mr. Justice Newlands thought that the appellant was entitled, under the terms of the agreement providing that time should be of its essence, to cancel it on the default which had been made. He was willing to relieve the respondents from forfeiture of the amount paid under the agreement. The respondents, however, did not accept this offer, and appealed. The Supreme Court held that the case was governed by the decision of the Board in *Kilmer* v. *British Columbia Orchard Lands, Ltd.*[1] in which it was held, on a somewhat similar agreement, that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for penalty, and should be relieved against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it believed to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture.

"Viscount Haldane, who spoke for the Judicial Committee of the Privy Council said : 'As to the relief from forfeiture, their Lordships think that the Supreme Court were right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court were wrong in reversing Mr. Justice Newland's judgment. Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to

1. (1913) A. C. 319 : 108 L. T. 306 : 82 L. J. P. C. 77 : 29 T. L. R. 319 : 556 S. J. 338

time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.

"In the case referred to, this appears to have been what happened, for *Kilmer* v. *British Columbia Orchard Lands, Ltd.*[1] was an appeal in which the fact that the company had sold land for a price to be paid in instalments at specified dates, with a clause of forfeiture, in default of punctual payments, both of all rights under the agreement and of all payments already made. Time was, as in the present case, declared to be of the essence of the agreement. Default in punctual payment having occurred, the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counter-claimed for specific performance. This Board held that, as regards the company's claim, the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms.

"So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board, it appears that their Lordships proceeded on the view that this was so. The date of the payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that, when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counter-claimed.

"In the present case there has been no such agreement to extend time, nor anything that amount to waiver of the right to treat time as of the essence. While, therefore, the Court below was, in the present case, right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their Lordships are of opinion that 'there was no justification for decreeing specific performance. They think that the respondents should, even at this late stage, be relieved from forfeiture of the sums paid by them under the agreement as proposed by the learned Judge who tried the case'."

In *Stickney* v. *Keeble No.* 1,[2] there was an agreement in writing by which the appellants agreed to purchase from the respondent certain agricultural lands, and received a sum of money by way of deposit, a date was fixed for the completion of the contract, but in the agreement it is not stated that the time was the essence of the contract. At the date of the contract the defendants had no title to the land and therefore they delayed the completion of the contract till they had perfected the title by obtaining deeds of conveyance in their favour. The plaintiff continuously pressed for the completion of the

1. (1913) A.C. 319 : 108 L.T. 306 : 82 L. J. P.C. 77 : 29 T.L.R. 319 : 556 S.J. 338.
2. (1915) A. C. 386 : 84 L. J. Ch. 259.

contract. He gave notice to the defendants to this effect. After the expiry of three months fixed for the completion of the contract, the plaintiff gave a notice to the defendants requiring them to complete it in a fortnight and on their failure to do so the plaintiff brought an action for the return of the deposit. It was held by the House of Lords that there had been unnecessary delay in the completion of the contract for which the defendants were responsible and that in the circumstances the time limited by the notice was sufficient to cancel the contract.

Vasudevamurthy, J., in *Rahmat Unnissa Begum* v. *Shimoga Co-operative Bank, Ltd.*,[1] says : "It is a well-recognized rule that time is not normally to be considered of the essence in a contract to sell or purchase immoveable property though either party has a general right to have the contract performed within a reasonable time according to the circumstances by giving a notice to the other side."[2] In *Shanmugam Pillai* v. *Annalakshmi Ammal*,[3] the facts were that the properties in suit were mortgaged along with other properties to the respondents family by the appellants who were their owners. The mortgagors then sold the suit properties to one belonging to the family of the mortgagees. Two days later two further documents came to be executed by and between the parties. The first was a lease-deed executed by the purchaser as lessor and appellant No. 1 as a lessee and the second was a registered agreement whereby the purchaser agreed to reconvey the properties to the appellant by a specified date for the same sum as was the consideration for the earlier saledeed but subject to the condition that if the lessee was in arrears as to the lease amount, the agreement would stand. It was also stated in the agreement that time was the essence of the agreement. The lessee defaulted in payment but subsequently made payments which were accepted by the lessor. But when the default was committed in the payment of the fifth instalment, another member of the lessor's family to whom the property had been allotted in partition by notice terminated the lease and cancelled the agreement to repurchase the suit property. Another default was committed and the lessor demanded payments of money as damages. The lessor thereupon paid certain sums and made endorsements of the payments on the lease-deed. A suit was filed by the lessee prior to the specified date for specific performance of the registered agreement. Patanjali Shastri, J., delivering the majority judgment of the Court at pages 41 and 42 said : "It is well settled that when a person stipulates for a right in the nature of a concession or privilege on fulfilment of certain conditions, with a proviso that in case of default the stipulation should be void, the right cannot be enforced if the conditions are not fulfilled according to the terms of the contract. Such conditions though relating only to payment of money, are not regarded as a penalty and courts of equity will not afford relief against a forfeiture for their breach. Thus, in *Davis* v. *Thomas*,[4] which was decided on very similar facts, there was a sale of the equity of redemption in a certain estate which was followed by a demise of the estate to the vendor for a term at a certain rent payable half-yearly. That was a collateral agreement whereby the vendor stipulated that he should have the right to repurchase the premises any time within five years at a price slightly in excess of the original price in case he 'regularly paid the rent by 4th June and 26th October' with a proviso that if defaults were made in the

1. A. I. R. 1951 Mys. 59 at p. 62.
2. Jamshed Khodaram Irani *v.* Burjorji Dhunjibhai, A.I.R. 1915 P.C. 83 , Dau Alakhram *v.* Mst. Kulwantin Bai, I. L. R. (1950) Nag 386 : A. I. R. 1950 Nag. 238 and Mahadeo Prasad *v.* Narain Chandra, 24 C. W. N. 330 : A. I. R. 1920 Cal. 65.
3. A.I.R. 1950 F.C. 38 at pp. 41-44 : (1950) S. C. J. 1.
4. (1830) 1 Russ. & M. 506 : 39 E.R. 195.

payment of rent within the stated periods the agreement was to be void. The vendor failed to pay the rent at the periods stated and distresses for it had been levied on the premises, but within the five years he applied to repurchase and at the same time tendered the arrears of rent then due. The vendee having refused to reconvey, a bill was filed claiming specific performance or redemption on the footing that the transaction was a mortgage. The bill was dismissed by the Master of the Rolls (Sir John Leach) and the decision was affirmed on appeal by the Lord Chancellor (Lord Brougham). It was held that though in cases of non-payment of money the Court will relieve against penalty or forfeiture yet when it is not a question of penalty or forfeiture but a privilege is conferred upon payment of money at a stated period, the privilege is lost if the money be not paid accordingly.

"The decision of the Privy Council in *Kilmer* v. *British Columbia Orchard Lands, Ltd.*[1] is not in conflict with the above-mentioned principle. It was not a case of a stipulation for a right in the nature of a privilege or concession on fulfilment of specified conditions and the decision has no application here.

"It was urged that a strict enforcement of the provisions of Cl. (3) of the agreement would result in great hardship to the appellant as the value of the property in question has since greatly increased. Such considerations, however, can have no place in adjudging the legal rights of parties. As Viscount Finlay truly observed in *Maclaine* v. *Gatty*[2] :

> 'It is much better that these rights should be enforced even although there is hardship in the individual case, than that the principle should be trenched upon, as infringement of it might lead to confusion in law and possible hardship and difficulty in other cases.'

"Then again at pages 42-43 the learned Judge continued :

> 'The question is : Did the acceptance of these payments in terms of this endorsement affect in any manner the position as it stood in relation to the agreement when these payments were made and accepted ?
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> 'The position then as already pointed out was that forfeiture for non-payment of rent had been incurred in respect of the lease as well as the agreement both of which had therefore become voidable at the instance of Rangaswami. Having the option to affirm or disaffirm the transactions he had elected by giving notice in writing of his intention to determine the lease and the lease had accordingly determined. By the same notice he had also terminated the agreement as he was entitled to do under the terms thereof. Acceptance of payments as rents for the subsequent period from the appellant who was continuing in possession might result in renewal of the tenancy. But such renewal, even if one was to be presumed in the circumstances, could not *ipso facto* or of necessity, revive the appellant's right of repurchase under the agreement which was a distinct transaction. I am unable to find anything in the terms of the agreement or in the subject-matter to which it relates, to indicate that, after both the transactions had been lawfully terminated, a renewal of the lease was to operate as a revival of the agreement.'

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1. (1913) A. C. 319 : 82 L.J.P.C. 77. P. C. 73.
2. (1921) 1 A. C. 376 at p. 390 : 90 L. J.

"On the question of waiver the learned Judge says : There is no force in this argument which proceeds on a misconception as to what can amount to a waiver. As pointed out by Fry, J., as he then was, in *Keene* v. *Biscoe*,[1] there must be some conduct inconsistent with the right claimed or asserted before its waiver could be inferred or implied. In that case a creditor agreed not to call in the principal for two years if the interest was punctually paid. On default made on the due date, he demanded payment of the principal sum but subsequently accepted the overdue interest. Holding that the creditor had not thereby waived his right to demand such payment, the learned Judge observed :

> 'Where a right has accrued it can be waived, but to amount to waiver there must be something done which is inconsistent with the continuance of that right. Now, the right here was to immediate payment of £400 and interest and the receipt of a portion of that sum is in no way inconsistent with that demand. I cannot conceive any case more different from that of receipt of rent after a forfeiture. . . . The receipt of money as rent is inconsistent with the determination of the lease. But I see no inconsistency here'."

In *Tukaram Zipre* v. *Baban Dhondu*,[2] it was held that in a case where sanction was necessarry for transfer of the property, either the Court can compel the defendant to make the application for the same or appoint a Court Commissioner to do so or permit the plaintiff to make the application. The underlying principle of these cases is that unless the transaction is itself of such a nature that it contravenes the law, it must be enforced by requiring the defendant to take such steps as are necessary in that direction. Much more so would be the case where the suit is not for specific performance but for damages, where the Court cannot specifically enforce the agreement of agency since it would be impossible to supervise the carrying out of it. The plaintiff would in such a case not be barred from asking for damages where the defendant does not carry out the contract not because the law prevents it but because he refused to take any action to satisfy the conditions imposed by law upon him before fulfilment of the contract. A case becomes much worse where the defendant terminated the contract after he had already got a wholesaler's licence for the drugs and he started competing the plaintiff's sales by pushing the drugs of other manufactures.[3]

8. Doctrine of mutuality.—In a decree for specific performance of a contract there is always an element of mutuality. The plaintiff as well as the defendant is bound by it. If the terms of the decree give the plaintiff a right of specific performance of the contract, they lay down his duties and obligations. If the defendant fails to carry out the decree, it can be specifically enforced against him, but if the plaintiff fails to carry out his obligations under the decree, the defendant has legal right under the decree to enforce those obligations against the plaintiff by applying for the enforcement of the decree against him. Thus a decree for specific performance of a contract is a double-edged sword capable of being wielded by both, i.e. the plaintiff and the defendant with equal efficacy and effectiveness. It is capable of being enforced both by the plaintiff and the defendant as well. In *Bai Karima Bibi* v. *Abder Rehman Sayad Banu*,[4] it was stated : "Now it seems to me on general principles, leaving aside altogether the dealings between the

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1. (1878) 8 Ch. D. 201 : 147 L. J. Ch. 644.
2. (1965) 67 Bom. L. R. 908.
3. Southern Chemical Works *v.* Mohamed Husein Fakruddin Maniar, A. I. R. 1970 Bom. 128 at p. 130.
4. A. I. R. 1923 Bom. 26 at p. 27.

defendants and other parties, that the decree for specific performance was capable of being executed by the defendants as well as by the plaintiff. If this were not so, it would follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration-money, the defendant is left with no remedy whatever, while, owing to the decree passed against him, he would still be debarred from dealing in any way with the suit property. We think it is clear in such a case that a defendant would be entitled to come to Court and ask for the payment to him of the consideration money for the purchase on his tendering a sale-deed."

9. **Specific performance and compensation.**—A party to a contract has remedies in law, if the other party refuses or fails or omits to carry out the terms of the contract so far as they relate to him. He may bring an action for the specific performance of the contract, offering to do his or after having performed his part of the contract. He may cancel the contract and bring a suit for damages for the breach of the contract. He may forego his right to enforce the specific performance of the contract and only sue for damages. He may sue for both, i. e. the specific performance of the contract and for compensation for its breach. This section deals with the power of the Court to grant to the plaintiff appropriate relief, i. e. grant a decree for specific performance of the contract, with or without compensation or grant compensation with or without enforcing specific performance of the contract and for that purpose permit appropriate amendments in the plaint of the plaintiff. This section has been enacted to enable the Court to do full and complete justice between the parties and to grant appropriate relief. The question of specific performance of the contract has to be considered from a number of standpoints, namely from the plaintiff's point of view, from the defendant's standpoint and from the point of view of the Court. The law of specific relief is a law of equity. When the plaintiff claims against the defendant specific performance of a contract with or without compensation, he claims the equitable relief and the Court of law acts as a court of equity when it grants or does not grant the plaintiff the relief for specific performance of the contract with or without compensation or gives appropriate relief with suitable conditions. For the guidance of the courts the law of specific reliefs has enunciated certain well-defined principles. Sections 9 to 13 of the Specific Relief Act, 1963, prescribed for the specific performance of contracts. Section 14(old) provides about the contracts which cannot be specifically enforced. Sections 15 to 19 of the present Act detail the circumstances and the persons under which and for whom the specific performance of the contract could be had, while Sec. 19 (new) deals with cases in which relief of specific performance could be granted. Section 20 (new) prescribes discretion and power of the Court while the present Sec. 21 (new) enacts about the award of compensation with or without specific performance of the contract and the Court's power and discretion relating thereto. In a suit for specific performance of the contract the appropriateness of the relief to be granted by the courts depends upon number of factors, facts and circumstances, namely (1) the terms and the nature of the contract, (2) the nature of the breach of the essential or unessential conditions of the contract, (3) the conduct of the plaintiff, his acts or omissions and defaults, (4) the conduct of the defendant and his liability for the breach or violation of the terms of the contract and (5) the appropriateness and the suitability of the relief which would adequately compensate the plaintiff for his losses and injuries suffered by him for the non-performance of the terms of the contract by the defendant. The law requires that in order that the plaintiff be entitled to the relief of specific performance of the contract he should himself treat the contract as subsisting

and alive, that he should allege and prove his continued readiness and willingness from the date of the contract to the date of the hearing of the suit, to perform his part of the contract. Thus where in a suit for specific performance of the contract the plaintiff announces during the course of the hearing that he is no longer ready and willing to perform his part of the contract he thereby renounces not only his right to the relief of specific performance of the contract but also disentitles himself to that relief and the Court has no power under the law, to decree specific performance.[1] In *Shib Kumar Banerjee* v. *Rasul Bux*,[2] the Court, while considering the power and discretion of the Court in passing a decree in a suit for specific performance of the contract stated :

> "A court of equity is not bound to grant a decree for specific performance of an agreement even though the agreement is proved and the plaintiff has performed and/or is ready and willing to perform his part of the agreement. It has to take into consideration the entire agreement and the surrounding circumstances and other material facts to decide whether it would be proper to grant a decree for specific performance of the contract or not. Where it was found that the defendant was compelled to enter into an agreement for sale of his property under tragic circumstances or where the defendant enters into an agreement for sale of his house and other properties for a sum wholly inadequate and much below the proper price under a terrible mental strain and under a sense of insecurity of his life and property, it was held that under such circumstances the Court should not compel the defendant to perform specifically his part of the agreement and the plaintiff was in law entitled to compensation as a proper and suitable substitute for specific performance.
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> "When a plaintiff files a suit for the specific performance of a contract he has to make the election at that stage as to whether he wants to treat the contract as at an end or as still subsisting. If he treats the contract as at an end, he is precluded from subsequently bringing a suit for specific performance of the contract, whatever happens to his suit for damages. Once he has elected to terminate the contract, then no amount of subsequent readiness or willingness on his part would make his suit for specific performance of the contract successful. It is no doubt open to the plaintiff to treat the contract as subsisting and alive and then sue either for specific performance of the contract or for compensation or for both. In a suit for specific performance of contract compensation forms a subsidiary or ancillary relief when both the reliefs are claimed or are granted. It cannot be considered as independent or alternative, rather as one flowing from the main relief. The award of the relief is in the discretion of the Court and the alternative can only be awarded by the Court only when the Court decides in the light of the proved facts that it was not a fit case to grant the main relief of the specific performance of the contract and that compensation would be the appropriate relief which would meet the ends of justice."

The limited effect of Sec. 19 was not long left in doubt, wide as are apparently its terms. In a series of decisions it was consistently held that just as its power to give damages additional was to be exercised in a suit in

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1. Ardeshir H. Mama *v.* Flora Sassoon, A. I. R. 1928 P. C. 208 at p. 218.
2. A.I.R. 1959 Cal. 302 at pp. 305-6.

which the Court had granted specific performance, so the power to give damages as an alternative to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of relief, nor to a case in which that relief had become impossible. Where the plaintiff had debarred himself from asking at the hearing for specific performance, and in such circumstances, notwithstanding Lord Cairns' Act, the result still was that with no award of damages the Court could award none—the order would be one dismissing the suit with no reservation of any liberty to proceed at law for damages.[1] In other words, the plaintiff's rights in respect of the contract were at an end.

The change in this matter effected in England by the Judicature Act was one in procedure only. It enabled every Division of the High Court to give both legal and equitable remedies, but it did not alter the construction or effect of a claim framed under Lord Cairns' Act[2]—nor the principles upon which the systems now combined were before the Act, separately administered. Accordingly an order dismissing an action for specific performance which before the Act would have been unqualified, remained after the .Act a decree which excluded the possibility of legal relief. And here their Lordships would draw affection for convenience sake, to the definiteness with which that position is retained for India by Sec. 29 (old), Specific Relief Act.

And, first, very notable is the fact that in the Act, the distinction between the two kinds of action is maintained, a distinction obvious in England where originally they had to be brought in different courts, but not necessarily called for, when, as in India, both legal and equitable relief may be obtained in one. The distinction, however, is clearly indicated in Sec. 24 (*c*) (new) which enacts that specific performance of a contract cannot be enforced in favour of a person who had already chosen his remedy and obtained satisfaction for the alleged breach of contract : and even more directly is it manifested in Sec. 29 (old) which enacts that the dismissal of a suit for specific performance of a contract shall bar the plaintiff's right to sue for compensation for the breach of such contract. Although so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England [Sec. 24 (*b*) is the nearest], it seems invariably to have been recognized, and, on principle their Lordships think rightly, that the Indian and the English requirements in this matter are the same.[3]

Now the close correspondence of the terms of this section with those of Sec. 2 of Lord Cairns' Act, coupled with the presence in the Act of Sec. 24 (*c*) (new) and Sec. 29(old) already noted, indicating that the old distinction in case of breach of contract between the equitable and the legal form of remedy is still maintained and that the old conditions under which each could be asked for are being preserved, lead their Lordships to the conclusion that, except as the case provided for in the explanation as to which there is introduced an express divergence from Lord Cairns' Act, as expounded in England[4]—the section embodies the same principle as Lord Cairns' Act, and does not, any more than did the English Statute, enable the Court in a specific performance suit to

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1. *See per* Lord Selborne, Hipgrave *v.* Case, (1885) 28 Ch. D. 356 : 54 L.J. Ch. 399 : 52 L. T. 242.
2. *See* Hipgrave *v.* Case, *supra*.
3. Karsandas *v.* Chhotalal, A. I. R. 1924 Bom. 119 : I.L.R. 48 Bom. 259.
4. *See* Ferguson *v.* Wilson, (1867) 2 Ch. 77 : 15 W. R. 27.

award "compensation for its breach" where at the hearing the plaintiff has debarred himself by his own action from asking for a specific decree.[1]

In *Kumar Gokul Chandra Law* v. *Haji Mohammed Din*,[2] it was stated : "It cannot be disputed that under the provisions of Sec. 19 (old), Specific Relief Act, the Court has power to award compensation to the plaintiff for breach of a contract if the plaintiff has not debarred himself from claiming specific performance of the contract."

The present Sec. 21 of the Act postulates the existence of a valid, complete and enforceable contract. The Court may, in its discretion, while finding that such a contract was broken may still decide not to enforce the contract specifically under a particular set of circumstances. But in a case where the plaintiff's suit for specific performance of the contract was rejected on the ground that they were entitled to base their claim on an agreement which they themselves materially altered, they cannot subsequently claim damages on the basis of the original agreement on the ground that the defendant was guilty of the breach of the original contract as it stood prior to its alteration.[3]

10. Amendment of the plaint.—Where the plaintiff sues for a specific performance of the contract, but subsequently changes his mind to convert this suit for compensation *simpliciter* it is open to him to do so and he can abandon his claim for specific performance and can claim compensation instead, but he cannot recover compensation, without amending his plaint so as to include the claim for compensation, and under the present section it is the duty of the Court to permit it in order to enable it to do substantial justice between the parties and grant adequate relief. And the amendment should be permitted at any stage of the suit. But it is not permissible for the plaintiff to change the nature of the case by means of the amendment. In *Ram Saran Mandar* v. *Mahabir Sahu*,[4] the question that was agitated before the Judicial Committee of the Privy Council was whether the amendment of the plaint from one for specific performance of the contract to that for compensation introduced a change in the nature of the suit and the Privy Council answered the question in the negative. In this case the facts were these : "The plaintiff who was a member of the joint Hindu family, filed a suit against other members of the joint Hindu family with the allegations that the defendant No. 1, as the head of the family and as *karta* entered into an agreement with the plaintiff to sell certain house and lands belonging to the said family for Rs. 11,000 and on 20th August, 1919, executed the agreement for such sale on receipt of Rs. 9,000 as earnest money. The stipulation was that the registered conveyance in a regular manner would be executed within three weeks of the receipt of the balance of the sale consideration. The defendant No. 1 failed to execute the sale-deed, when called upon by the plaintiff to do so. The plaintiff filed the suit in which he prayed for the specific performance of the agreement, on payment of Rs. 2,000 or, if for any reason a decree for specific performance be not possible in the opinion of the Court, Rs. 9,000, the principal amount of the earnest money, with interest thereon at Rs. 2 per month by way of damages, may be awarded to the plaintiff against the defendants." The defendant No. 1 denied that he had ever entered into the agreement or that he executed the document or that he "received a single farthing as earnest money". There were other factual pleas as well. Other defendants

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1. Ardeshir H. Mama *v.* Flora Sassoon, A. I. R. 1928 P. C. 208 at pp. 217-18 : I. L. R. 52 Bom. 597.
2. A. I. R. 1938 Cal. 136 at p. 138.
3. V. Kameshwara Rao *v.* H. Hema Lathamma Rao, A. I. R. 1959 A. P. 596 at p. 599.
4. A. I. R. 1927 P. C. 18 at pp. 18 to 20.

also contested the suit, denied the plaint allegations and even challenged the right of the defendant No. 1 to enter into such an agreement on their behalf. The Trial Court (the District Judge) dismissed the suit holding that the said agreement was not genuine and that even if it was held to be genuine no consideration passed for it, that the contract was not binding on other defendants as it was not for their benefit and that it was not an act of prudent management. The plaintiff appealed before the High Court of Patna. Pending this appeal defendant No. 1 died and his legal representatives and heirs were brought on the record. At the time of hearing of the appeal the plaintiff-appellant's counsel gave up the claim for specific performance of the contract, but contended that plaintiff was entitled to recover the earnest money paid (Rs. 9,000) with reasonable interest. The High Court only examined the issue of genuineness of the agreements and held that the document was genuine and without considering the finding of the District Judge on other issues set aside the decree of the Trial Court and decreed the plaintiff's suit for the recovery of (Rs. 9,000) with interest against all the defendants. The Privy Council in appeal upset the decree of the High Court and dismissed the plaintiff's suit. Lord Sinha, who delivered the judgment of the Board observed : "The suit was framed as an ordinary suit for specific performance of an agreement, with an alternative claim for damages for breach thereof, such damages being assessed at Rs. 9,000 (the earnest money paid), with interest at 2 per cent. from date of agreement to date of realization. The amendment of the cause title in the appeal before the High Court on the death of defendant 1 above referred to, did not alter the nature of the suit. Nor did the abandonment of the claim for specific performance at the hearing of that appeal alter the suit as framed into an action for money had and received, or for the recovery of a debt." Then again at page 20, he concluded : "Their Lordships cannot accede to these arguments. It is not permissible by amendments to change the nature of the suit as framed ; and even if it were, the defendants affected by such amendment must have an opportunity to rebut such a new cause of action, a course which would involve fresh written statements and a fresh trial. Their Lordships are unable to permit such a course at this stage."

The rule is that when a party to a contract does not accept specific performance of a contract he, thereby, disentitles herself to claim compensation as an additional or alternative relief.

11. Claim for damages as alternative prayer for specific performance.— So far as the claim for damages in substitution for specific performance is concerned, such an alternative prayer is ordinarily or normally made by way of caution for the reason that the granting of specific performance is discretionary with the Court even in the event of the plaintiff proving that a breach of contract had arisen in circumstances entitling him to make a prayer for specific performance. The crucial question, however, is whether the provisions of Sec. 19 (new Sec. 21) cited above which enables a plaintiff to ask for compensation for breach of contract in addition to a prayer for specific performance do not proceed upon the legal principle that the cause of action for such additional damages is the same as the cause of action for the prayer for specific performance, viz. breach of the contract of sale.[1]

12. Award of compensation in addition to specific performance of contract.—This section also deals with the question of award of compensation in addition to specific performance of the whole contract can be decreed. If in

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1. H. M. Kumaraswamy *v.* T. P. R. Rudranadhuja, A. I. R. 1966 Mys. 215 at p. 216 : (1965) 1 Mys. L. J. 253.

such a case the Court decides that specific performance is not sufficient to satisfy the justice of the case, compensation should be awarded to the plaintiff. It also deals with the other case, viz. where in the opinion of the Court specific performance ought not to be granted but a contract between the parties having been broken the Court shall award compensation for the breach of contract. But what is to be noted is, that in these cases where the Court is of the opinion that specific performance should be decreed and compensation also should be awarded, this section is attracted only if decree for specific performance of the whole contract can be granted. If specific performance of the whole contract cannot be decreed, this section has no application. The distinguishing feature of this section from Sec. 12 is that whereas Sec. 21 is attracted only in those cases where the decree for specific performance of the whole contract can be granted, Sec. 12 applies to cases where specific performance can be decreed only in respect of a part of the contract and for the remainder compensation is awarded. Section 12 applies to cases where the part which cannot be performed bears only a small proportion to the whole contract in value and admits of compensation in money, and further applies to cases where the part unperformed forms a considerable portion of the whole contract or does not admit of compensation in money.[1]

13. Compensation and indemnity.—"Compensation" used in this section is different from "indemnity". Banerji, in his valuable Treatise on the Specific Relief Act, 1877, at page 427 points out the distinction between "indemnity" and "compensation" in the following words : He says : "And an indemnity must be distinguished from compensation. Neither a purchaser can be forced to accept a defective title with indemnity nor a vendee can be made to convey less than what he has sold *plus* an indemnity against the risk of eviction and the reason is that specific performance with compensation finally settled the matter, but not a specific performance with indemnity, which contemplates and almost involves litigation. In a contract for specific performance for sale of certain properties, with a condition attached that in the event the vendor does not specifically perform the contract a certain sum was payable by him by way of damages. What the Court has to see is to gather the true intention of the parties by reading the contract as a whole. If after reading the whole of the contract the primary intention of the parties is ascertained, the Court has to give effect to it and compel specific performance of the contract by means of the decree. In such a case the mention of a certain amount of damages for non-performance of the contract is only to ensure a specific performance of the contract rather than to provide for an alternative relief. In order that the condition for payment of damages in the event of the breach of the contract for specific performance might be construed as providing for an alternative relief to the main relief of specific performance it is necessary that there must be something in the deed of agreement itself to point out that damages mentioned in the deed were to be treated as full compensation for specific performance and were equivalent as to the specific performance.[2] The test to determine whether there is an alternative contract is whether the defendant had an alternative choice to sell the land or to pay the amount mentioned in the agreement and if this is not so, and if the agreement points out that the sum mentioned was in the nature of a security for the performance of the contract, it cannot be said that the specific performance can be refused to the plaintiff. The law on the subject has been stated in Halsbury's *Laws of England*."[3]

1. Smt. Labanya Ray *v.* Rai Saheb Phanindra Mohan Mukherji, 68 C. W. N. 611 at pp. 649-50.
2. Jaswant Singh *v.* Ishwar Singh, A.I.R. 1959 Raj. 88 at pp. 89, 90 : I. L. R. (1959) Raj. 6 : 1959 Raj. L. W. 55.
3. Second Ed., Vol. 31, paras. 373-74.

Paragraph 373 reads as follows :

"Where the contract contains a stipulation that in the event of non-performance a certain sum of money shall be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted. Nor does the distinction between penalty and liquidated damages affect the answer to this question. The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum, or whether he is bound to do a certain thing with a penal sum or sum by way of liquidated damages attached as security. In the latter case the Court, notwithstanding the penal clause, enforces performance, if the contract be such that, without the penal clause it would have been proper for specific performance ;

Where the term as to payment of money as damages is put on a contract in order to secure the performance of the main condition of the contract, it cannot be said that the contract provides for two separate alternative reliefs. Such a contract clearly falls within the four corners of Sec. 20 (old) (corresponding to the present Act1963.[1]) of the Specific Relief Act, 1877

Where a plaintiff sues for specific performance of the contract but does not include in his prayer the relief of compensation either in addition to or in substitution of such performance no decree for compensation can be passed in his favour because he has not sued for it. In a subsequent suit for compensation for the breach of the contract, when in the earlier case he omitted to claim compensation in his suit for specific performance of contract, he is debarred from claiming compensation under the provisions of O. II, R. 2, C. P. C., read with Sec. 21 (5) of the Specific Relief Act, 1963.[2]

14. Pleading.—Where the plaintiff has not averred and proved his readiness and willingness to perform his part of the contract he cannot hold the defendant responsible for the breach. Furthermore, when the guardian of the minor had no lawful authority or capacity to enter into the agreement for sale the contract is not binding on the minor, nor could he be held liable for payment of compensation, nor could the guardian be made liable because he had purported to act not in his individual capacity but for the minor. As has been observed by their Lordships of the Privy Council in *Sri Kakulam Subrahmanyam* v. *Kurra Subba Rao*[3] : "If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent (minor) and not by or against his mother". These words indicate that the suit for specific performance would be against the guardian and consequently he cannot be held responsible for payment of compensation under Sec. 21 (new) of the Specific Relief Act.[4]

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1. *See* Achhru Ram *v.* Hari Singh, A.I.R. 1960 Punj. 216 at p. 217: 61 Punj. L.R. 659 : I. L. R. (1959) Punj. 192.
2. *See* Pratapa Chandra Koyal *v.* Kalicharan Acharya, A.I.R. 1963 Cal. 468 at p. 469.
3. A. I. R. 1948 P. C. 95.
4. Addul Sattar *v.* Ismail, A. I. R. 1958 M. P. 373 at pp. 378-79.

15. Measure of damages.—In England the rule of law as laid down in *Flureau* v. *Thornhill*[1] and subsequently re-affirmed by the House of Lords in *Bain* v. *Fothergill*[2] is that if a person enters into a contract for sale of a real estate knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract. He can only obtain other damages by an action for deceit. In India this rule of law was adopted in an early case by the Bombay High Court without reference to the provision of Sec. 73 of the Indian Contract Act.[3] But this view has not been adopted by the Bombay High Court in subsequent rulings or by any other High Court. In India the law is now well settled that the question of damages must be considered in the light of Sec. 73, Contract Act. This section does not admit of any distinction between a contract to sell immoveable and moveable property, and damages with respect to a breach in either case are to be assessed on the same standard.[4] The measure of damages due to the purchaser is the value of the land at the time of his eviction (if he is evicted for want of title of his vendor) and not merely the purchase money he paid.[5] It is obvious that he is not entitled to any damages if both are the same.

Measure of damages is governed by Sec. 73, Contract Act.

Measure of damages.

16. Prospective damages.—Prospective damages are only awarded when the Court may reasonably anticipate that the plaintiff would suffer damages in future in consequence of the defendant's acts or omissions. There must be evidence from which the Court can anticipate it.[6]

Various methods are used in proving prospective profits. These methods are not mutually exclusive, but often one method is more feasible than others:

(1) Where the defendant has promised a fixed price, the simplest method is to prove the cost of total performance. Whether there has already been part-performance or not this will enable the profit to be fixed. If the total costs would exceed the promised price, profits as an element or damage are excluded.

(2) Evidence of past profits in an established business furnish a reasonable basis for estimating future profits.[7] Probable increase of profits can be shown.[8] But if a business has not been started or has been but recently launched, estimates of profits are likely to be too speculative to be admissible.[9]

(3) Profits made by others or by the plaintiff himself in a similar business or under a similar contract where the facts were not greatly different may also afford a reasonable inference of the plaintiff's loss.

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1. 2 W. Bl. 1078.
2. (1869) L.R. 4 Q.B. 659 : 7 H. L. 158.
3. Pitamber Sunderji *v.* Cassibai, I. L. R. 11 Bom. 272.
4. Abdul Ali *v.* Gokul Dass, A. I. R. 1927 Sind 49 ; Jai Kishen Das *v.* Arya Pradeshak Pritinidhi Sabha, I.L.R. 1 Lah. 380; Nagar Das *v.* Ahmad Khan, I.L.R. 21 Bom. 175 ; Ranchhod *v.* Manmohan Das, I. L. R. 32 Bom. 165 ; Vallabh Das *v.* Nagar Das, 23 Bom. L. R. 1213 ; Nabin Chandra *v.* Krishna, I. L. R. 38 Cal. 458 ; Adikeshvan *v.* Gurunatha, I.L.R. 40 Mad 338 (F. B.) : 39 I. C. 358 : 32 M.L.J. 180: 22 M. L.T. 300.
5. Nagar Das *v.* Ahmad Khan, *supra* ; Ranchhod *v.* Manmohan Das, *supra*.
6. Ram Chandra Lalbhai *v.* Chanubhai Dalbhai, A. I. R. 1944 Bom. 76 at pp. 88-89 : 214 I. C. 42 : 17 R. B. 55 : 45 Bom. L. R. 1074.
7. Borser City Co. *v.* Adams, 19 Ark. 219.
8. Neal *v.* Jefferson, 212 Mass. 517.
9. Ellerson *v.* Grove, 44 F. (2d.) 493.

In *Sinclair Ref. Co.* v. *Jenkins Petroleum Process Co.*,[1] a bill for discovery of the use made by the defendant of a device was sustained in aid of an action at law for breach of a contract to assign an application for a patent ; that is, the profits derived by the defendant were treated as evidentiary of what the plaintiff would persumably have had. In *Wilson* v. *Stocks*,[2] a tenant farmer suing his landlord for breach of the rental contract was allowed to establish his damages by the value of crops raised (less probable cost) by another tenant to whom the defendant leased the land on evicting the plaintiff. For breach of a contract of Exclusive Agency evidence of the profits made by the infringer are admissible to prove the plaintiff's loss.[3]

(4) The evidence of experts if based on anything more than individual opinion or conjecture. The plaintiff, if qualified, as an expert, has been allowed to testify as to his opinion.[4]

(5) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property.

17. Compensation for delay.—In case of a specific performance for the contract proper compensation for delay is granted. Ordinarily the buyer is entitled to the rents and profits of the property from the time the contract should have been completed,[5] and the vendor is allowed interest on the purchase money for the same period.[6] The fact that the moneys were lying dead makes no difference provided the delay was due to a fault on the part of the purchaser,[7] but not if the fault lay with the vendor.[8]

Where a vendor delays making a conveyance beyond the agreed time, it may be assumed that these jurisdictions which hold that a vendor acting in good faith is not liable in damages for loss of the bargain where he is unable to perform his contract owing to a defect of title would apply a similar rule where for the same reason he is unable to perform on the agreed day.[9] Where the vendor becomes liable for delay, the normal rule of damages in action at law would seem to be the rental value of the premises less any advantage which the buyer may have had by retaining the whole or part of the purchase money, together with any foreseeable consequential damages.[10] If the delay is due to the purchaser's fault, he is liable for interest, though the vendor has received no rents and profits and can, therefore, credit him with none.[11]

18. Damages for delay ; performance during suit.—On this point Banerji says : "So, again, a plaintiff at the time he institutes his suit may be entitled to specific relief, but by the time the suit comes for trial the defendant may have performed the contract. In such a case, the Court may, if it finds that the injury has been caused to the plaintiff by reason of the defendant having

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1. 289 U. S. 689.
2. 231 Ala. 58.
3. Schiffman *v.* Peerless Motor Car Co., 13 Cal. App. 600.
4. Rude *v.* MacCormac, 72 Colo. 221.
5. De Visme *v.* De Visme, 1 Mac. & G. 346.
6. Lowther *v.* Andover, 1 Bro. Ch. 396.
7. Calcraft *v.* Roehuck, 1 Ves. Jun. 221.
8. Howland *v.* Norris, 1 Cox. 59.
9. Jones *v* Gardiner, (1902) 1 Ch. 191.
10. Jones *v.* Gardiner, *supra* ; Jaques *v.* Miller, 6 Ch. D. 153. In these cases, the vendor's delay was due to neglect or wilfulness and not to any de ect in title.
11. Prichard *v.* Mulhall, 140 Ja. 1.

wrongfully delayed performance, make a decree for such damages as it deems proper."[1]

19. Damages as additional relief.—"Or, the circumstances of the case may be such that, by reason of the wrongful default of the defendant, the Court may think that a decree for specific performance, may be belated as it will always be, will not afford adequate satisfaction to the plaintiff, e. g. there may be a contract for lease of property, which the lessor knows, the lessee wants to carry on business there. But the lessor makes wilful default, with the result that the business could not commence for 15 weeks. The Court, upon the lessee's suit, will decree specific performance and may award damages for the plaintiff's loss of profits during the 15 days.[2] Similarly, if a contract for the sale of immoveable property is delayed in consequence of the vendor's default, he not having cared, or troubled, or taken reasonable pains to perform his contract, the vendee may, by suit obtain specific performance and, in addition thereto, damages for the delay."[3]

20. Damages for part.—In some cases the Court may not enforce the whole of the contract *in specie* but may give damages in respect of a portion of it, as where by a contract the lessee agreed to pull down an old house and build a new house to be let to him and he pulled down the old one but failed to build the new one the lessor may be given damages for such default and specific performance of the contract to take the lease.[4] In other words, performance would be ordered even if the contract is in complete at that date, if the incompleteness is due to the default of the defendant and is such that it can be remedied or compensated.[5] So also, where the contract was to give lease of a hotel and to make there certain repairs specific performance was decreed of the contract to give the lease and damages were granted for the loss sustained for not doing the repairs.[6]

21. Damages for the breach of contract.—Where a sale requires the permission of some one who is not a party before the Court and is not amenable to its jurisdiction and that permission is refused, the only remedy for the aggrieved party is to claim damages for breach of contract.

"Where defendant's performance depends on the consent or approval of one not a party to the contract who is free to withhold his consent, specific performance of the contract will not be decreed where it does not appear that such consent or approval has been or can be obtained, or where it appears that such consent or approval is withheld or refused or has become impossible . . . . .The mere fact that as contract or transfer sought to be specifically enforced is subject to the approval of a public agency whose discretion is not subject to control by the Court is not a bar to a decree compelling a party to the documents necessary for the consummation of the contract or transfer and

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1. Cory *v.* Thames Iron Works & Ship Building Co., (1863) 11 W. R. (Eng.) 589: 8 L. T. 237 ; Banerji, p. 417.
2. Jaques *v.* Miller, (1877) 6 Ch. D. 153 ; Royal Bristol Building Society *v.* Bomash, (1887) 35 Ch. D. 390.
3. Jones *v.* Gardiner, (1902) 1 Ch. D. 195; *cf.* illus. to para. III to Sec. 19.
4. Soames *v.* Edge, (1960) Johns 660, quoted in Mayor & Corporation of London *v.* Southgate, 17 W. R. 197 (distingnished) ; Norris *v.* Jacson, 1 J. & H. 319 ; Somuda *v.* Lawfoot, 4 Giff. 42 ; Banerji, pp. 417, 418 ; also Fry, Sec. 1309 ; Sec. 339.
5. Soames *v.* Edge, (1960) Johns 660, quoted in Mayer & Corporation of London *v.* Southgate, 17 W.R. 197 (distinguished) ; Norris *v.* Jacson, 1 J. & H. 319 ; Middleton *v.* Greenwood, (1864) 2 De G. J. & S. 142 , Halsbury, p. 348 (Hailsham Ed.).
6. Middleton *v.* Greenwood, *supra.*

to apply to the public agency for its approval. On the other hand, where the public agency fails or refuses to consent to the transfer the Court will not grant specific performance of the contract."[1]

22. **Practice, in case of deterioration**.—"And it is a constant course of the Court in case of a vendor and purchaser, where a sufficient case is made for the purpose to an inquiry as to the deterioration of the estate and in so doing, the Court is, in truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed."[2]

Vendee is entitled to damages in case of non-performance.

23. **Contract to sell by co-sharer**.—A manager of a joint Hindu family contracting to sell immoveable property belonging to himself and other members of the family who are minors and on whom the contract is not binding is personally liable for damages under Sec. 73 of the Contract Act for failure to perform the contract. It makes no manner of difference that the vendee was aware of the defect in title of the vendor.[3] Nor does it make any difference that the vendor though he professed to be the manager of the joint family is not really so.[4] Where a person contracts to sell a plot of land owned by him and another person jointly but that other declines to join in the sale, the vendor can be compelled by the Court to render the specific performance in respect of his own share provided the purchaser pays full price agreed for the whole plot and relinquishes all claims to further performance and compensation. But if the vendee does not agree to these conditions he can still claim damages for breach of the contract.[5] Where one of the co-sharers enters into a contract for sale of the entire land including the interest of the other co-sharers, at the same time giving an undertaking to obtain the consent of the other co-sharers to the transfer and the contract is not fulfilled on account of the refusal of the rest of the co-sharers to give up their shares, the vendee is entitled to damages for non-performance of the contract. A statement by the vendee that he would confine his claim to damages only as specific performance was not possible can have no bearing at all on the course of the trial.[6] Again, where a *moharrari* lease was granted to the plaintiff by the first defendant on behalf of himself and his co-sharers, defendants 2 to 7, with delivery of possession, but the latter refused to confirm the lease and ejected the plaintiff from the land. Sir R. Garth, C. J. (with Bose, J.), in a suit by the plaintiff against all the defendants to enforce the contract or in the alternative for the refund of Rs. 250 paid as premium, decreed compensation against the first defendant under Sec. 19 of 1877 (which corresponds to Sec. 21 of the present Act). The measure of compensation was Rs. 230 deducting from the premium a small sum to represent the very short time during which the plaintiff was in possession.[7]

Lease by one co-sharer on behalf of all.

Measure of compensation.

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1. Golab Ray *v.* Muralidhar Modi, A.I.R. 1964 Orissa 176 at p. 178 : I. L. R. (1964) Cut. 89.
2. *Per* Turner, L. J., Prothero *v.* Phelps, (1855) De G. M. & G. 722 at p. 734 ; Banerji, p. 418 ; Fry, Sec. 1299.
3. Adikesavan *v.* Gurunatha, I. L. R. 40 Mad. 338 (F. B.) : 39 I. C. 358 : 32 M.L.J. 180 : 22 M.L.T. 800.
4. Krishna Aiyar *v.* Shamannal, 23 M.L.J. 517.
5. Sita Ram *v.* Balkishen, A. I. R. 1925 Lah. 456 at p. 466 : I.L.R. 6 Lah. 221 : 88 I. C. 472.
6. Mangal Singh *v.* Pandit Dial Chand, A. I. R. 1940 Lah. 159, relying on A. I. R. 1925 Lah. 465.
7. Rajdhur Choudhry *v.* K. Bhuttacharya, I.L.R. 8 Cal. 963 at p. 965.

24. Alternative reliefs.—A suit may be brought for specific performance of a contract *plus* damages in substitution of such performance with an alternative claim for damages for breach of contract.[1] The right to specific performance of a contract or in the alternative to a return of the earnest-money should be decided in one and the same suit and the plaintiff failing to obtain a decree for specific performance should not be drawn to a separate suit to recover back his deposit if he is entitled to relief in that form. The circumstance that the purchaser is not entitled to specific performance is, by no means, conclusive against his right to a return of the deposit.[2] Where the specific performance is refused by the defendant the plaintiff may claim compensation without claiming specific relief of the contract.[3] A lessee whom the lessor contracted to put in possession but who cannot obtain possession may sue either for specific performance or for damages.[4]

It is a well-established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its power.

No special form for drafting a decree for specific performance is supplied by the Civil Procedure Code, as is supplied by it in the case of a decree in a pre-emption suit by O. XX, R. 14, which directs that, if the purchase-money is not paid as stipulated in the decree, the suit shall be dismissed with costs. Hence the analogy of decree, etc. in pre-emption suits and reported rulings thereon is not of assistance in this case. The form of decree drawn up in the trying Court is the general form adopted in this Presidency for such decrees. But that it is in the nature of a preliminary and not a final decree is placed beyond doubt by Sec. 35 of the Specific Relief Act. This section lays down that when a decree for specific performance of a contract of sale has been passed and the purchaser makes default in payment of the sum which the Court has ordered him to pay, the vendor may either file a fresh suit, for rescission of the contract or may, in the specific performance suit itself, apply to the Court to rescind the contract. It is perfectly clear that the contract is not determinable or determined by the mere failure to comply with the terms of the decree. It is not determined until the Court orders that it is determined. By the decree for specific performance the Court sets out what it finds the real contract between the parties was, and declares that such a contract exists and gives what it considers a reasonable time within which the contract shall be carried out. Regarding the decree from this point of view, as a contract, it is clear in this case, as in most others of the same kind, that time is not of the essence of the contract and that until the contract is rescinded by formal order or decree, such time for performance, not being an essential part of the contract, may be varied by the Court which has declared what the essential terms of the contract are. It is clear, as the learned Chief Justice has shown, that it must be within the power of the Court to vary the time within which the contract shall be performed, as difficulties might arise through no fault whatever of the parties preventing performance within the time specified in the decree, e. g. when a third party has within that period set up a *bona fide* claim of title to the property, it may even be necessary to direct specific performance to stand over for a reasonable but indefinite period, until that claim

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1. Calcutta Improvement Trust *v.* Subarna Bala, 44 C. W. N. 541.
2. Muni *v.* Koer, I. L. R. 45 All. 378 : 72 I. C. 86 : A. I. R. 1923 All. 821.
3. Natu Ram *v.* Ulluck Chand, 95 I. C. 700 : A.I.R. 1926 Cal. 1041.
4. Munnee Dutt *v.* Campbell, 12 W. R. 149.

has been adjudicated.[1] A purchaser would be entitled to the return of the deposit even though his suit for specific performance has been dismissed for non-payment of the balance of the purchase price within the stipulated time, especially when the vendor made default in fulfilment of his part of the contract.[2]

New

22. Power to grant relief for possession, partition, refund of earnest money, etc.—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immoveable property may, in an appropriate case, ask for—

(*a*) possession, or partition and separate possession, of the property, in addition to such performance ; or

(*b*) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made to him, in case his claim for specific performance is refused.

(2) No relief under Cl. (*a*) or Cl. (*b*) of sub-section (1) shall be granted by the Court unless it has been specifically claimed :

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under Cl. (*b*) of sub-section (1) shall be without prejudice to its powers to award compensation under Sec. 21.

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1. General.—In the Nothes on Cl. 21 which is equivalent to the new Sec. 22 of the Specific Relief Act, 1963, it has been stated :

> "Sub-clause (1) (*a*) introduces a rule, now settled by judicial decisions, that in order to avoid a multiplicity of proceedings the plaintiff

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1. Abdul Shanker Sahib *v.* Abdul Rahiman Sahib, A. I. R. 1923 Mad. 284 at p. 287 ; Pearisundari *v.* Hari Charan. I. L. R. 15 Cal. 211 ; Seth Jaidial *v.* Ram Sahai, I. L. R. 17 Cal. 432.
2. Alokeshi *v.* Harak Chand, I. L. R. 24 Cal. 897 ; Rosik *v.* Chundra, 15 C.L.J. 410 ; *see* also I.L.R. 30 Mad. 375.

may claim a decree for possession in a suit for specific performance, even though strictly speaking the right to possession accrues only when specific performance is decreed. In some cases it has been held that the Court may, in a suit for specific performance, direct a refund of earnest money while refusing specific performance if the facts disclose a case for such a refund. Sub-clause (*b*) gives effect to this and also permits the plaintiff to claim any other relief. It is, however, provided that any such relief will not be granted unless a claim in that behalf is made by the plaintiff either initially or by an amendment at a later stage, but that does not prejudice his right to compensation under Cl. 21."[1]

2. Object.—A reading of Sec. 22 shows that this section applies to those persons who sue for specific performance of a contract for the transfer of immoveable property after the coming into force of the new Act. The opening part of the section says "any person suing for specific performance of a contract". This shows that the Legislature wants this provision to apply to those who instituted suits for specific performance after the new Act came into force. There is nothing in this section or in any other part of the Act to evince an intention on the part of the Legislature that pending suits be also governed by the new section. The section contains clear words which show that the Legislature has no intention that the Act should operate on pending proceedings.

Section 22 enacts a rule of pleading. The Legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though, strictly speaking, the right to possession accrues only when specific performance is decreed. The Legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession.[2]

3. Scope of the section.—This is a new section. It is procedural. It enacts that a person in a suit for specific performance of a contract for the transfer of immoveable property, may ask for appropriate reliefs, namely, he may ask for possession, or for partition or for separate possession including the relief for specific performance. He may also ask for the refund of any earnest money, or deposit made by him, in the event of his claim for specific performance of the contract being rejected by the Court. These reliefs he can claim, notwithstanding anything contained in the Code of Civil Procedure, 1908, to the contrary. Sub-section (2) of this section specifically provides that these reliefs cannot be granted by the Court, unless they have been expressly claimed by the plaintiff in the suit. Sub-section (2) of the section recognized in clear terms the well-established rule of procedure, that the Court should not entertain a claim of the plaintiff unless it has been specifically pleaded by the plaintiff and proved by him to be legally entitled to. The proviso to this sub-section (2) says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stages of the suit, the Court shall permit the plaintiff at any stage of the proceedings, to

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1. Notes on Clauses, p. 10.
2. *See* Ninth Report of the Law Commission, page 35 ; Mahender Nath Gupta *v.* Messrs. Moti Ram Rattan Chand, A.I.R. 1975 Delhi 155 at p. 159.

include one or more of the reliefs, mentioned above by means of an amendment of the plaint or such terms as he may deem proper. This section has been newly enacted so that the multiplicity of suits might be avoided and the plaintiff may get appropriate relief without being hampered by procedural complication.

It will thus be seen that the Court's discretion in the matter of amendments of the plaint, has been fettered to a certain extent.

4. Agreement of reconveyance.—In *Benode Behari Das Gupta* v. *Benoy Bhushan Choudhary*,[1] according to plaint allegations, the plaintiff sold the house in dispute to the defendant for a sum of Rs. 400 per registered sale-deed, dated 26th June, 1957. On the same date the defendant executed another registered deed in favour of the plaintiff undertaking to re-transfer the house to the latter on payment of Rs. 400 to him at any time within a period of five years. The plaintiff approached the defendant repeatedly for re-transfer for the house to him on receipt of Rs. 400 but the defendant put him off. Ultimately the plaintiff sent a registered notice on 11th June, 1962 to the defendant requesting him to appear at the Sub-registry Office, Hailakandi, on 21st June, 1962 for execution of a deed of reconveyance or receipt of Rs. 400. However, the defendant failed to reach Hailakandi on the date mentioned and so the plaintiff had to return from that station disconsolate. The plaintiff having lost hope that the defendant would honour his commitment within the period of five years, he filed the suit on 26th June, 1962, the last day of that period, in the Court of the Munsif, Hailakandi, claiming specific enforcement of the agreement of reconveyance.

It was held that the contract between the parties falls in the category of contracts involving reciprocal promises ; that the plaintiff had option to pay Rs. 400 to the defendant at any time within five years counted from 26th June, 1957 ; that immediately the plaintiff paid or tendered the money to the defendant the latter was bound in the terms of the contract to execute the deed of reconveyance in favour of the plaintiff and as such the contract is governed by the provisions of Sec. 51 of the Contract Act ; that the plaintiff made repeated attempts to tender money to the defendant but the latter gave him a slip each time as he was determined not to reconvey the house to the plaintiff; that if the plaintiff's contention that the defendant was not out to honour his commitment is well founded, then the plaintiff was not legally required to manage paying somehow or other Rs. 400 to the defendant ; that even if the contract is covered by Sec. 55 of the Contract Act the plaintiff was not bound to pay Rs. 400 to defendant if the latter was reluctant to reconvey the house to him ; and that the entire blame for non-fulfilment of contract to this date rests on the defendant.[2]

5. Effect of the section.—This section makes it incumbent on a plaintiff to ask for possession of the property in addition to specific performance. Sub-section (2) provides that if in a suit for specific performance the plaintiff has omitted to ask for the possession of the property in addition to specific performance no relief shall be granted by the Court unless it has been

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1. A. I. R. 1973 Gau. 66.
2. Benode Behari Das Gupta *v.* Benoy Bhusan Choudhury, A. I. R. 1973 Gau. 66 at pp. 67, 71-72 : 1972 Assam L. R. (Gau.) 113.

specifically claimed. The effect of the section is that in a suit for specific performance prayer for possession must be distinctly and specifically made.[1]

6. Meaning of the expression "at any stage of the proceeding".—The word "proceeding" is not defined in the Act, *Shorter Oxford Dictionary* defines it as "carrying on of an action at law ; a legal action or process, any act done by authority of a court of law ; any step taken in a cause by either party".

The term "proceeding" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted.

The word "proceeding" in Sec. 22 includes execution proceedings also. Such a wide interpretation has been placed on this word by the courts in decided cases.[2]

The expression "at any stage" in its literal and actual meaning means without limitation either in frequency or duration or length of time. It is not a restrictive expression. The general purpose and scope of a statute where this expression is used may show that the expression has not a limited or controlled meaning. It is a term giving the widest freedom to a court of law so that it may do justice to the parties in the case. "At any stage" will include execution. Execution is a stage in the legal proceedings. It is a step in the judicial process. It marks a stage in litigation. It is a step in the ladder. In the journey of litigation there are various stages. Execution is one of them. It registers a degree of advance towards the goal which the litigant has set out for himself.

Amendment for including the relief of possession can be allowed "on such terms as may be just". These words also point in the same direction. Justice was the dominant idea in the mind of the Legislature at the time it was enacting the proviso. It knew, one would presume, of the difficulties which a litigant might face by omitting a relief to which he may be entitled and which the section says he must ask for. The proviso says the Court "shall" allow the amendment. The words are emphatic and imperative.[3]

In the *Duke of Buccleuch*,[4] Fry, L. J., said :

> "I base my decision upon the words 'at any stage of the proceedings'. It has been argued that the rules do not apply after final judgment. They apply, in my opinion, as long as anything remains to be done in the case."

7. Proceedings in the pending suits should be governed by the old Act and not by the new Act.—It is a settled principle of law that the rights of the parties to an action are to be governed by the law in force when the action was commenced that a change in the law would not affect pending actions unless there is a clear provision to that effect in the new enactment.

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1. Messrs. Ex-Servicemen Enterprises (P.) Limited *v.* Sumey Singh, A. I. R. 1976 Delhi 56 at p. 58.
2. *See* Companies Act, 1913, Sec. 171 and Rameshwar Nath *v.* Uttar Pradesh Union Bank, A. I. R. 1956 All. 586 at p. 588.
3. Messrs. Ex-servicemen Enterprises (P.) Limited *v.* Sumey Singh, *supra* at p. 59.
4. (1892) P. 201.

Under the old Specific Relief Act of 1877 the High Courts had held that it was not necessary for a plaintiff to ask for the relief of possession separately and specifically. Such a relief was comprehended in the decree for specific performance. The claim to possession was involved in the claim to specific performance, the courts held. It was laid down in decided cases that possession can be asked for in execution of a decree for specific performance even though possession was not claimed in the plaint on the ground that the relief of possession is merely incident to that of execution of a deed of conveyance.[1]

Pt. Balmukand v. *Veer Chand*[2] may be taken as fairly representative of the views which prevailed before the enactment of the new Act in 1963. A Division Bench held that where in a suit for specific performance of a contract for sale relief for possession is not claimed and consequently the decree passed in the suit contains no relief of delivery of possession, the Court executing the decree is competent to deliver possession ; an order directing delivery of possession being merely incidental to the execution of the deed of sale.

In that case the plaintiff filed a suit for specific performance of a contract and the suit was decreed. The plaintiff had also asked for delivery of possession of the property, but no mention was made in the decree about the delivery of possession. The judgment-debtor contended that the plaintiff having claimed possession and possession not having been specifically granted in the decree, it must be deemed that the relief for possession was refused and the plaintiff could not claim delivery of possession.

The Division Bench rejected the argument and said :

"We do not think there is any force in this contention. Section 55 (1) (*f*) of the Transfer of Property Act of 1882 provides that—

> The seller is bound—
>
> (*f*) to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits.

The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendant and the sale-deed shall be executed within a certain time, failing which the Court will have the sale-deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of Sec. 55 (1) (*f*), Transfer of Property Act. Delivery of possession is a necessary ingredient and part of transfer of ownership."

The learned Judges continued :

> "We do not think that it is necessary in a suit for specific performance either to separately claim possession or it is necessary for the Court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by Sec. 55, Transfer of Property Act."

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1. *See* Arjun Singh *v.* Sahu Maharaj Narain, A. I. R. 1950 All. 415 and Kartik Chandra *v.* Dibakar Bhattacharjee, A.I.R. 1952 Cal. 362.
2. A. I. R. 1954 All. 643.

On 1st March, 1964, Specific Relief Act of 1963 came into force. This Act altered the law by enacting Sec. 22. It made it necessary for a plaintiff to ask specifically the relief of possession in suits for specific performance.

In *Mahender Nath Gupta* v. *Messrs. Moti Ram Rattan Chand*,[1] the appellant instituted a suit for specific performance. This suit was instituted in June, 1963 in the Court of the Subordinate Judge. He decreed the suit on 31st August, 1968 after coming into force of the new Act. A decree for specific performance was passed in favour of the appellant.

The appellant made an application for execution of the decree. He prayed for the delivery of possession of the plot of land which he had agreed to buy from the respondents. The respondents made an application under Sec. 47 of the Code of Civil Procedure to the executing Court. Their sole objection was that the appellant was not entitled to get possession of the property as no such relief was granted to him by the Court and as none was asked for in the plaint in the suit.

Under Sec. 6 of the General Clauses Act the repeal of an enactment does not *prima facie* affect pending actions which are to be decided as if the repealed enactment was still in force. This is the general rule.[2] But when the repeal is followed by fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. Here in the new Act there is Sec. 44. This is a simple repeal. There is no saving clause (Sec. 3 of the Act of 1963 though deals with "savings" contains no reference to the old Act of 1877). The repeal is followed by fresh legislation on the same subject. But there is nothing in the new Act to show an intention of the Legislature to destroy the old rights and liabilities of the party which accrued under the old Act. The repeal of the old Specific Relief Act will not affect any right, liability acquired or incurred under the repealed enactment or any legal proceedings or remedy in respect of such right or liability, etc., and such legal proceeding or remedy may be continued as if the repealing Act has not been passed.[3]

New	Old
23. Liquidation of damages not a bar to specific performance.—(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the	**20. Liquidation of damages not a bar to specific performance.**—A contract, otherwise proper to be specifically enforced may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

1. A. I. R. 1975 Delhi 155 at pp. 157 158.
2. *See* Adarsh Bhandar *v.* Sales tax Officer, A. I. R. 1957 All. 475 (F.B.).
3. *See* G. Ekambarappa *v.* Excess Profits-tax Officer, A. I. R. 1967 S. C. 1541 ; Mahender Nath Gupta *v.* Messrs. Moti Ram Rattan Chand, A. I. R. 1975 Delhi 155 at pp. 156, 158.

Court having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpase of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the Court shall not also decree payment of the sum so named in the contract.

Illustration

A *contracts to grant* B *an underlease of property held by* A *under* C, *and that he will apply to* C *for a licence necessary to the validity of the underlease, and that, if the licence is not procurcd,* A *will pay* B *Rs.* 10,000. A *refuses to apply for the licence, and offers to pay* B *the Rs.* 10.000. B *is nevertheless entitled to have the contract specifically enforced if* C *consents to give the licence.*

SYNOPSIS

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2. Reasons for the change ... 702
3. Construction ... 703
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1. Legislative changes.—This section corresponds to the old Sec. 20. The previous section has been numbered as sub-section (1) and reproduced with the substitution of the word "so" for the word "thus" and the addition of the following words at the end of the old section :

> "If the Court, having regard to the terms of the contract and other attending circumstances, is satisfied that the same was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance."

Sub-section (2) has been newly introduced in this section. The illustration has been omitted.

2. Reasons for the change.—The Law Commission of India in their report on the Specific Relief Act says :

> "Section 20 does not state the entire law relating to liquidation of damages as a bar to specific performance. It appears that the principles of English law on this subject have been applied by the courts in our country. It would therefore be expedient to codify these principles. In interpreting Sec. 20 the courts[1] in India and the Judicial Committee[2] always sought to ascertain the intention of the parties on the true construction of the contract.

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1. *Cf.* Sadiq Hussain *v.* Anup Singh, I.L.R. (1923) 4 Lah. 327 ; V. K. Kandasami *v.* Shanmugha, A. I. R. 1949 Mad. 302
2. Bissessar Doss Daga *v.* E. Vas, I. L. R. 55 Cal. 238 (P. C.).

"There may however be cases in which the circumstances indicate that the parties intended that in the event of a breach of the contract only the payment of money by way of damages should be ordered and not specific performance.[1]

"A reading of the decisions referred to will show that our courts have followed the English law thus stated in Halsbury[2] :

'Where the contract contains a stipulation that in the event of non-performance a certain sum of money shall be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted. Nor does the distinction between penalty and liquidated damages affect the answer to this question. The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum, or whether he is bound to do certain thing, with a penal sum or sum by way of liquidated damages attached as security. In the latter case the Court, notwithstanding the penal clause, enforces performance, if the contract be such that without the penal clause it would have been proper for specific performance.'

"We recommend that these principles should be incorporated into the section, with a proviso that the plaintiff cannot have both specific performance and the sum specified in the contract."[3]

3. Construction.—The modern general rule of equity is that if a thing is agreed to be done the very thing ought to be done, though there is a penalty annexed to secure its performance or a sum is named in the contract to be paid in case of its breach.[4] Whether a contract must be taken as specifying a sum to secure performance of the contract or whether it should be treated as penalty or damages in the alternative is a question of the construction of the terms of the document.[5] A court of equity is anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done and not a sum of money really intended to be paid.[6] On the other hand, it is certainly open to parties who are entering into a contract to stipulate that on failure to perform what has been agreed to be done a fixed sum shall be paid by way of compensation.[7] The equity bars against the construction that the contract is of alternative nature.[8] Courts of equity in all cases of this sort look to the substance of the transaction and primary object of the parties and where that requires a specific performance they will treat the penalty as a mere security for its performance and attainment.[9] The contract must not be one where compensation of money would be adequate relief.

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1. V. K. Kandasami *v.* Shanmugha. A.I.R. 1949 Mad. 302 at p. 303.
2. 2nd Ed., Vol. 41, para. 373.
3. Law Commission of India, Ninth Report on Specific Relief Act, 1877, pp. 19-20.
4. Fry ; French *v.* Morale, 2 Dr. & War. 274, Armstrong *v.* Stiffler, 56 A. (2d) 808 Md.
5. Sadiq Hussain *v.* Anup Singh, I. L. R. 4 Lah. 327 : 76 I. C. 91.
6. Ranger *v.* G. W. Ry. Co., 5 H.I.C. 72; Franco *v.* Oloszewski, 25 N. W. (2d) 593.
7. *Ibid.*
8. Nawab *v.* Hukam Din, 87 I. C. 511 : A. I. R. 1925 Lah. 605 : 26 Punj. L. R. 751; *see* also M. Rama Bhatlu *v.* M. Annayya Bhatlu, 80 I. C. 605: A.I.R. 1926 Mad. 144 : 22 L. W. 366 : 49 M. L. J. 152 ; Sangali Sadgan *v.* Naganuthu Malavadi. 84 I. C. 612 : A. I. R. 1925 Mad. 227 : 20 L. W. 523 ; Rigs *v.* Sokaletu, 318 Mass. 337.
9. Sadiq Hussain *v.* Anup Singh, *supra* ; Sangali Sadgan *v.* Nagamuthu Malavadi, 84 I.C. 612: A.I.R. 1925 Mad. 227: 20 L. W. 523 : 1924 M. W. N. 857.

It is essentially a question of construction for the Court depending upon the circumstances of eaeh case and the primary intention of the parties ; where there is a contract containing a clause for payment of money in the event of non-performance, the Court has to determine whether it is (*a*) a contract stipulating that one certain act shall be done with a sum annexed to secure the performance of this very act, or (*b*) it is a contract stipulating that one of two things shall be done at the election of the party who has to perform it, e. g. either performance or payment in money. To this latter class of contracts termed alternative contracts, this section does not apply for it would be substantially performed by the payment of money ; the former class is covered by this section which enables a court to decree specific performance in spite of the damages and thus carry out the intention of the parties.[1]

A reading of the undernoted decisions[2] will show that our courts have followed the English law as stated in Halsbury :

> "Where the contract contains a stipulation that in the event of non-performance a certain sum of money shall be paid, that fact is not in itself decisive in considering whether or not specific performance should be granted. Nor does the distinction between penalty and liquidated damages affect the answer to this question. The answer is to be found by considering the intention of the parties, that is, whether the party bound to performance has an alternative choice given to him by the contract, to perform or to pay the agreed sum, or whether he is bound to do a certain thing, with a penal sum or sum by way of liquidated damages attached as security. In the latter case the Court, notwithstanding the penal clause, enforces performance, if the contract be such that without the penal clause it would have been proper for specific performance."

The above principles have been incorporated into the present section, with a condition that the plaintiff cannot have both specific performance and the sum specified in the contract.

4. Otherwise proper to be specifically enforced.—There cannot be any question that, when once the plaintiff has proved an agreement to sell arrived at between him and the vendor, it is for the vendee, in order to defeat the plaintiff's claim, to prove that he paid the money to the defendant-vendor under the sale-deed in his favour in good faith and without notice of the prior contract. And it is one of the recognized canons of jurisprudence that a person, who seeks to take advantage of an exception, has to prove affirmatively that his case falls within the scope of that exception. This is the principle which lies at the root or a number of precedents which lay down that in these cases it is for the vendee to prove want of notice. By way of illustration the following cases may be quoted on this point : *Himmatlal* v. *Vasudeo*,[3] *Naubat Rai* v. *Dhaunkal Singh*,[4] *Ram Deni Singh* v. *Gamani Raut*,[5] *Dharm Deo Singh* v. *Ram Prasad Shah*[6] and *Him Chandra Deo Sarkar* v. *Amiabala Deo*

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1. Bissessar Doss Daga *v.* E.Vas, I.L.R. 55 Cal. 238 (P.C.); Nawab *v.* Hukum Din, 87 I. C. 612 : A. I. R. 1925 Lah. 605 : 26 P.L.R. 751; Metta Ram *v.* Annayya, 90 I. C. 605 : A. I. R. 1936 Mad. 144 : 22 L. W. 366 : 49 M.L.J. 152.
2. A. P. Pritinidhi Sabha *v.* Lahori, I.L.R. 5 Lah. 509 ; Somasundaram *v.* Chidambaram, A.I.R. 1951 Mad. 282; *cf.* Sadiq Hussain *v.* Anup Singh, I. L. R. 4 Lah. 327 ; Kandasami *v.* Shanmugha, I.L.R. (1949) Mad. 302; Bissessar Doss Daga *v.* E. Vas, I.L.R. 55 Cal. 238 (P. C.).
3. I. L. R. 36 Bom. 446 : 16 I. C. 618.
4. I.L.R. 38 All. 184 : 32 I. C. 953.
5. A. I. R. 1929 Pat. 300.
6. (1918) 44 I. C. 470.

Sarkar,[1] and lastly a judgment of Abdul Raoof, J., a learned Judge of the Lahore High Court, reported in *Bindraban* v. *Bodh Raj*.[2] In all these cases the principle enunciated has been very fully and thoroughly discussed. It was for the defendant-vendee to prove by reliable evidence affirmatively that he had no notice of the agreement already arrived at between the plaintiff and his vendor.[3]

After a careful consideration of the deed as a whole as well as of the particular provisions on which reliance has been placed by the parties, the real intention of the executant was to enter into an agreement to sell to the plaintiff the squares in question or such other land as might be acquired in exchange therefor, and that it was not contemplated that the defendant had the option of either selling the land or merely paying monetary compensation in lieu thereof.[4] Explanation to Sec. 10 of the Specific Relief Act, 1963, provides that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved. Consequently it has been repeatedly laid down that where an agreement to sell immoveable property provides for a penalty in case of a breach of the agreement, a party should not be allowed to evade specific performance merely because he is willing to pay the penalty provided for. The presumption is that the breach cannot be adequately compensated for in money and the onus is on the defendants to establish that specific performance cannot be granted.[5]

A decree made in the terms of a compromise of a suit restrained the respondents from selling any manganese ore from their mines to third parties until they had delivered to the appellants the quantity sold to them by the contract sued on, and provided that the defendants should deliver to the appellants 4,000 tons a year at Rs. 8 per ton until the whole contracted quantity was delivered ; Cl. 10 of the agreement provided that if the respondents failed so to deliver, or violated any condition to the compromise they should pay to the appellants Re. 1 per ton on the whole of the ore still undelivered, that the same should be recovered by execution of the decree. The respondents having failed to deliver in the first year the quantity provided, the appellants applied to execute the decree by the seizure of ore of the appellants and the appointment of a receiver. After the date of decree the price of the manganese ore had risen to about Rs. 25 per ton. *Held* that the respondents could not discharge the decree by paying Re. 1 per ton on the undelivered ore since Cl. 10 did not provide that the payment of that amount should be a full and exclusive satisfaction of all obligation under the contract and to hold that that was the effect of the decree would be to enable the respondents to render nugatory the injunction whenever the price of ore made it profitable to them to do so.[6] In *Kandasami Chettiar* v. *Shanmugha Thevar*,[7]

1. A. I. R. 1925 Cal. 61 : 84 I. C. 693 : I. L. R. 52 Cal. 121.
2. A. I. R. 1924 Lah. 344 : 69 I. C. 470.
3. Kanhaya Lal *v.* Devi Das Jagan Nath, A.I.R. 1931 Lah. 227 at p. 228 : I.L.R. 12 Lah. 328.
4. Abdur Rahman *v.* Nasir Ali Khan, A. I. R. 1931 Lah. 657 at p. 659 : 33 P. L. R. 96.
5. Bissessar Doss Daga *v.* Vas, I. L. R. 55 Cal. 238 (P.C.); Ram Singh *v.* Babulal, A. I. R. 1954 Bhopal 3 at p. 5 ; also Kanhaya Lal *v.* Devi Das Jagan Nath, *supra*.
6. *Ibid*.
7. (1948) 2 M. L. J. 356 : 1948 M. W. N. 674: 61 M.L.W. 642 ; Arjuna Mudaliar *v.* Lakshmi Ammal, A.I.R. 1949 Mad. 265 at pp. 266-7 : (1948) 2 M. L. J. 271; Ram Singh *v.* Babulal, A. I. R. 1954 Bhopal 3 at p. 5 ; Rustomali *v.* Ahidar Rehman, 45 C. W. N. 837 at p. 839 ; *see* also principle of the decision of Sidique & Co. *v.* Ranghiah Chettiyar, 60 L. W. 337 at p. 345 : I. L. R. (1948) Mad. 157: (1947) 2 M.L.J. 79 : A. I. R. 1948 Mad. 122 (regarding goods).

in the agreement of sale of immoveable property, it was provided that the balance of price after giving credit to the advance paid, was to be paid within one month from the date of the contract, and that on such payment the vendor should execute the sale-deed and get it registered. It was further provided that "in case there is default in completing the sale-deed within the aforesaid due date as aforesaid, the individual who commits the default shall pay other individual Rs. 100 as damages, and in addition this contract shall become void". Default having taken place, the vendor sold the property to a third person who had notice of the contract. The vendee sued for specific performance. The vendor contended that the suit for specific performance did not lie, as the contract had become void and unenforceable. It was held that by virtue of the provision in Sec. 20 (now Sec. 23) notwithstanding that a sum is named in the contract as the amount to be paid in the case of its breach and even though the party in default is willing to pay the same the other party is entitled to enforce specific performance of the contract, and that the clause making the contract unenforceable was in addition to the payment of damages by the defaulting party. It was further held that even assuming that the clause means that the contract is void and unenforceable at the instance of either of the parties, the purchaser is not precluded from enforcing the contract as the party in default cannot take advantage of his own wrong. This allegation must be that he was ready and willing to perform it as it actually was and not as is alleged by him.[1] But the failure to do so will not be fatal if finally he says in the plaint that he would be ready and willing to perform the terms of the contract in accordance with the decision of the Court.[2] The principle of this section applies also to injunctions. Thus if a case be a proper one for injunction, the fact that the contract contains provision for penalty for its non-performance is no bar to an award of relief by way of injunction.[3]

The principle of this section applies also to injunctions. Thus if a case be a proper one for injunction, the fact that the contract contains a provision for penalty for its non-performance is no bar to an award of relief by way of injunction.[4]

New	Old
	(i) The effect of dismissing a suit for specific performance
24. Bar of suit for compensation for breach after dismissal of suit for specific performance.—The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the	**29. Bar of suit for breach after dismissal.**—The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

1. Ramsingh *v.* Babulal, A. I. R. 1954 Bhopal 3 at p. 5, Rustomali *v.* Ahidar Rehman, 54 C. W. N. 837 at p. 839 ; Bindeswari Prasad *v.* Mahant Jairani Gir, I.L.R. 9 All. 705 at p. 711 (P.C.) : 14 I. A. 173.
2. Arjuna Mudaliar *v.* Lakshmi Ammal, A. I. R. 1949 Mad. 265 at pp. 266-7 : (1948) 2 M. L. J. 271.
3. Madras Railway Co. *v.* Rust, I.L.R. 79 Mad. 18 at p. 22 ; *see* also I. L. R. 18 Bom. 702.
4. *Ibid.*

New

breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

SYNOPSIS

1. Legislative changes ... 707
2. Reasons for the change ... 707
3. Principle ... 707
4. Shall bar ... 708
5. Limitation ... 708
6. Compensation ... 708
7. Damages or restitution as alternative relief for specific performance ... 708
8. Election between remedies of specific performance and money damages ... 709
9. What is a suit for compensation 710

1. **Legislative changes.**—This section corresponds to old Sec. 29. The marginal note of the old Sec. 29, which read as "Bar of suit for breach after dismissal", has been substituted by a new marginal note in the following words, namely: "Bar of suit for compensation for breach after dismissal of suit from specific performance." The language of the previous section has been reproduced verbatim in the earlier part of the new Sec. 24 but at the end of the old section following words have been added to make the new section, "but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach".

2. **Reasons for the change.**—The Law Commission of India in their Report on Specific Relief Act says: "As we have included in the Act specific provisions enabling a plaintiff to ask for reliefs such as a refund of earnest money, in a suit for specific performance we recommend that by way of abundant caution, it should be made clear that the dismissal of a suit for specific performance will not bar a suit for any relief other than damages."[1]

3. **Principle.**—Where the Court is once properly seized of the subject-matter of litigation, it should dispose of it in its entirety once for all.[2] Plaintiff may elect his remedy, but he cannot maintain two suits. If he elects to sue for damages and fails he cannot next claim specific relief.[3] Similarly, if he elects to sue for specific performance and fails, he cannot sue again for compensation in respect of the same contract or part of the contract.[4] It is, however, open to him to sue in the alternative in respect of both the remedies.[5] Specific provisions have been included in the present section enabling a plaintiff to ask for reliefs such as a refund of earnest money, in a suit for specific performance. By way of abundant caution, it has been made clear that the dismissal of a suit for specifie performance will not bar a suit for any relief other than damages. Where the suit for specific performance of a contract of sale by the plaintiff who had agreed to purchase from the defendant and had paid part of the sale price in advance is dismissed on the ground

1. Law Commission of India, Ninth Report on Specific Relief Act, 1877, p. 35.
2. Collett, Sec. 29.
3. *See* Sec. 11, C. P. C.
4. Section 24 of the Specific Relief Act, 1963.
5. Section 21 of the Specific Relief Act, 1963.

that he himself was in the breach, his subsequent suit for refund of the amount paid is not barred.[1]

4. Shall bar.—The term compensation of course does not include deposit. Consequently a vendee may in spite of dismissal of his suit for specific performance bring a separate suit for recovery of his deposit.[2] A purchaser in a suit for specific performance may claim in the alternative for a return of the earnest money. It is open to him to give up his prayer for specific performance at the hearing and ask for return of the earnest money and the Court is competent to decree the return of the earnest mohey.[3] Where in a suit for specific performance, the relief by way of specific relief is refused but a case for damages is disclosed, the damages should be awarded or enquiry into damages should be directed even though no damages have been asked for in the plaint.[4] Nor is a suit barred which is lodged in respect of a collateral or independent matter.[5] If after the passing of a decree for specific performance it is found that the defendant is incapable of performing the decree specifically plaintiff may on review be granted a decree for damages.[6] Where a decree for specific performance is followed by the execution of a sale-deed under Order. XXI, rule 34, C.P.C., the subsequent suit for recovery of possession under the deed is not barred.[7]

5. Limitation.—The starting point of limitation in a suit for return of earnest money brought after dismissal of a suit for specific performance, is the date of such dismissal under Sec. 47, Limitation Act, 1963.[8]

6. Compensation.—What is barred is a suit for compensation for the breach of the contract. The principle is that claim for the relief of specific performance and of the claim for the relief by the same plaintiff for compensation for the defendants breach, whether in addition to the relief of specific performance or in substitution for it has to be worked out and given in the same suit. So far as the law applicable in India is concerned it is incorporated in the section itself. Section 24 of the Specific Relief Act, 1963, enacts a rule which should govern suits mentioned in the section.[9]

7. Damages or restitution as alternative relief for specific performance.—If the subject-matter of a contract is suitable for specific performance and the plaintiff was ignorant when he brought his bill that specific performance was impossible or impracticable, the bill will not be dismissed; but in order to give complete relief and thereby prevent unnecessary litigation the plaintiff will be awarded damages[10] or restitution[11] without being compelled

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1. Govind Appaji *v.* Miraji Rama, A.I.R. 1945 Nag. 67 at pp. 67, 68 : I. L. R. (1949) Nag. 718 : 1944 N. L. J. 388.
2. Raghunath Sahai *v.* Chandra, 15 I. C. 268 : 17 C.W.N. 100 ; Abdul Rahman *v.* Rahim Bakhsh, A. I. R. 1929 Lah. 332 at p. 333 ; Munni Babu *v.* Kamta Singh, A. I. R. 1923 All. 321 at p. 321 : I.L.R. 45 All. 378 ; Ibrahimbhai *v.* Fletcher, I.L.R. 21 Bom. 827 (F.B.) ; Peraugodan *v.* Perumtodoka, I. L. R. 27 Mad. 380 ; Alokesh *v.* Harchando, I. L. R. 24 Cal. 827 ; Amma *v.* Uditnarain, I. L. R. 31 All. 68.
3. Karsandas *v.* Chhotalal, A. I. R. 1924 Bom. 119 at p. 127 : I. L. R. 48 Bom. 259 : 77 I. C. 275.
4. Callianji *v.* Narsi, I.L.R. 10 Bom. 764 ; Kalian *v.* Tulsi, I.L.R. 23 Bom. 786.
5. Kashi *v.* Channan, 5 A. L. J. 247.
6. Peari *v.* Hari Charan, I. L. R. 15 Cal. 211.
7. Nathu *v.* Budhu, I.L.R. 18 Bom. 537.
8. Amma Bibi *v.* Udit Narain, I. L. R. 31 All. 68; Munni *v.* Koer Kamta Singh, A.I.R. 1923 All. 321 at p. 321 : I. L. R. 45 All. 378 : 72 I.C. 86; Udit Narain *v.* Minnatullah, I.L.R. 25 All. 618.
9. For the Law in the U.S.A., *see* Restatement of Law of Contract in U. S. A. ; Williston on *Contract*, Secs. 1444 and 1444-A.
10. Gabrielson *v.* Hogan, 298 F. 722 (C.C.A. 8).
11. Oliver *v.* Cromwell, 42 Ill. 41.

to resort to a court of law. *A fortiori* this relief will be granted where the defendant's inability to perform supervenes during the pendency of the bill.[1] The practice is frequently applied to cases where the defendant himself has prevented performance, for example, by a conveyance to a *bona fide* purchaser after having contracted to sell to the plaintiff.[2] Damages will also be awarded where specific relief is unsuitable or inequitable due to a change in circumstances or for some other reason.[3] But if the plaintiff when he filed his bill knew, or should have known, that specific performance would not be granted, the plaintiff must by amendment or by new proceedings seek relief in an action at law.[4] It is frequently stated that before damages will be awarded, the plaintiff must make out a cause of action for specific performance.[5] This rule discriminates against persons who reasonably though erroneously consider their legal remedy unsatisfactory, or for other good reasons believe that equity should afford them relief ; and the Restatement of Contracts has taken a broader view by providing that it is enough "if a plaintiff in good faith sues for specific enforcement". Upon similar principles of granting complete relief and preventing unnecessary litigation equity will in some cases give damages not as alternative but rather as supplemental relief in addition to specific performance. Conversely, upon default of one party, specific performance may be the only adequate remedy and, therefore, the fact that a contract contains a provision for the payment of a penalty or liquidated damages for breach of a promise is not a bar to the specific enforcement of the promise, either affirmatively or by way of injunction whichever is appropriate.[6]

While it is sometimes said that a true alternative contract to render a certain performance or to pay a certain sum of money is not specifically enforceable since failure to perform is not a breach[7] this may not be true. For instance, if the defaulter is the party possessing the power of election and has chosen the non-pecuniary performance, or the Court has elected for him because of his refusal to choose, then a decree of specific performance may be given where that is the appropriate remedy.

8. Election between remedies of specific performance and money damages.—Though an action for damages and a suit for restitution are distinctly alternative remedies that is not true of specific performance and compensation in money; therefore, both of the last mentioned forms of relief may be given in the same suit. It follows that the fact that suit is brought for money damages should not be considered, ordinarily as an election of remedies which will preclude a subsequent action for specific performance,[8] nor conversely, should pursuit of specific performance prevent a later claim for damages. In neither case are the remedies inconsistent since both are based upon an affirmance of the contract. But where there has been an adjudication of specific performance, a subsequent action for damages may be barred on principles of *res judicata*, and where the choice of action reasonably induces a material change of position by the defendant, the alternative or supplementary relief may be barred. Under certain circumstances, moreover, the institution of an action for specific performance may indicate a choice of rights which will perclude a subsequent action based upon an inconsistent

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1. Graves *v.* Ashbur, 215 U. S. 331.
2. Gushing *v.* Levi, 117 Cal. App. 94.
3. Gabrielson *v.* Hogan, 298 F. 722 (C. C. A. 8).
4. Clark *v.* Rosario, 176 F 180.
5. Morgan *v.* Dibble, 43 Cal. App. 116.
6. Wright *v.* Rodgers, I.L.R. 193 Cal. 137.
7. Clark *v.* Rosario, 176 F. 180.
8. Conniban *v.* Thompson, 111 Mass. 270.

choice as where an infant after majority institutes an action for specific performance of a contract made during infancy and thereafter attempts to avoid the contract upon the ground of infancy.

9. What is a suit for compensation.—Suppose a suit for specific performance of a contract to sell land is dismissed on the ground that the plaintiff himself was guilty of breach, and then he sues for the return of the consideration that he had paid. This is not a suit for compensation which is barred by the section. The question inyolved here is not one of election of remedies that the plaintiff has for the defendant's breach, there being no question here of the defendant's breach.[1]

New	Old
ENFORCEMENT OF AWARDS AND DIRECTIONS TO EXECUTE SETTLEMENTS	(*j*) *Awards and directions to execute settlements*
25. Applications of preceding sections to certain awards and testamentary directions to execute settlements.—The provisions of this chapter as to contracts shall apply to awards to which the Arbitration Act, 1940 (10 of 1940), does not apply and to directions in a will or codicil to execute a particular settlement.	**30. Application of preceding sections to awards and testamentary directions to execute settlements.**—The provisions of this Chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

SYNOPSIS

1. Legislative changes ... 710
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1. Legislative changes.—This section corresponds to the previous Sec. 30. Under the marginal note the word "certain" has been inserted before the word "awards". In the body of the section the words "*mutatis mutandis*" have been omitted and the words "to which the Arbitration Act, 1940, does not apply", have been inserted in the section between the words "shall apply to awards" and the words "and to directions in a will".

2. Reasons for the change.—The Law Commission of India in their Report on Specific Relief Act says :

> "Old Sec. 30 provides, *inter alia*, that the provisions of Chapter II relating to specific performance of contracts will also apply to a suit for the enforcement of an award. When this provision was made there was no enactment in force in India relating to arbitration, Since the enactment of a comprehensive law of arbitration in the

1. Govind Appaji *v.* Miraji Rama, A.I.R. 1945 Nag. 67 at p. 68

Arbitration Act, 1940, the scope of the application of (old) Sec. 30 has become very limited. Under Sec. 14 (2) of the Arbitration Act, an award made by arbitrators without intervention of Court may be filed in Court for enforcement, by application made by either party to the arbitration agreement, within 90 days of the date of the service of notice of the making of the award [Art. 178 (now Art. 119), Limitation Act]. Thereupon follows an executable decree under Sec. 15, if the Court sees no reason to remit or set aside the award. Hence if the procedure under Sec. 14 (2) of the Arbitration Act be followed, there would be no need for any of the parties to resort to a suit for specific performance. But under the provisions of Sec. 30 (now Sec. 25) of the Specific Relief Act a party to an award may also bring a regular suit to enforce such award without adopting the procedure laid down in the Arbitration Act. Prior to the enactment of the Arbitration Act, 1940, it was held that the procedure laid down in Sch. II of the Civil Procedure Code was not exclusive and it was not imperative upon a plaintiff who sought to enforce an award, to resort to that procedure.[1] But after the passing of the Arbitration Act, 1940, there has been a difference of opinion on the question whether a suit still lies to enforce the award under the provisions of the present section of the Specific Relief Act in view of Sec. 32 of the Arbitration Act, which says :

> 'Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.'

"The Madras[2] and Patna[3] High Courts have held that by reason of the words 'notwithstanding any law' in the above section, the only procedure for enforcing an award now is an application under Sec. 14 of the Arbitration Act and that a suit is no longer maintainable.

"The Nagpur[4] and Calcutta[5] High Courts, on the other hand, maintain that Sec. 32 of the Arbitration Act bars a suit challenging an award and not a suit for enforcing the award and that Sec. 32 of the Arbitration Act has not abolished the right to bring a suit under Sec. 30 (now Sec. 25) of the Specific Relief Act. The Arbitration Act is a consolidating enactment and its territorial application is co-extensive with that of the Specific Relief Act. The enforcement of the award under the Arbitration Act takes place through the Court which has jurisdiction, in the same proceeding, to remit, modify or set aside the award. All the reliefs relating to the award are, accordingly, available in the proceeding under the Arbitration Act.

"We are, therefore, of the view, that no separate suit lies in cases when the Arbitration Act is applicable and that the scope of Sec. 30 (now Sec. 25) of the Specific Relief Act should be confined to cases of

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1. Subbaraya Chetti *v.* Sadasiva Chetti, I.L.R. 20 Mad. 490.
2. Moolchand *v.* Rashid Jamshed, A.I.R. 1946 Mad. 346.
3. Ramchander Singh *v.* Munshimian, A.I.R. 1950 Pat. 48 at p. 50.
4. Nanhelal *v.* Singhai, A. I. R. 1944 Nag. 24.
5. Munshilal *v.* Modi Bros., (1947) 51 C. W. N. 563.

arbitration under other laws, the operation of which is saved by Secs. 46 and 47 of Arbitration Act.[1]"

3. Principle.—The jurisdiction of the Court in enforcing the specifie performance of an award rests on the ground that the award is the outcome of a contract to refer to arbitration.[2] The award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person. An award, therefore, will be enforced by the Court, if that which is ordered by the award is a matter which, if the subject-matter of an agreement, would have been proper for specific performance.[3] But an award though arising from an agreement, is not a contract itself and a suit for specific performance of the contract is not a suit for specific performance.[4] In other words, the effect of Sec. 25 (new) is merely to apply to awards the provisions of Chapter II, in which it is contained as to contracts, and not to convert an award into a contract.[5] Acts to be done under the award must in their nature be such as the Court would enforce, if found in an ordinary agreement.[6] When parties have agreed to submit their differences to the determination of a third person, and to abide by any orders or regulations which he may make, his decision and the regulations and orders which he may prescribe, constitute the agreement of the parties and it is for the purposes of enforcing that agreement that the Court of equity interferes to enforce and give effect to the award.[7]

4. Scope.—All that this section lays down is that when the question is one of specific performance the Court has the same powers and should proceed upon the same principles, in the case of an award as in the case of a contract. The way to consider the question then is to take the terms of the award before the Court and to see whether, if these same terms had been embodied in a contract between the parties, the suit before the Court is or is not one in which specific performance of those terms is claimed and ought to be decreed.[8] This section merely makes applicable to awards the provisions of Chapter II as to contracts but does not convert award into a contract.[9] *Held*, however, that an award is not a contract. This section of the Act, does not have the effect of making a contract. This section only says that an award can be enforced in the same manner as a contract. Where an award which is registrable under Sec. 17 of the Registration Act has not been registered, it is inadmissible in evidence by reason of Sec. 49 of the Registration Act ; and a suit based on an award cannot be regarded as a suit for specific performance of a contract, and hence such a suit is not maintainable.[10]

5. Arbitration Act and Specific Relief Act, Sec. 25 (new).—The Arbitration Act is a consolidating enactment and its territorial application is co-extensive with that of the Specific Relief Act. The enforcement of the award under the Arbitration Act takes place through the Court which has jurisdiction in the same proceeding, to remit, modify or set aside the award. All the

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1. Law Commission of India, Ninth Report on the Specific Relief Act, 1877 at pp. 35, 37.
2. Sornavali *v.* Muthayya, I. L. R. 23 Mad. 593.
3. Wood *v.* Griffith, Swan. 54.
4. Kuldip *v.* Mahaul, I. L. R. 34 All. 43 : 11 I. C. 705 : 8 A.L.J. 1138 ; Bhajahri *v.* Behari, I.L.R. 33 Cal. 881.
5. Maung Po Tok *v.* Ma Swe Mi, 49 I. C. 62 at p. 62 (I.L.R. 13 Mad. 344 foll.).
6. Collett.
7. Nickel *v.* Hancock, (1855) 7 De G. M. & G. 300.
8. Kuldip *v.* Mahaul, I. L. R. 34 All. 43 : 11 I. C. 705 : 8 A. L. J. 1138.
9. Maung Po Tok *v.* Ma Swe Mi, (1918) U. B. R. 109 : 49 I. C. 62.
10. M. Pattabhi Ramayya *v.* B. Subbarao, A. I. R. 1945 Mad. 83 at p. 83 : (1944) 2 M. L. J. 316 : 1944 M. W. N. 737.

reliefs relating to the award are, accordingly, available in the proceeding under the Arbitration Act.

Therefore, this section provides that "no separate suit should lie in cases where the Arbitration Act is applicable and the scope of Sec. 30 (old) (25 new) of the Specific Relief Act has been confined to cases of arbitration under other laws, the operation of which is saved by Secs. 46 and 47 of Arbitration Act."[1]

The question has arisen whether a suit to enforce an award which has not been filed in Court under the provisions of the Arbitration Act is a suit for specific performance and whether the suit lies. It was held by Pollock, J., in *Nanhe Lal Anandi Lal* v. *Singhai Gulabchand*,[2] that Sec. 32, Arbitration Act, bars a suit challenging an award and not a suit to enforce an award. This view is borne out by the terms of the section. In *Moolchand* v. *Rashid*,[3] the learned Judges of the Madras High Court did not agree with the view taken in the above case and have held that no suit lies to enforce an award which had not been filed in Cou t under the provision of the Arbitration Act. The learned Judges observe :

> "By reason of Sec. 31 (now 26), no court other than that in which the award has been or may be filed has jurisdiction to decide any question relating to the validity, effect or existence of the award. Old Sec. 32 emphasizes this by stating that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of the award. The Act of 1940 was intended to consolidate and amend the law of India relating to arbitration matters. The scheme of the Act is to prevent the parties to an arbitration agitating questions relating to the arbitration in any manner other than that provided by the Act. The suit which the appellants filed clearly raised the question with regard to the existence and validity of the award, and such a suit is expressly barred by Sec. 32. The learned Advocate has laid great stress on the fact that the Act of 1940 has not repealed Sec. 30 (now 25), Specific Relief Act, that it has not eliminated Form No. 10 from App. A to the Code of Civil Procedure and that under the English Act a suit may be filed in order to enforce an award without making it a judgment of the Court. Section 30 (now 25), Specific Relief Act, merely says that the provisions of Chapter II as to contracts shall *mutatis mutandis* apply to awards and to directions in a will or codicil to execute a particular settlement. This section obviously cannot override Sec. 32, Indian Arbitration Act, 1940, which applies 'notwithstanding any law for the time being in force'. The governing section is Sec. 32, Arbitration Act. We fail to see what bearing Form No. 10, printed in App. A to the Code of Civil Procedure has. Even if it has bearing, it is not of any importance because Sec. 30 (now Sec. 25), Specific Relief Act, is subordinate to Sec. 32, Arbitration Act. The fact that in England, notwithstanding the amendment to the English Act of 1889 by the Act of 1934 a suit can be filed to enforce an award notwithstanding the judgment has been entered in the terms of the award does not assist the appellants, because in the English Act there are no corresponding provisions to those to be found in Secs. 31 and 32 of the Indian Act. A single

1. Law Commission of India Report on the Specific Relief Act, 1877 at p. 37.
2. A. I. R. 1944 Nag. 24 at p. 25.
3. A. I. R. 1946 Mad. 346 at pp. 347-48.

Judge of the Nagpur High Court in *Nanhe Lal Anandi Lal* v. *Singhai Gulabchand*,[1] accepted the argument now advanced on behalf of the appellants, but the judgment does not discuss the question. On the other hand, in I. L. R. (1942) Bom. 452, the Bombay High Court read Sec. 32 in the way which we read it."

It may, however, be pointed out that the decision in the Bombay case was that it was not competent to a party to apply to set aside an award till it was filed in Court.

6. Settlements.—So long as the settlement directed remained executory, any party interested under it may sue the trustees or other representatives in whom the property has become vested to enforce the execution of the directions, in the will for the conveyance or other disposal of the property and this is the kind of the specific performance contemplated by this section, and then in substance the suit will be such a one as is contemplated by Secs. 11, 12 (*a*) (old), 11 (*h*) (new). When the directions in the will have been so far carried out that the settlement has become an executed one, then the instrument embodying the settlement may be enforced specifically for and against the like parties as an ordinary trust-deed may be.[2] In Halsbury's *Laws of England* the matter is put thus :

"A contract in writing for good consideration to leave by will a definite property to a particular person may be enforced as against all persons claiming as volunteers under the persons who so agreed.[3] Specific performance is not, however, ordered where the person was merely acting in the exercise of a testamentary power of appointment,[4] and an agreement to make ample provision for person by will is too vague to be enforced."[5]

In the *Law of Wills* by Ramamurti, it is stated as follows :

"A contract by a person with another for consideration to devise a particular property of his is valid.[6] The contract must be definite. A mere statement as regards the future made with a view to influence the conduct of those to whom it was made, but not intended to create binding obligations upon the person making it, does not lead to a contract.[7]

"A definite contract to make an ascertainable gift by will is as a rule, enforceable,[8] usually by way of damages. This right of action arises the moment covenantor has put it out of his power to perform the contract, even during his life. Thus in *Synge* v. *Synge*,[9] the defendant before his marriage, as an inducement to his marriage with the plaintiff, promised in writing, as part of the term in marriage, to leave

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1. A. I. R. 1954 Nag. 24.
2. Collet, Sec. 30, Thakar Singh *v.* Baldev, 11 I. A. 135.
3. Synge *v.* Synge, (1895) 1 Q. B. 466, 470, 471 C. A.
4. *Re* Parkins, Hill *v.* Schwarz, (1892) 3 Ch. 510 at p. 517.
5. Halsbury, Vol. XXXI, Sec. 487, pp. 412-13.
6. Ramamurti's *Law of Wills*, Ch. LIX, pp. 539-40 ; Coverdale *v.* Eastwood, 15 Eq. 121 ; Hammersley *v.* De Biel, 12 Cali. & F. 45 at p. 78.
7. *Re* Fickns, Farina *v.* Fickns, (1900) 1 Ch. 331.
8. Hammersley *v.* De Biel, (1845) 12 Cali. & F. 45 (House of Lords) ; Synge *v.* Synge, (1894) 1 Q.B. 406, 470, 471 C.A. following above case.
9. (1894) 1 Q. B. at p. 471 (the measure of damages would be the value of the life estate after his death. inquiry ordered, p. 472) ; Ramamurthy's *Law of Wills*, p. 406.

by will a house and land for her. The plaintiff consented to the terms proposed, and the marriage took place ; but the defendant subsequently conveyed the property by deed to third person. The plaintiff sued for damages for breach of the covenant. It was held that the wife was entitled to damages."

The question as to whether a particular instrument is a deed of gift, will depend not only upon the form of the document phraseology employed, words used but upon the actual intention of the parties, gathered from surrounding circumstance, the condition precedent, and subsequent to the execution of the document, various tests have been laid down by courts for determining as to whether the instrument in question is deed of gift or a will. The name by which the instrument has been named, the fact of registration, the reservation of a life estate, the reservation of the power of revocation and the use of present or future tense and other surrounding factors are all circumstances which are to be considered in coming to the conclusion as to whether the document in question is will or not. These are all the indications which help in determining the true nature of the document and the true intention of the parties. The fact that the executant of the instrument has merely reserved the life estate to himself does not necessarily indicate that the document is a testamentary instrument and that therefore the agreement is revocable. Nor does the fact that the executant of the instrument, after a few days of the execution, revoked it, necessarily proves the fact that the executor intended to make a will and not a deed of settlement. In construing an instrument conduct of the parties subsequent to the date of the execution would not be taken into consideration, where there is no ambiguity, uncertainty or vagueness about the terms and expressions used in the document. Where in a case a document was named as a deed of settlement, and was registered as such, the donor conferred immediate title on the donee through that instrument, to the property, subject to a condition that the donor would enjoy the property during his lifetime but the mortgage would not be competent to make sale or gift or mortgage of the same and the donor has also not reserved to himself the right of revocation. It was held that the fact that the donor had by means of the instrument deprived himself of all the rights of absolute ownership, i.e. sale, gift or mortgage, had not reserved to himself the right of revocation, showed the clear and unequivocal intention of the party to transfer the interest in the property on the settlee and not to postpone it for future subject to the enjoyment of the property during his lifetime. The document clearly spoke from the date at which it was written and not a future date when the donor died, that it was to take effect. It was immaterial that the immediate possession of the property, remained with the donor. The document clearly purported to transfer the property immediately to the donee. Under the circumstances the instrument was a deed of settlement and not a will.[1]

The Court has power to order specific performance of the contract against all who claim under the covenantor as volunteers, if the contract is for valuable consideration and that remedy is appropriate in the circumstances. Thus in the above case,[2] it was held that it was a proper case to decree specific performance after the death of the covenantor as against all who claimed under him as volunteers. So also, where a farmer and his wife promised that if the plaintiff remained unmarried and lived with them and worked with them

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1. *See* Mallappa *v.* Kogera Venkalappa, 1958 Andh. L. T. 570.

2. Synge *v.* Synge, (1894) 1 Q.B. at p. 471.

so long as either lived they would leave all their property by will and the plaintiff did so but the farmer, later devised all his properties to third persons and died. It was held that the plaintiff was entitled to an equitable decree assuring him the property if he faithfully performed his duties during the lifetime of the wife.[1]

7. **American law.**—Equity will not specifically enforce during "the promisor's lifetime, a contract to leave property by will, since there has not been a breach until the promisor's death, and even after the promisor's death, compensation in damages may be adequate. Where, however, the promise relates to specific property of such a kind as to make legal relief inadequate, equity may prevent such a disposition of the property during the life of the promisor as might deprive the promisee of redress after the promisor's death; and after his death equity will enforce an obligation against those to whom the property descends by devise or inheritance if as is usual they are volunteers, to fulfil the testator's contract. Breach of contract based on sufficient consideration to adopt another as the promisor's child and give him the rights of an heir has been similarly dealt with.[2]

"Where a contract is not simply to make a specified devise or bequest, but not to revoke a specific will already drawn, as here parties agree upon mutual wills, the contract will in effect be enforced specifically by denying validity to any attempt made to revoke the will by later testamentary Acts."[3]

Not to revoke will.

"On this principle (of enforcing specific performance if the grantee is not a *bona fide* purchaser for value) equity is enable to enforce contracts to leave property by will. Though such contracts cannot be strictly enforced after the death of the promisor, those who receive his property as heirs, personal representatives, devisees, or legatees if merely volunteers, can be compelled to convey it to the promisee."[4]

"An agreement to use influence with a testator in favour of a particular person or object is void.[5] On the other hand, it is well established that a man may validly bind himself or his estate by contract to make any particular disposition (if in itself lawful) by his own will."[6]

8. **Form of suit on an award.**—As to the form of a suit on an award, *see* Sch. I, App. A, Form No. 10, C. P. C.

New	**Old**
CHAPTER III	CHAPTER III
RECTIFICATION OF INSTRUMENTS	OF THE RECTIFICATION OF INSTRUMENTS
26. When instrument may be rectified.—(1) When through fraud or a mutual mistake of	**31. When instrument may be rectified.**—When through fraud or a mutual mistake of

1. Matheson *v.* Gullickson, 24 N. W. (2d) 794.
2. Williston on *Contracts*, Art. 1421, Winkelman *v.* Winkelman, 345 Ill 566; *see* also recent case Matheson *v* Gullickson, *supra*.
3. Williston on *Contracts*, Art. 1421, Frazier *v.* Patterson, 243 Ill. 82.
4. Williston on *Contracts*, Art. 1453.
5. Pollock on *Contracts*, 1951 Ed., p. 326; Debendham *v.* Ox., (1749) 1 Ves. Sr. 276.
6. De Beil *v.* Thompson, (1841) 3 Beav. 469; *Re* Brodshaw, (1902) 1 Ch 463: 71 L. J. C. H. 230.

New

the parties, a contract or other instrument in writing [not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956) applies] does not express their real intention, then—

(*a*) either party or his representative in interest may institute a suit to have the instrument rectified ; or

(*b*) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified ; or

(*c*) a defendant in any such suit as is referred to in Cl. (*b*), may in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Old

the parties, a contract, or other instrument in writing, does not truly express their intention, either party or his representative in interest, may institute a suit to have the instrument rectified and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same the Court may, in its discretion, rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Illustrations

(a) A, *intending to sell to* B *his house and one of the three godowns adjacent to it, executes a conveyance prepared by* B, *in which, through* B's *fraud, all the three godowns are included. Of the two godowns which were fraudulently included,* B *gives one to* C, *and lets the other to* D *for a rent, neither* C *nor* D *having any knowledge of the fraud. The conveyance may, as against* B *and* C, *be rectified so as to exclude from it the godown given to* C ; *but it cannot be rectified so as to affect* D's *lease.*

(b) *By a marriage settlement,* A, *the father of* B, *the intended wife, covenants with* C, *the intended husband, to pay to* C, *his executors, administrators and assigns, during* A's *life, an annuity of Rs.* 5,000. C *dies insolvent and the official assignee claims the annuity from* A. *The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for* B *and her children, may rectify the settlement, and decree that the assignee has no right to any part of the annuity.*

New

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the Court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed :

Provided that where a party has not claimed any such relief in his pleading, the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

Old

34. Specific enforcement of rectified contract.—A contract in writing may be first rectified, and then, if the plaintiff has so prayed in his plaint, and the Court thinks fit, specifically enforced.

Illustration

A *contracts in writing to pay his attorney,* B, *a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude* B *from all rights under it.* B *is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum as if at the time of its execution it had expressed the intention of the parties.*

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41. Sub-section (4) ... 742
42. Cancellation with option to accept rectification ... 742

1. **Legislative changes.**—In the new Sec. 26, the language of Secs. 31 and 34 of the repealed Act have been reproduced with substantial changes, alterations and modifications. Besides this, new provisions have also been incorporated in the new section. The new Sec. 26(1) (*a*) reproduces the language of the earlier part of Sec. 31 of the repealed Act with two verbal changes, namely: (1) the word "truly" has been deleted in the new sub-section (2) and the word "real" has been inserted before the word "intention" in the new Sec. 26 (1) (*a*) of the Act, the words ' of not being the articles of association of a company to which the Companies Act, 1956, applies" have been newly inserted. The word "then" in Sec. 26(1) and the word "or" in Sec. 26(1) (*a*) have also been added.

Sub-sections (*b*) and (*c*) of the new Sec. 26 (1) have been newly inserted. In the earlier part of sub-section (2) of the new Sec. 26 the language is entirely new while its latter part reproduces the language of the latter part of the old Sec. 31 of the repealed Act. Sub-section (3) of Sec. 26 of the new Act reproduces the language of the old Sec. 34 with the following changes:

> "If the plaintiff" has been substituted by the words "if the party claiming rectification", the word "plain" has been substituted by the word "pleading" and the words "may be" have been added before the words "specifically enforced."

Sub-section (4) and the proviso to the sub-section have been newly inserted. Illustrations have been omitted.

2. **Reasons for the change.**—The Law Commission of India in their Report on Specific Relief Act, says :

> "In England, the Court of Appeal has held[1] that the articles of association of a company cannot be rectified by a court even though they do not conform to the concurrent intention of the signatories to the articles and that the only mode of altering them is the passing of a special resolution in the manner provided by the Companies Act.[2] Since there is a corresponding provision in Sec. 31 of our Companies Act, 1956, articles of association may be excluded from Sec. 31 of the Specific Relief Act following the principle laid down in the English decision.
>
> "The words 'may institute a suit' are not quite happy and seem to suggest as if the relief of rectification can be granted only if a separate suit is brought for the purpose. It has been held that in a suit for damages for breach of contract, the Court may allow the plaintiff to ask for the necessary rectification by amending the plaint,[3] subject of course to the Law of Limitation.
>
> "The Court has sometimes given substantive relief to the plaintiff, after rectifying the instrument, even though the relief of rectification

1. Scott *v.* Frank F. Scott (Lond.) Ltd., (1940) Ch. 794 (804) C. A.
2. *Vide* Sec. 23 of the Companies Act, 1948 (11 and 12 Geo. 6 c. 38).
3. Raipur Mfg. Co. *v.* Venkatsubba Rao & Co., A.I.R. 1921 Mad. 664.

had not been specifically asked for.[1] A justification for such power is given in American Jurisprudence[2] thus:

> 'According to strict practice, in a law action in which an equitable cause for reformation is not asserted, the written contract will be given full force and effect and a plaintiff will not be heard to say that it does not express the real agreement of the parties . . . . But in jurisdictions . . . . in which the distinctions between law and equity are abolished, or in which both forms of relief are administered by the same Court, in an action at law upon an instrument the Court may, in a proper case construe the contract as it was intended by the parties, or supply matters omitted either by mutual mistake, or fraud and render a proper judgment on the basis thereof, as if there had been first a reformation of the contract. The judgment may confer only the final legal remedy, the preliminary equitable relief being assumed as a prerequisite, but not in terms awarded.'

"There is greater reason for the exercise of such a power in India where there exists no distinction between law and equity. It is therefore proposed that it should be provided that the relief of rectification may be obtained not only in a suit specifically brought for the purpose but also in a suit in which any right arising under the instrument is in issue.

"It is not quite clear from the statute itself whether a plea by way of rectification can be taken in defence and, if so, what are the conditions subject to which it is available. In England, it is now clearly laid down by Sec. 39 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, as follows: 'The Court or Judge shall have power to grant to any defendant in respect of any equitable estate or right or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him (*a*) all such relief against any plaintiff or petitioner as the defendant has properly claimed by his pleading, and as the Court or Judge might have granted in any suit instituted for that purpose by that defendant against the same plaintiff or petitioner.' In India, it has been held by the High Courts of Bombay,[3] Calcutta,[4] Madras[5] and Nagpur,[6] that even where under the law of procedure the defendant is not entitled to make a counter-claim, the defendant should on the principle of 'justice, equity and good conscience',[7] be allowed to raise in defence any plea that would have enabled him to obtain rectification in a suit, instead of being driven to a separate suit. So long as the remedy of counter-claim is not available in all courts, it would be desirable to enact the principle established by the cases just cited.

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1. Kota *v.* Kannakanti, A.I.R. 1916 Mad. 795.
2. 45 Am. Juris. at pp. 589-90.
3. Shiddappa *v.* Rubdrappa, A. I. R. 1954 Bom. 463 ; Dogdu *v.* Bhana, I. L. R. (1904) 28 Bom. 420 at p. 426.
4. Binns *v.* W. & T. Avery, Ltd., I. L. R. (1934) 61 Cal. 548.
5. Rangaswami *v.* Souri, I. L. R. (1916) 39 Mad. 792.
6. Rajaram *v.* Manik, A.I.R. 1952 Nag. 90.
7. Pollock and Mulla support this view (*Contract and Specific Relief Act*, 8th Ed., pp. 831-2). It is in conformity with Sec. 92 (I) of the Evidence Act.

"The question then arises, under what conditions should the defendant be permitted to raise this plea. In the case of *Shiddappa* v. *Rudrappa*,[1] the defendant's right to bring a suit for rectification was not barred by limitation and emphasis was laid on that fact. But there are cases[2] in which it has been held that the defendant should be allowed to raise the plea even though his right to sue for rectification is barred by limitation. We are of the view that the conditions in the case of the plaintiff and the defendant should be the same. This result could be secured by providing that either the plaintiff or the defendant may have relief by way of rectification, but only if it is specifically asked for in his pleading, whether initially or by amendment."[3]

3. Principle.—The actual expression of a thought very often fails to express the whole thought, sometimes more may be expressed, sometimes less, sometimes something totally different may be expressed. When parties have come to a contract but have failed to express themselves correctly, if the mistake is a real one and mutual and can be established by satisfactory proofs, a court of equity will reform the written instrument so as to make it conformable to the precise intent of the parties. The real intention may have been misrepresented in writing either by mutual mistake or fraud. Equity affords relief in either case, in faith and confidence in the formation of contracts.[4] If an instrument that does not give effect to the real agreement between the parties be enforced, one party is bound to suffer. If it can be cancelled as a whole, both parties suffer, because a real agreement by such cancellation falls through. If, on the other hand, the instrument be set right, the genuine contract becomes capable of enforcement and neither party can suffer by being held to his actual agreement.[5]

4. English law.—Courts of equity possess a jurisdiction to reform instruments which either by the fraud of mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties.[6] Thus where the parties enter into an agreement, but there is an error in the reduction of the agreement into writing, so that the written instrument fails, through some mistake of the draftsman either in matter of law or in matter of fact, to represent real agreement between the parties, or omits, contains terms or stipulations contrary to the common intention of the parties, a court of equity will correct and reform the instrument to the real intention of the parties.[7] In the exercise of such jurisdiction a court of equity receives evidence of the true agreement in contradiction of the written instrument. The Court does not refuse to rectify the instrument even though the party seeking relief himself drew the instrument ; for "every party who comes to be relieved against an agreement which he has signed by whomsoever drawn, comes to be relieved against his own mistake".[8]

In most cases of rectification the proximate origin of the mistake lies in the carelessness or want of skill of the draftsman employed, if, exceptionally,

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1. A. I. R. 1954 Bom. 463.
2. Kesho Singh *v.* Roopan Singh, A.I.R. 1927 All. 355.
3. Law Commission of India, Ninth Report (Specific Relief Act, 1877), pp. 37-40.
4. Story's *Equity*, Sec. 154.
5. Dr. Banerji's *Tagore Law Lectures*, p. 25.
6. Walker *v.* Armstrong, 114 R. R. 234 : 25 L. J. Ch. 738, following (1922) 2 Ch. 509.
7. Druiff *v.* Parker, 5 Eq. 137 ; Ashnat *v.* Mill, 7 Am. 502 , Munay *v.* Parker, 19 Beav. 308 : Welmon *v.* W., 15 Ch. D. 370 ; *In re* Bird's Trust, 3 C. D. 214 ; Dela Touche's Settlement, 10 Eq. 600.
8. Pollock on *Contracts*, 11th Ed., p. 425, Ball *v.* Stories, 24 R. R. 170, 219.

one of the parties by negligence, or to conceal some fact he does not wish to disclose (not to speak of downright fraud) has caused the instrument to be so framed as to defeat the intention, known to himself, of the other party or parties, the party so in default cannot be heard to say that his own intention was different. Cases of this kind are likely to be on the verge of fraud or undue influence.[1]

5. **Consent order based on agreement of parties.**—Similarly, a consent order, which is based upon the agreement of the parties, may be set aside for mistake if the facts would justify setting it aside.[2]

6. **New deed need not be prepared.**—Where an instrument is thus rectified Court's order is sufficient and there is no necessity to draw up a new deed. A copy of the Court's order should be endorsed on the document itself which has been so rectified.[3]

In case where an instrument comprises several clauses and some of the clauses may have been passed over without attention, "the single fact of there being no discussion on a particular point will not justify the Court in saying that a mistake committed on one side must be taken to be mutual."[4]

The Court refuses to exercise its jurisdiction and does not rectify an instrument when the result of so doing would be to affect interest already acquired by third parties on the faith of the instrument as it stood.[5]

A court of equity will interfere only as between the original parties or those claiming under them, e.g. heirs, devisees, legatees, assignees, voluntary grantees or judgment-debtors or purchasers from them with notice of the facts.[6]

7. **Exception to the rule of common mistake.**—There exists a rare class of cases in which the rule that common mistake must be shown may admit of modification. Where one party to an instrument or series of instruments forming one transaction, by his own default, whether consisting in executive negligence, suppression of facts, or otherwise, causes a disposition to be so framed as to frustrate the intention of another party or parties known to himself he cannot be heard to deny that his own intention was the same.[7]

This principle, which is really a special branch of the law of estoppel, is to be applied with caution.[8]

8. **Effect of refusal to accept offer or rectification.**—In *Laver* v. *Dennett*,[9] it has been held that an agreement cannot be cancelled at the suit of one party

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1. Lovesy *v.* Smith, (1880) 15 Ch. D. 655; Whiteley *v.* Delaney, (1913) A. C. 132, 144, 150.
2. Huddersfield *v.* Lister, 64 L. J. Ch. 523 C. A.
3. White *v.* White, 42 L. J. Ch. 288.
4. Thompson *v.* Whitmore, (1860) 1 J. & H. 268, App. 276.
5. Pollock *on Contracts*, 11th Ed., p. 428, citing Blackie *v.* Clark, (1852) 15 Beav. 595 : 92 R. R. 570.
6. Miles *v.* Fox, 37 Ch. D. 153; Hall Dase *v.* Hall Dase, 31 Ch. D. 251 ; Pearce *v.* Verbeke, 2 Beav. 233,
7. Pollock on *Contracts*, 11th Ed., p. 428, citing Whiteley *v.* Delaney, (1914) A. C. 132 : 83 L. J. Ch. 349 (suppression of an encumbrance); Clark *v.* Girdswood, (1877) 7 Ch. D. 9 : 47 L. J. Ch. 116, Lovesy *v.* Smith, (1880) 15 Ch. D. 655 : 49 L. J. Ch. 809 (marriage settlement hastily and improperly prepared by husband's instructions alone).
8. *Ibid*., citing Blay *v.* Pollard, (1930) 1 K. B. 628 : 96 L. J. K. B. 421 C. A.
9. (1883) 109 U. S. 90.

who has rejected a proper offer of the other party to rectify it. Thus where it was agreed between the defendant and the plaintiff that the defendant should give the exclusive right of using a patent in certain districts, and therefore a document was executed which was only a licence from the defendant to the plaintiff, sometime afterwards the plaintiff objected that the document executed was not in conformity with the intention of the parties the defendant admitted this and proposed to rectify the document. But the plaintiff did not agree and brought about a suit for rescission, it was held under the circumstances that the relief of rescission could not be granted.

9. Liberal construction of contract of insurance.—A contract of insurance is liberally construed for the purpose of reforming the policy founded upon it in accordance with the true intention.[1]

10. Suit for rectification of mistakes.—It is not correct to say that the suit for rectification of mutual mistake of parties in describing the property intended to be sold will not lie in the absence of a further agreement for rectification antecedent to the suit.[2]

11. No rectification of contract already performed under orders of Court.—An agreement cannot be rectified after it has been adjudicated upon by a competent court and performed under the direction of that Court.[3]

12. Unilateral acts.—The Court may not only rectify but rescind unilateral acts, such as appointments under a settlement or will, which have been executed under a misapprehension of material facts.[4]

But the aggrieved party should seek the assistance of the Court without unreasonable delay.[5]

13. Instrument.—"An instrument" includes every document which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.[6] It has been held to include a decree,[7] a compromise decree,[8] an award and a decree based on award.[9] Similarly a will,[10] or a document executed in pursuance of a power, but apparently not an instrument like articles of association which is only statutory are covered by the term instrument.[11] So is a promissory note. Thus it has been held that when there is a mutual mistake and the document does not represent the true bargain between the parties, evidence in proof of the real terms is admissible and the Court has power to grant a decree on the basis of the real contract, ascertained from the rectified document.[12]

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1. Equitable Ins. Co. *v.* Hearne, (1874) 20 Wallace Sup. Ct. (U. S.) 494.
2. Natarajan Asari *v.* Pichamuthu Asari, A. I. R. 1972 Mad. 192 at p. 193 : (1972) 1 M. L. J. 156.
3. Caird *v.* Moss, 55 L. J. Ch. 854.
4. This is outside the field of contract, *see* Hood Avalon *v.* Mackinnon, (1909) 1 Ch. 476 : 78 L. J. Ch. 300.
5. Allcord *v.* Skinner, 36 Ch. D. 145.
6. Indian Stamp Act, Sec. 2 (14).
7. Balaprasad *v.* Kanoo, 14 I. C. 407.
8. Valliakal *v.* K Goundan, A. I. R. 1926 Mad. 1146 at p. 1146 : 97 I. C. 920 : 51 M. L. J. 464 : 1926 M. W. N. 714 ; Krishnaswamy *v.* Muthulakshmi, A.I.R. 1928 Mad. 1097 at p. 1099: 1928 M.W.N. 600.
9. Bhaichari *v.* Delibhai, 52 I. C. 915 : 13 S. L. R. 144.
10. Vaughen *v.* Clark, (1902) 87 L. T. 114.
11. Evans *v.* Chapman, (1902) 86 L. T. 381.
12. Ladha Singh *v.* Munshi Ram, A. I. R. 1927 Cal. 605 at pp. 605-6 : 31 C.W.N. 747 , Ram Bharosya *v.* Janbi, A. I. R. 1930 Oudh 95.

14. Exclusion of articles of association from the scope of this section.— In England, the Court of Appeal has held[1] that the articles of association of a company cannot be rectified by a court even though they do not conform to the concurrent intention of the signatories to the articles and that the only mode of altering them is the passing of the special resolution in the manner provided by the Companies Act.[2] Since there is a corresponding provision in Sec. 31 of the Companies Act, 1956, articles of association have been excluded from this section, following the principle laid down in the English decision.[3]

15. Rectification.—The Court in administering equitable principle permits mistake to be proved, where it is common, that is, where the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established, then the Court can give relief of rectification, but be it noted (as therein error often lurks) that what is rectified is not the agreement but the mistaken expression of it. Ordinarily this mistaken expression would be in the form of a document and the existence of a real agreement prior to the document is necessarily implied. The rectification consists in bringing the document in conformity with this prior agreement.[4] If parties enter into an agreement, but there is an error in the reduction of the agreement into writing so that the written instrument fails, through some mistake of the draftsman either in matter of law or in matter of fact, to represent real agreement between the parties, or omits, contains terms or stipulation contrary to the common intention of the parties, a court of equity will correct and reform the instrument, to the real intent of the parties.[5] In *Natarajan Asari* v. *Pichamuthu Asari*,[6] Chandanam Amman executed a sale-deed in favour of the plaintiff in respect of the eastern half share in the plaint property. Chandanam Ammal represented her husband Subbiah Asari and Subbia Asari in the partition got only the western share. Chandanam Ammal could not deal with the eastern half as her husband was entitled only to the western half and what she intended to convey was only the western half, and what the purchaser intended to purchase was the western half belonging to Subbiah. Thus, the parties intended to sell the property belonging to Subbiah and Subbiah owned only the western half. The recital in the document that it was the eastern half, was, therefore, a mistake and this being a mutual mistake, the present suit for rectification of the mistake was maintainable.

16. Court should not make a new contract for the parties.—But no court will be justified in making a new contract for the parties. Whenever an application is made for reforming an instrument, the question to be considered is not what the parties would have done, had they been able to anticipate subsequent developments, but what was their intention at the time the contract was executed.[7]

If the parties have deliberately left out something from the written instrument that cannot be put in. If they have deliberately chosen one form of security in preference to another, the Court cannot direct a new security. Similarly, where doubtful rights have been deliberately renounced and family

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1. Scott *v.* Frank F. Scott (Lond.) Ltd., (1940) Ch. 794 (804) C. A.
2. *Vide* Sec. 23 of the Companies Act, 1948 (11 and 12 Geo. 6, c. 38).
3. Report of the Law Commission of India on Specific Relief Act pp. 37-38.
4. Dagdu *v.* Bhana, I. L. R. 28 Bom. 420.
5. Druiff *v.* Parker, 5 Eq. 137, Ashnat *v.* Mill, 7 Am. 502; Munay *v.* Parker, 19 Beav. 308; Welman *v.* W., 15 Ch. D. 370, *Re* Bird's Trust, 3 C. D. 214; Dela Touche's Settlement, 10 Eq. 600.
6. (1972) 1 M. L. J. 156 at p. 159.
7. Story's *Equity*, Sec. 164; 2 Pomeroy, Sec. 843.

settlements have been effected,[1] or where the only matter in dispute is the construction of an ambiguous document,[2] no question of rectification arises.

Where it is proved that due to a mistake the written contract does not substantially represent the real intention of the parties, the Court has jurisdiction, not only to rectify the written agreement but also to order specific performance of it as rectified.[3] In *Lovell and Christmas Ltd.* v. *Wall*,[4] Cozens-Hardy, M.R., observed : "The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential." As regards the admissibility of evidence to justify rectification the cardinal rule is that parol evidence cannot be received to contract or vary a written agreement. The basis of that principle is that the writing affords better evidence of the intentions of the parties, than any parol proof. But in the case of genuine mistake if the rule operates it would be to allow an act originating in innocence to operate ultimately as a fraud by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to promote it. In a practical view, there would be as much mistake done by refusing relief in such cases, as these would be introduced by allowing parol evidence in all cases to vary written contracts.[5] But it has always been recognized that to permit rectification upon oral testimony is an exception—a justifiable exception to the cardinal principle.

17. Essentials for rectification.—It is necessary that the following essential conditions are satisfied before rectification of an instrument is obtained : *Firstly*, the relief is not granted unless a completed agreement is reached prior to the written instrument which is sought to be rectified is executed. If the negotiations leading up to the execution of the instrument were vague and inconclusive, if it is impossible to ascertain what the parties really meant, then the instrument represents the only agreement that has been concluded and there is no antecedent agreement, upon which the rectification can be based. There are two stages which must be passed before a contract is concluded. (1) An agreement oral or written which clearly expresses the final intentions of the parties and (2) an instrument which purports to re-state that intention. Here it must be remembered that the prior agreement need not be enforceable in law. In *Shipley U. D. C.* v. *Bradford Corporation*,[6] it was ruled that it was not essential that the antecedent agreement should have been put in the form of an enforceable contract. This decision was affirmed in the Court of Appeal which did not consider it necessary to consider the question of rectification. It was followed by Simond, J., in *Crame* v. *Hegeman Harris Co. Inch.*[7] *Secondly*, the essential condition is that both the parties must have intended that the exact terms of the prior agreement should be reduced to writing and this intention should remain unchanged up to the

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1. Dr. Banerji's *Tagore Law Lectures*, p. 25; Lachhman *v.* Ganpat, 2 N. L. R. 49; *see* also Lord Irnham *v.* Child, (1781) 1 Br. Ch. 92 : 28 E. R. 1006 ; Hunt *v.* Rousmanier, (1828) 8 Wheat 174 ; Stewart *v.* Stewart, (1839) 6 U. & F. 912.
2. Gulam *v.* Fateh, 130 P. L. R. 1910.
3. United States *v.* Motor Trucks Ltd., (1924) A. C. 196 ; Shipley U. D. C. *v.* Bradford Corporation, (1936) Ch. 375 at pp. 394-395.
4. (1911) 104 L. T. 85.
5. Story, *Equity Jurisprudence*, Sec. 155.
6. (1936) Ch. 375.
7. (1939) 1 All E. R. 662.

moment of the actual execution of the instrument.[1] In other words, if the proof is forthcoming that the parties subsequently changed their original intention and that the instrument finally represents the true intentions of the parties it is fatal to the suit of rectification. *Thirdly*, the evidence of the mistake common to both the parties must be clear and the burden of proving this lies on the party praying for rectification.[2] The mistake should be obvious and not the mere probability of mistake. In such cases the courts require clear, distinct and unambiguous evidence to show the real intention of the parties, that the intention of the parties at the time of the prior agreement was different from that expressed in the written instrument.[3] If the defendant can satisfy the courts that he understood the contract exactly in the sense which was expressed in the written instrument, no alteration will be made.[4] *Fourthly*, the prerequisite for rectification is the rectification of literal mistakes so as to enable the parties to act according to their intentions already revealed clearly and unequivocally in their prior agreement, prevent them from nullifying it for the failure on their part to correctly and accurately express that intention in the subsequently executed written instrument. In *Fredrick E. Rose (London) Ltd.* v. *William H. Rm. Fur. & Co., Ltd.*,[5] the facts were these. The plaintiffs in London received an order from their house in Egypt for Moriccean horse-beans described here, as "feveroles". The plaintiffs not knowing what feveroles were enquired of the defendants who said that the word was a mere synonym for horse-beans which they were in a position to supply. The plaintiffs thereupon made an oral contract with the defendants for the purchase of horse-bean, and the contract, in these terms was later put into writing. The defendants delivered the horse-beans to the plaintiffs, who in turn sold and delivered them to an Egyptain firm. When they reached Egypt, the Egyptian buyers found that though horse-beans, they were not feveroles and claimed damages on a breach of warranty. The plaintiff asked for rectification of the contract. The courts refused rectification. Denning, L. J., said : "In order to get rectification it is necessary to show that the parties were in complete agreement upon the terms of their contract but by error wrote them down wrongly ; and in this regard, in order to ascertain the terms of their contract one does not look into the inner minds of the parties into their intentions, any more than one does in the formation of any other contract. One looks at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the documents which they have signed. If one can predicate with certainty what the contract was and that it is, by a common mistake wrongly expressed in the document, then one rectifies the document, but nothing less will suffice." As regards the argument of the defendant that the contract was void, the Court of Appeal rejected this contention. Denning, L. J., who gave the decision of the Court of Appeal observed: "What is the effect in law of this common mistake on the contract between the plaintiffs and defendants, I am clearly of opinion that the contract was not nullity. It is true that both parties were under a mistake and that the mistake was of fundamental character with regard to the subject-matter. The goods contracted for horse-beans were essentially different from what they were believed

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1. Bradal-bane *v.* Chaudhos, (1837) 2 My. & Cr. 711 ; Fowler *v.* Fowler, (1859) 4 De G. J. 250.
2. Tucker *v.* Bennalt, (1887) 38 Ch. D. at p. 9, *per* Cotton, L. J.
3. Fredensen *v.* Rothschild, (1941) 1 All E. R. 43.
4. Rooke *v.* Kensington Lord, (1856) 2 K. L. 753 ; Higgins (W.) Ltd. *v.* Northampton Corporation, (1927) 1 Ch. 128.
5. (1953) 2 Q. B. 450 : (1953) 2 All E. R. 739.

to be—'feveroles'. Nevertheless the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely horse-beans. Once they had done that nothing in their minds could make the contract a nullity from the beginning though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity. Here it will be useful to summarise the conclusions in the words of Cheshire and Fifoot."[1] It is what the learned authors say, "It would seem, therefore, that at common law a contract is not void merely because the parties have made the same mistake, however fundamental, in other words that the common law recognizes no doctrine of common mistake as such. A contract will be void only if there is nothing to contract about either because the subject-matter does not exist at the time of the agreement or because the object of a purported sale already belongs to the buyer, and the ground of such a nullity is not the mistake but the absence of a *res*. The agreement is void of all contents."

18. Condition precedent —The principle of rectification presupposes the existence of a valid and complete contract. There can be no rectification where there is not a prior actual contract by which to rectify the written document. It is always necessary for the plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified and that such contract is inaccurately represented in the instrument.[2] It must clearly and satisfactorily appear that the precise terms of the contract had been orally agreed upon and that the writing afterwards signed, failed to be as it was intended, an execution of such previous agreement, but on the contrary expressed a different contract.[3]

19. Scope of the section.—This section is only an enabling one. It entitles a transferee to seek relief by rectification but that is not the only remedy.[4] It is clear that the vendees could have instituted a suit under Sec. 31 (old), Specific Relief Act, but they did not do so, and as has been held in several rulings they were not bound to do so, as that section is an enabling section and the fact of it is not being made use of cannot deprive a purchaser of the rights conveyed to him. The fact that the plaintiffs did not seek rectification of their sale-deed within three years of their knowledge of the mistake cannot be of any assistance to the appellant because, as held in *Laxmi Narayan* v. *Mst. Mohamdi Begum*,[5] Sec 31 (old) is an enabling section and therefore the fact that the plaintiffs did not choose to avail themselves of that section at the time cannot deprive them of the rights which they obtained

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1. *The Law of Contract*, 5th Ed., on p. 184.
2. Craddock *v.* Hunt, (1923) 2 Ch. 136; United States *v.* Motor Trucks, Ltd, (1924) A. C. 196; Sobhaji *v.* Nawal Singh. A. I. R. 1921 Nag. 4; Mackenzi *v.* Coulson, (1869) L. R. 8 Eq. 368, Haji Abdul Rehman *v.* Bombay & Persian Steam Navigation Co., I.L.R. 16 Bom. 561.
3. Bepin Krishna *v.* Jogeshwar Ray, A. I. R. 1921 Cal. 730 at p. 735 : 34 C.L.J. 256 : 26 C. W. N. 35 : 66 I. C. 345; *see* also Madhabji *v.* Ram Nath, I. L. R. 30 Bom. 457 : 8 B. L. R. 354; U Shewe Thaung *v.* Kyaw Dun, A.I.R. 1930 Rang. 12; Palanivellappa Gounden *v.* Nachappa Gounden, 53 I.C. 379 (Mad.); Sheikh Barsati *v.* Sarju Prasad, I. L. R. 14 Luck. 308 : 178 I. C. 609 : A.I R. 1939 Oudh 10 : 1938 O. W. N. 1074 : 1938 O.L.R. 486 : 1938 A.W.R. (C. C.) 104 : 1938 R. D. 855 : 1938 O. A. 823; U Shewe Thaung *v.* Kyaw Dun, A. I. R. 1930 Rang. 12 at pp. 12-13; Ratneshwar *v.* Mongoli Chutina, A. I. R. 1952 Assam 70 at p. 72; Frederic E. Rose W. C. (London) Ltd. *v.* Wm. H. P. F. & Co., Ltd., (1953) 2 All E. R. 739 : (1939) 1 All E. R. 664 not foll.
4. Palanivellappa Gounden *v.* Nachappa Gounden, *supra* at p. 381.
5. A. I. R. 1932 Oudh 123 : 127 I. C. 102 : I. L. R. 7 Luck. 454 : 9 O. W. N. 60.

under their sale-deed. The same view was taken in *Kesho Singh* v. *Roopan Singh*.[1] Even if this plot were to be held to have been transferred to Noor Mahammad under the sale-deed of 1932, he was not protected by the last clause of Sec. 31 (old), Specific Relief Act, inasmuch as he was not a purchaser of this property without notice.[2] Where a purchaser because of clerical error in the sale-deed fails to obtain mutation of names, he can at that stage institute a suit under the section for rectification. But he is not bound to do so, as the section is only an enabling one and the fact of it not being made use of cannot deprive a purchaser of the rights conveyed to him.[3]

In England it is now clearly laid down by Sec. 39 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, as follows :

> "The Court or Judge shall have power to grant to any defendant in respect of any equitable estate or right or other matter of equity and also in respect of any legal estate, right or title claimed or asserted by him—(*a*) all such relief against any plaintiff—or petitioner as the defendant has properly claimed by his pleading, and as the Court or Judge might have granted in any suit instituted for that purpose by that defendant against the same plaintiff or petitioner. In India, it has been held by the High Courts of Bombay,[4] Calcutta,[5] Madras,[6] and Nagpur,[7] that even where under the law of procedure the defendant is not entitled to make a counter-claim, the defendant should on the principle of 'justice, equity and good conscience'[8] be allowed to raise in defence any plea that would have enabled him to obtain rectification in a suit, instead of being driven to a separate suit. So long as the remedy of counter-claim is not available in all courts, it would be desirable to enact the principle established by the cases just cited.
>
> "The question then arises, under what conditions should the defendant be permitted to raise this plea. In the case of *Shiddappa* v. *Rudrappa*,[9] the defendant's right to bring a suit for rectification was not barred by limitation and emphasis was laid on that fact. But there are cases,[10] in which it has been held that the defendant should

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1. A. I. R. 1927 All. 355 : 100 I. C. 568.
2. Sheikh Barsati *v.* Sarju Prasad, A. I. R. 1939 Oudh 10 at pp. 11-13 ; 1938 O. W. N. 1074.
3. Rangasami *v.* Gouri Ayyangar, I.L.R. 39 Mad. 792 : 29 I. C. 588 : 29 M.L.J. 229 : 1915 M. W. N. 448 : 18 M. L. T. 75 ; Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhury, 2 C. W. N. 260 ; Abdul Hakim *v.* Ram Gopal, A. I. R. 1922 All. 42; Sobhaji *v.* Nawal Singh, A. I. R. 1938 Nag. 4 ; Natha *v.* Hamid, 93 I. C. 7 : A. I. R. 1926 Oudh 344 ; Mohammad *v.* Chaterpat, I. L. R. 20 Cal. 854 ; Nandlal *v.* Jogesh, 70 I. C. 960 : A. I. R. 1923 Cal. 53 : 36 C. L. J. 421 ; Padmani *v.* Dwarka, 25 W. R. 335 ; Bathappa *v.* Sanjiva, 6 M. L. J. 103 ; Asilatullah *v.* Saadatullah, 41 I. C. 147 : 28 C. L. J. 197 ; W. C. Binns *v.* W. & T. Avery Ltd., A. I. R. 1934 Cal. 778 at pp. 779-80 : I. L. R. 61 Cal. 548 : 152 I. C. 117 : 38 C. W. N. 908 ; *contra* I.L.R. 8 Cal. 118 ; Rajaram *v.* Manik, A. I. R. 1932 Nag. 90 at p. 93 ; I. L. R. (1951) Nag. 948 (*see* cases quoted in it); Sheikh Barsati *v.* Sarju prasad; A.I.R. 1939 Oudh 10 at p. 13.
4. Shiddappa *v.* Rudrappa, A. I. R. 1954 Bom. 463 ; Dagdu *v.* Bhana, I. L. R. 28 Bom. 420 at p. 426.
5. W. C. Binns *v.* W. & T. Avery Ltd., *supra*.
6. Rangasami *v.* Gouri Ayyangar, I. L. R. 39 Mad. 792.
7. Rajaram *v.* Manik, A. I. R. 1952 Nag. 90.
8. Pollock and Mulla support this view (*Contract and Specific Relief Act*, 8th Ed., pp. 831-2). It is also in conformity with Sec. 92 (1) of the Evidence Act.
9. A. I. R. 1954 Bom. 563.
10. Kesho Singh *v.* Roopan Singh, A. I. R. 1927 All. 355.

be allowed to raise the plea even though his right to sue for rectification is barred by limitation. We are of the view that the conditions in the case of the plaintiff and the defendant should be the same. This result could be secured by providing that either the plaintiff or the defendant may have relief by way of rectification, but only if it is specifically asked for in his pleading, whether initially or by amendment and accordingly provision has to the effect been made in the present section."[1]

20. Mistake established—Construction of deed.—The principles upon which a court has to act before making a decree for rectification are stated in the following passage from the judgment of Lord Chelmsford, Lord Chancellor, in *Fowler* v. *Fowler*[2] :

> "The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord Thurlow's language is very strong on this subject ; he says the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence.[3] And this expression of Lord Thurlow is mentioned by Lord Eldon in the *Marquis of Townshend* v. *Stangroom*[4] without disapprobation. If, however, Lord Thurlow used the word 'irrefragabie' in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification ; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made confirmable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

The principles set out in the above passage have been applied in a series of Indian and English cases.

The combined effect of proviso (1) to Sec. 92 of the Indian Evidence Act and Sec. 31 (old) of the Specific Relief Act is that a defendant may plead and

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1. Report of the Law Commission on Specific Relief Act, pp. 39-40.
2. (1859) 4 De G. & J. 250 : 45 E. R. 97.
3. Lady Shelburne *v.* Lord Inchiquin, (1784) 1 Br. Ch. Ca. 338 at p. 341.
4. (1801) 6 Ves. 328.

prove any mistake in the expression of a contract notwithstanding that he had not filed a suit for rectification, and can resist a suit on the ground that what was sold to him was different from what the document described.[1] Oral evidence was thus admissible to prove that the properties described in the sale-deeds were not correctly stated due to common mistake. When a mistake is established, the deed can be construed as if the mistake had been rectified in a suit brought for the purpose under Sec. 31 (old) of the Specific Relief Act, subject to the condition that the rights of third parties acquired in good faith and for value should not be prejudiced thereby.[2] Where a third party has not acquired any interest in either of the two fields, and consequently there is no question of prejudice and there is no bar to the application of the principle stated above.

A failure to rectify the deed does not extinguish title to the property which was really sold but was not properly described in the sale-deed due to mistake.[3] In some of the cases, it was held that lapse of time is no bar to the grant of the relief on the ground of mistake.[4] In *Lakshmi Narain* v. *Mst. Mohammadi Begam*,[5] and *Barsati* v. *Sarju Prasad*,[6] it was pointed out that Sec. 31 (old) of the Specific Relief Act is an enabling section and therefore the fact that a plaintiff did not choose to avail himself of the section cannot deprive him of the rights which he had acquired under a sale-deed. The same principle was applicable in the case of a defendant who can successfully resist a suit on the ground that the property in his sale-deed was wrongly described though he had not filed any suit for rectification.[7]

Section 26 (new) (31 old) of the Specific Relief Act permits a suit to have the instrument rectified if there has been a mutual mistake of other parties or where fraud has been committed. In either case the section permits correction

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1. Dagdu *v.* Bhana. I. L. R. 28 Bom. 420 at p. 426 , Rangnath *v* Govind, I.L.R. 28 Bom. 639 ; Minalal Shadiram *v.* Kharsetji. I.L.R. 30 Bom. 395 ; Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhury, 2 C. W. N. 260 ; W. C. Binns, *v.* W & T. Avery, Ltd., I. L. R. 61 Cal. 518 at p 553 ; Tetali Sooramma *v.* Kovvuri Venkayya, A. I. R. 1938 Mad. 589.
2. *Vide* Kota China Mellayya *v.* Kanekanti Veeriah, A. I. R. 1916 Mad. 795; Mahadeo Aiyar *v.* Gopala Aiyar, I. L. R. 34 Mad. 51 , Tetali Sooramma *v.* Kovvuri Venkayya, A. I. R. 1938 Mad. 589 ; Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhury, 2 C. W. N. 260 ; Asitulla *v.* Sadatulla, A. I. R. 1918 Cal 809 ; Nandi Lal Agrani *v.* Jogendra Chandra Dutta, A. I. R. 1923 Cal. 53 at p. 56 and Sabhaji *v.* Nawalsingh, A. I. R. 1928 Nag. 4.
3. Kesheo Singh *v.* Roopan Singh. A.I.R. 1927 All. 355 ; Sukhdev Rai *v.* Ram Narain Rai. A. I. R. 1930 All. 387, Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhuty, 2 C. W. N. 260 , Asitulla *v* Sadatulla, A I. R. 1918 Cal. 809 ; Nandi Lal Agrani *v.* Jogendra Chandra Dutta, A. I.R. 1923 Cal. 53 at p. 56 ; Ladha Singh *v.* Munshiram, A.I.R. 1927 Cal. 605 ; Lakshmi Narain *v.* Mst. Mohammadi Begam, I. L. R. 7 Luck. 454 and Barsati *v.* Sarju Prasad, I. L. R. 14 Luck. 308 at p. 315.
4. Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhury, 2 C. W. N. 260, Asitulla *v.* Sadatulla, A. I. R. 1918 Cal. 809 ; Sukhdeo Rai *v.* Ram Narain Rai, A. I. R. 1930 All. 387 ; Minalal Shadiram *v.* Kharsetji, I.L.R. 30 Bom. 395 ; Tetali Sooramma *v.* Kovvuri Venkayya, A. I. R. 1938 Mad. 589 and Barsati *v.* Sarju Prasad, I. L. R. 14 Luck 308.
5. I. L. R. 7 Luck. 454.
6. I. L. R. 14 Luck. 308.
7. Rajaram *v.* Manik, A. I. R. 1952 Nag. 90 at pp. 92-93 : I. L. R. (1951) Nag. 948 ; *see* China Mallaiah *v.* Veeriah, 31 I. C. 671 : 3 L. W. 551 ; Mahadeo Aiyar *v.* Gopala Aiyar, I. L. R. 34 Mad. 51 ; Tetali Sooramma *v.* Kovvuri Venkayya, A. I. R. 1938 Mad. 589 ; Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhury, 2 C. W. N. 260, Asilatullah *v.* Saadatullah, 28 C. L. J. 197 : 41 I. C. 147 ; Nandilal Agrani *v.* Jogendra Chandra Datta, A. I. R. 1923 Cal. 53 at p. 56 ; Sabhaji *v.* Nawal Singh, A. I. R. 1928 Nag. 4.

of the error. There is no time-limit in the section for the discovery of the mistake or of the fraud. At any time when a mistake is discovered or fraud comes to light, it is open to the party affected to come to the Court for the rectification of the mistake in the instrument.[1]

21. Evidence.—To find out the true intention of the parties evidence relied upon may be written or oral for it is well settled that oral evidence by virtue of Sec. 92, Evidence Act, is admissible to show the mistake in the instrument.[2]

There is not much difficulty where a previous written draft or letters or other writing evidencing the real intention of the parties is available. Memoranda of the contents of an instrument, counterparts of deeds, etc. are all excellent pieces of evidence. The nature of a transaction may serve as a guide, e. g. where there is a joint loan to two persons and the bond is joint only but not joint and several, the presumption is that the real intention of the parties was to make it joint and several.[3] Circumstantial evidence may also be usefully relied on.[4] The factum of fraud or fraud or mutual mistake should be clearly proved. On the one hand, the danger of setting aside the solemn engagement of parties when reduced to writing by the introduction of parol evidence substituting other material terms and stipulation is sufficiently obvious ; but, on the other hand, a court of equity will be of little value if it could suppress only positive fraud and leave mutual mistake, innocently made, to work intolerable mischief, contrary to intention of the parties. Relief should, therefore, be given only where the proof is clear and satisfactory. But this does not mean that the evidence must be in its nature or decree incapable of refutation, but that it should be clear of all reasonable doubt ; and though Judges will always differ as to the result and weight of evidence, yet the rule acts as a caution against relief upon a mere balance of evidence, or where it is loose or equivocal, or in its texture open to doubt or to opposing presumption.[5] To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon the evidence of a different intention of the clearest and most satisfactory description.[6]

22. Burden of proof.—The burden of proving a case for rectification lies heavily on the person seeking rectification. The proof of error must be clear and conclusive. It is no ground for finding mutual mistake that the bargain enforced is one-sided. At the utmost that would show either unilateral mistake or fraud. Unilateral mistakes lead to no relief, whereas fraud must be pleaded and proved.

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1. *See* Garela Kalita *v.* Dharmeshwar, A. I. R. 1961 Assam 14.
2. Kesho Singh *v.* Roopan Singh, A. I. R. 1927 All. 355 at p. 356 : 100 I. C. 568 ; *see* Mahadeb *v.* Gopala, I. L. R. 34 Mad. 51 ; Radha *v.* Angna. 21 I. C. 420 : 16 O. C. 213 ; China Mallaiah *v.* Veeriah, 31 I. C. 671 : 3 L. W. 551 ; Dagdu *v.* Bhana, I. L. R. 28 Bom. 420 : 8 Bom. L. R. 126 ; Jiwraj *v.* N. A. C., 5 Bom L. R. 853 ; Mohammad Bhoy *v.* Chaterpat, I.L.R. 20 Cal. 854 ; Balkissan *v.* Legge, I.L.R. 22 All. 149 (P. C.) : 27 I. A. 58 ; Sukhdev Rai *v.* Ram Narain Rai, A. I. R. 1930 All. 387 at p. 387 ; Bepin Krishna Roy *v.* Jogeshwar Roy, A. I. R. 1921 Cal. 730 at p. 735 ; Rangasami *v.* Gouri Ayyangar, 20 M. L. J. 225 : 29 I. C. 583 ; Rajaram *v.* Manik, A. I. R. 1952 Nag. 90 at p. 92.
3. Story's *Equity* ; *see* also Dagdu *v.* Bhana, 28. Bom. 420 : 8 Bom. L. R. 126.
4. Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhury. 2 C. W. N. 260; K. Goundan *v.* Priathambi, I. L. R. 30 Mad. 397 ; Mahadeo Ayyar *v.* Gopala, I. L. R. 34 Mad. 51.
5. Story's *Equity*, Sec. 1531.
6. *See* also *per* Lord Thurlow in Lady Shelburne *v.* Lord Inchiquin, (1784) 1 Br. Ch. Ca. 338 at p. 341 ; *see* also Marquis of Townshend *v.* Stangroom, (1801) 6 Ves, 328 at p. 334.

23. **Mutual mistake** —The rule of law is well settled that in order to justify rectification there must be proof of common intention different from the expressed intention and a common mistaken supposition that the intention is rightly expressed in the instrument. It is immaterial by whom the actual oversight or error was made which caused the expression to be wrong. The mistake must be mutual, i.e. a mistake reciprocal and common to both the parties. In other words, each party should alike have laboured under the same misconception in respect to the terms of the instrument. The essential requisite which has to be proved for obtaining the relief of rectification of an instrument under the section is that it was through a mutual mistake of the parties that the instrument in question did not truly express the intention of the parties. The duty of the Court before it can rectify is to find it clearly proved that there has been a mistake in framing the instrument and it must ascertain the real intention of the parties in executing the instrument. On being satisfied of those two elements it is in the discretion of the Court to grant rectification.[1] To put the matter concisely, there must have been a common intention different from the expressed intention, and a common mistaken supposition that it was rightly expressed.[2]

Where there was mutual mistake of the parties in a mortgage transaction, which resulted in a mistaken judicial decision, without any mistake on the part of the Judge, it can be rectified by a separate suit. In *Bepin Krishna Roy* v. *Jogeshwar Roy*,[3] it was held that this can be done under the Act. A contrary view, however, was expressed in *Lalchaya* v. *Seethamma*,[4] to the effect that such a mistake in the decree cannot be rectified on a separate suit but that the correct remedy of the aggrieved party was to go to the Court which passed the decree and apply for the amendment of the plaint and after the plaint is amended to apply for a review of the decree or in the alternative for the amendment of the decree under Sec. 152 of the Code of Civil Procedure. In *Bepin Krishna Roy* v. *Jogeshwar Roy*,[5] it was stated : "In principle, the answer should clearly be in the affirmative, for as Neville, J., observed in *Thompson* v. *Hickman*,[6] to grant relief by way of rectification where the error has crept into one document and refuse it where it is embodied in two, is inconsistent with equitable principles, for equity regards the substance rather than the forms of transaction."

There is no substantial reason, for instance, why we should not hold that where the same mutual mistake has been repeated in each one of a chain of conveyances, under such circumstances as to entitle any one of the purchasers to a reformation as against his immediate vendor, equity may work back through all, and entitle the last purchaser to a reformation against the original grantor. Similarly, it may be held as a general rule that if there is a mutual mistake on a mortgage in the description of the property and the same mistake is reproduced in the decree, enquiry may go back to the original transaction and reform both the mortgage and the decree so as to make them conform to the intention of the parties concerned and this view was actually

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1 Siddique & Co. *v.* Utoomal Assoodamal Co., A. I. R. 1946 P C. 42 : (1946) 1 M L. J. 74 : 1946 A. W. R. (P. C.) 93 : 1946 P. W. N. 74 : 1946 A. L. J. 102 : 1946 M. W. N. 106 : 59 L. W. 89 : 223 I. C. 47 (P C.).

2. Bepinkrishna *v.* Prujabarata, 34 C.L.J. 256 : 26 C. W. N. 43 ; Mohendra Nath Mukherjee *v.* Jogendra Nath Roy Chaudhury, 2 C. W. N. 260 ; Dagdu *v.* Bhana, I. L. R. 28 Bom. 420 : 8 Bom. L. R. 126 ; Radhe *v.* Angna, 21 I. C. 429 : 16 O. C. 213 ; Lachman *v.* Ganpat. 2 N. L. R. 49.

3. A. I. R. 1921 Cal. 730 : 66 I. C. 345.

4. A. I. R. 1932 Mad. 275 at p. 279 : 136 I. C. 850.

5. A. I. R. 1921 Cal. 730 at p. 740.

6. (1907) 1 Ch. 550 : 76 L. J. Ch. 254.

adopted in *Bala Prasad* v. *Kanoo*.[1] In *Kistoormall* v. *Sattar Mohamed*,[2] the learned Judges while following the Calcutta ruling given in *Bepin Krishna Roy* v. *Jogeshwar Roy*,[3] said : "In our opinion a decree in which mistake has crept in on account of mutual mistake of the parties in an earlier transaction, which extends into judicial proceeding automatically as it were without mistake on the part of the Judge is on a similar footing with a compromise decree in which there is a mistake due to mutual mistake of the parties. Their Lordships are accordingly in respectful agreement with the decision in *Bepin Krishna Roy* v. *Jogeshwar Roy*.[4] It would be useful to point out that Sec. 31 (old) [Sec. 26 (new)] of the Specific Relief Act provides than an instrument can only be rectified when the rights acquired by a third person in good faith and forbearance are not affected by such rectification.

24. Unilateral mistake.—There can be no rectification if the mistake is not mutual or common to all parties to the instruments,[5] or if one of the parties knew of the mistake at the time he executed the deed. Where one party only has been under a mistake, while the other, without a fraud, knew what the character of the deed was, and intended that it should be, the Court cannot interfere, for otherwise, it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had *bona fide* acquired by an executed deed. Rectification can only be had where both parties have executed an instrument under a common mistake, and have done what neither of them intended.[6] There must be evidence to satisfy the requisites for rectification on the ground of common mistake pointed out in *Fowler* v. *Fowler*[7] by Lord Chelmsford.[8] A mistake on one side may be a ground for rescinding, but not for correcting or rectifying an instrument.[9]

There can be no rectification where there is not a prior actual contract by which to rectify the written instrument. So a policy cannot be rectified by slip because the slip does not constitute a contract, and there is no contract till the policy is signed and the premium paid.[10]

Nor can there be rectification if one of the contracting parties had never heard of that which is said to be the real agreement. So the Court refused to rectify a policy according to the intention of the insured as there was no mistake on the part of the company in granting it.[11]

The mistake of one party to a contract can never be a ground for compulsory rectification so as to impose on the second party the erroneous conception of the first.[12] The mistake of the plaintiff alone may, however, where there is fraud, be a ground for putting the defendant to elect between having

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1. 14 I. C. 407 : 8 Nag. L. R. 13.
2. A. I. R. 1958 Raj. 276 at p. 279.
3. A. I. R. 1921 Cal. 730.
4. *Ibid*.
5. Rooke *v*. Kensington, (1856) 2 K. & J. 764 : 25 L. J. Ch. 795 : 110 R. R. 456 ; Fowler *v*. Fowler 4 D. & J. 265 ; Sell *v*. Sells, 1 Dr. & Sm. 42 : 29 L. J. Ch. 500 : 127 R. R. 20 : *Re* Walsh, 15 W.R. 1117 ; Bradford *v*. Romney, 30 Beav. 431.
6. Eaton *v*. Bennett, 34 Beav. 196 : 145 R. R. 476 ; Paget *v*. Marshall, 28 Ch. D. 261 : 54 L. J. Ch. 575.
7. 4 D. & J. 265.
8. Vaudeville Electr c Cinema *v*. Muriset, (1923) 2 Ch. 74 : 92 L. J. Ch. 558.
9. Mortimer *v*. Shortall, 2 Dr. & War. 372 : 59 R. R. 730 ; Fowler *v*. Fowler, 4 D & J. 265 : 124 R. R. 234 ; *Re* Walsh, 15 W. R. 1117 ; Paget *v*. Marshall, *supra* , Ellis *v*. Hills, 67 L. T. 287.
10. M'Kenzie *v*. Coulson, 8 Eq. 368.
11. Fowler *v*. Scotish Equitable Ins. Co., 28 L. J. Ch. 225. The Court, however, set aside the policy, and ordered a return of the premiums as having been paid by mistake.
12. Rooke *v*. Kensington, (1856) 2 K. & J. 753 ; Thompson *v*. Whitmore, 1 J. & H. 263 : 128 R. R. 353 ; Bradford *v*. Romney, 30 Beav. 431 ; Fowler *v*. Sugden, 85 L. J. K. B. 1090.

the transaction annulled altogether or submitting to the rectification of the deed in accordance with the plaintiff's intention,[1] but this can only be done where there is fraud of conduct equivalent to fraud.[2]

In *Harris* v. *Pepperell*,[3] Lord Romilly, M. R., said that the rule that the Court will not rectify an instrument on the ground of mistake, except the mistake be mutual, is liable to an exception in a case between vendor and purchaser. But the distinction is not supported by the authorities and does not seem sound. *Garrard* v. *Frankel*[4] and *Harris* v. *Pepperell*,[5] if correctly determined, might possible be supported on the principle that the Court in these cases merely abstained from setting the agreement aside on the consent of the defendant to submit to the variation alleged by the plaintiffs.[6] But it seems that *Harris* v. *Pepperell*,[7] *Garrard* v. *Frankel*,[8] and *Paget* v. *Marshall*,[9] can only be supported on the ground of fraud ; and in the absence of fraud vendors or purchasers of land cannot be put to their election to rescind or accept rectification on the ground of unilateral mistake.[10]

The relief laid down in this section presupposes a prior agreement and variance between that agreement and in wording of the instrument into which it has been reduced.[11]

25. Reformation of mistake in expression of contract.—Where a written agreement is not in conformity with the actual intention of the parties in a material matter, a court of equity will perform the writing in accordance with that intention if innocent parties will not be affected thereby.[12] The jurisdiction is confined to writings but as to them it is clear.[13] "In the application of this principle, mistakes as to title have been corrected, the word 'heirs' substituted for 'successors', omission of words of inheritance supplied, a deed reformed to bind a co-partnership instead of an individual member, a mortgage in the name of an agent recified by inserting the name of the principal as mortgagor, and the principal substituted for a trustee who has been mistakenly designated and had bound himself as a contracting party. If an instrument which requires a seal is by accident or mistake executed without one, a court of equity may grant relief by compelling a seal to be affixed or otherwise."[14] An omission of an agreement by the grantee to assume encumbrances[15] or of a reservation in a warranty deed of certain incumbrances[16] may similarly be supplied. A deed may be reformed to except oil and gas beneath the surface of the premises,[17] and a contract to purchase real estate to except therefrom a right of way.[18]

Equity "will exercise its power to reform instruments, not only as between the original parties, but as to those claiming under them in privity,

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1. Garrard *v.* Frankel, (1862) 30 Beav. 445 ; Harris *v.* Pepperell, (1867) L. R. Eq, 1 ; Bloomer *v.* Spittle, (1872) L.R. 13 Eq. 427 ; Paget *a.* Marshall. (1884) 28 Ch. D. 225.
2. May *v.* Platt, (1900) 1 Ch. 616 : 69 L. J. Ch. 357.
3. (1867) L. R. Eq. 1.
4. (1862) 30 Beav. 445.
5. 30 Beav. 451 : 31 L. J. Ch. 604 : 132 R. R. 352.
6. *See* Bloomer *v.* Spittle, 13 Eq. 429 : 41 L. J. Ch. 369.
7. (1867) L. R. Eq. 1.
8. (1862) 30 Beav. 445.
9. 28 Ch. D. 261 : 54 L. J. Ch. 575.
10. May *v.* Platt, *supra* ; but *see* Craddock Bros. *v.* Hunt, (1923) 2 Ch. 136 : 92 L. J. Ch. 378.
11. *Ibid.*
12. U. S. A. Restatement of Law of Contracts.
13. Walden *v.* Skinner, 101 U. S. 25.
14. Gaylord *v.* Pelland, 169 Mass. 356.
15. Williams *v.* Everham, 90 Ia. 420.
16. Zuspann *v.* Roy, 102 Kan. 188.
17. Grigsby *v.* Draughn, 261 Ky. 717.
18. Stubbe *v.* Stranglers, 157 Wash. 283.

such as personal representatives, heirs, assignees, grantees, judgment-creditors, or purchasers from them with notice of the fact".[1] Where the same mistake is repeated in a chain of conveyances under circumstances that would entitle any grantee to reformation against his grantor, equity will work back and correct the claim of any grantee.[2] A third party beneficiary of a liability indemnity insurance contract also has been granted reformation.[3]

26. Reasons and limits of reformation.—It is often said that in the exercise of his jurisdiction a court of equity is merely substituting the real transaction between the parties for the apparent one, but the explanation is inadequate. Even if it were granted that mental assent is essential to the formation of contracts, it certainly cannot be claimed that mental assent, which is unexpressed, constitutes a contract ; and though parties have arrived at a definite understanding as to the terms of the proposed bargain, if they contemplate a writing as the first obligation binding upon them, their mutual understanding prior to the writing will not make a contract. Nor can even a fully expressed intention operate as a conveyance of land. Moreover, if prior to the erroneous writing, there exists, as undoubtedly is often the case, a contract expressing the actual intent, the erroneous writing has subsequently been accepted and agreed to as the contract or conveyance which shall be substituted for the original agreement. It is a confusing fiction to imagine that equity in reforming this latter instrument is specifically enforcing an existing contract, especially since an examination of the Chancery cases shows no insistence on a binding agreement prior to the writing of which reformation is sought. Equity does, however, insist that the parties shall have come to a complete mutual understanding of all the essential terms of their bargain for, otherwise, there would be no standard by which the writing could be reformed.

Knowledge by one party of the other's mistake regarding the expression of the contract is equivalent to mutual mistake.[4] Thus, if one party before the execution of the instrument knew of or discovered the error in it, reformation will be allowed against him though the mistake is not strictly mutual.[5] And so reformation may be allowed to make an instrument conform to fraudulent misrepresentations. Doubtless the mistake is one of law, but this should not preclude relief.

It is not enough to justify reformation that the Court is satisfied that the parties would have come to a certain agreement had they been aware of the actual facts. Nor will equity reform a contract where acquired rights of *bona fide* purchasers for value would be disturbed. But neither creditors nor trustees in bankruptcy[6] are such purchasers, and reformation may be had in spite of their adverse interest. Conversely, it has been said : "to entitle a person to reformation it must appear he was a party to or privy to the transaction in question and has a substantial interest therein".[7]

If a writing that purports to be a contract is not wholly void, reformation of it necessarily involves rescission. If the instrument is wholly void, it is perhaps improper to speak of rescinding it, though a bill *quia timet* for its cancellation might sometimes be appropriate if injurious operation was

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1. Scheider *v.* Bulger, 194 S. W. 737.
2. Modica *v.* Cowbs, 158 Ark. 149.
3. Williston on *Contracts*, Sec. 1547.
4. Columbian Nat. L. Ins. Co. *v.* Black, 35 F. (2d) 571.
5. Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293.
6. Zariman *v.* First Nat. Bk., 216 U. S. 132.
7. Security Sav. & Tr. Co. *v.* Portland, 124 Or. 276.

feared because of its apparent validity. The right to reformation does not depend on whether the original instrument was void or not. If what the parties intended would be valid contract and the written instrument was not, reformation should obviously be permitted. Generally, however, the instrument of which reformation is sought is valid until avoided, and the first step towards the desired relief must be to rescind the written contract or conveyance into which the parties have entered ; but where the parties clearly intended an instrument of a different tenor as to which their minds were at one, it is inequitable to destroy the transaction into which the parties actually entered except upon the terms of establishing a transaction into which they intended to enter. Circumstances may have supervened, however, making this impossible or inequitable, and in such a case rescission only is allowable. Reformation has likewise been denied in joint contracts and conveyances where the complainant shared the mistake with less than all the joint adversary parties.[1]

27. **Reformation can only make a writing express what parties intended should be written.**—The province of reformation is to make a writing express the bargain which the parties desired to put in writing.[2] Agreements of which they did not desire written expression will not be put into writing by decree of the Court. Therefore, if parties intentionally make an oral agreement which is unenforceable for the reason that it is not in writing, the Court cannot order a writing executed even though the parties erroneously supposed that their oral bargain was legally valid. Similarly, if the parties to a written instrument understand that part of their previous agreement has been omitted from the writing and rely on oral agreement with one another to vary or add in certain respects to the written agreement, whether they rely on moral obligation or believe that such a variation or addition is legally valid, equity cannot reform the writing by the insertion of the oral agreement. Still more clearly if, because of mistake as to an antecedent or existing situation, the parties make a written instrument which they might not have made, except for the mistake, the Court cannot reform the writing into which it thinks they would have made, but in fact never agreed to make.[3]

If, however, the mistake is of sufficient importance and the *status quo* can be restored, equity should rescind the whole transaction, unless the mistake is one of law and the Court feels constrained by that circumstance ; and though a direct decree of reformation could not be granted, it would be proper to make the decree of rescission conditional on the refusal of the defendant to assent to reformation.[4]

28. **Reformation of conveyances.**—The commonest illustration of reformation concern conveyance where a deed conveys a different or larger estate or right than was intended, and both parties shared an intent as to the estate which should have been conveyed, the grantor is allowed a reformation of the instrument so that it shall express this intent ; and under similar circumstances where a deed conveys a smaller estate or gives a smaller right than was intended, or inadequately describes an estate or right, the grantee is allowed a reformation of the instrument so that it shall express the real intention. Where, however, the parties misapprehended the extent of the grantor's interest and a conveyance of a half interest in an estate was made, which it was supposed was the whole of the grantor's right, for a consideration based

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1. Williston on *Contracts*, Sec. 1548.
2. Lewitt & Co. *v.* Jeweller's Safety Fund Sec. 249 N. Y. 217.
3. Russel *v.* Shell Petroleum Corp., 66 F. (2d) 864.
4. Williston on *Contracts*, Sec. 1549.

on the supposed extent of the right, equity refused[1] to reform the conveyance so that it would convey an additional right in fact owned by the grantor, without further consideration than that originally fixed for the half interest.[2] But a transfer in excess of the legal rights of the transferor was held not to entitle a transferee to have the instrument of transfer in *Ratneswar* v. *Mongoli Chutiani*.[3] In this case the plaintiff, suing for the rectification of a sale-deed alleged that whereas a Hindu widow who was the sole heir to her husband intended to sell the property in her own right for the discharge of her husband's debts. The writer, through mistake, wrote so as to read that the widow executed the same as the guardian of her minor daughters. The defendant, the widow denied these allegations. The minor daughters were not parties to the suit. It was held that the writer's mistake did not amount to a mutual mistake within Sec. 31 (old). Morever, even though the widow as a limited owner was entitled to convey her own interest and not the interest of the minor daughters, a transfer in excess of legal rights of the transferor did not entitle a transferee to have the deed rectified under Sec. 31 (old). Again, where a decree gave a detailed description covered by it and there was no doubt about the identity it was held that it was not a case for rectification notwithstanding the tahsil in which it was situated was wrongly described.[4]

29. Rectification of kobala.—In a case it was found that a *kobala* differed from a *bainama* on which it purported to be based both in respect to the total area of the land conveyed and also in respect of one of the boundaries of a piece of land, that the rectification had been carried out with the knowledge and consent of both the parties, and that there was no fraud or mistake, Patterson, J., held that no case for rectification was made out.[5] Where in a deed of conveyance executed by the defendant some other land was inserted fraudulently instead of the land intended to be conveyed by him in favour of the plaintiff, the plaintiff on discovering the error in the deed of conveyance filed a suit for declaration of his title in the land agreed to be conveyed by the defendant in his favour and also for possession the question arose whether the plaintiff be driven to file another suit for rectification of the deed of conveyance in suit or whether in the very suit for declaration and possession the Court could grant the equitable relief by way of a declaration of the plaintiff's title in the lands which had actually been agreed to be conveyed. It was ruled by the Orissa High Court in *Bidya Dhar Mohanty* v. *Ananta Hota*,[6] (*i*) That the courts have consistently applied the equitable principle of giving relief to a party entitled to it without driving them to file a separate suit for rectification of a mistake fraudulently inserted in a conveyance and (*ii*) that there was no rule of procedure, making it obligatory upon a party to ask for rectification before claiming a declaration of title to the property agreed to be sold ; (*iii*) that it was well established that the courts of equity will interfere in cases of written agreements whereby there has been innocent omission of insertion of a *material* stipulation contrary to the intention of both parties, where the contract has been executed and the defendant has done all that he was bound to do it would be wholly otiose to require the defendant to execute a fresh deed or rectify the deed that he already executed ; (*iv*) that there would be no use in reforming an agreement when it is wholly executed

1. Jenkins *v.* Frazier, 64 Kn. 267.
2. Williston on *Contracts*, Sec. 1550.
3. A. I. R. 1951 Assam 70 at p. 72.
4. Madhoram Narayana *v.* Deep Chand, 102 I. C. 588.
5. Mohd. Yusuf *v.* Umed Ali Mian, A. I. R. 1934 Cal. 750 at p. 750 : 59 C.L.J. 360 ; Somaruddy Molla *v.* Port Canning L. I. Co., 16 C. W. N. 225.
6. A. I. R. 1956 Orissa 83.

and nothing remains to be done by other party and in such cases the relief that the courts grant must be absolute and unconditional.[1]

30. **Fraud**.—In order to establish his right to rectification of a document it is essential to show that there has been either fraud or mutual mistake[2] and oral evidence is admissible to prove fraud or mistake.[3] It is open to the Court in its equitable jurisdiction under Sec. 26 (new) of the Specific Relief Act to give effect to the real intention of the parties or the arrangement arrived at by agreement between them before it is reduced into writing.[4] Fraud or mutual mistake be proved before rectification be ordered, besides this the right of third parties should not be affected by such rectification. Then it is not necessary to invoke the equitable jurisdiction of the Court in cases of mere slips or omission, they may be corrected by the Court in the process of construction. It is not necessary to file a suit for rectification in the case of verbal slips or omissions. Under Sec. 26 (new) of the Specific Relief Act, courts do not rectify contract but they rectify the instrument which fails to give effect to the real intention of the parties. In a case of rectification the plaintiff must show that there was a concluded contract actually prior to the execution of the instrument which is required to be rectified and that contract is inaccurately expressed in the instrument. The Court should not refuse to grant the relief of rectification merely because the plaintiff omitted to claim it specifically. The omission to pray for rectification is not fatal. Where the error has been brought to light and was due to fraud or mistake the instrument should be rectified although the plaint does not specifically include any prayer for rectification.[5] A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument ; but on the facts there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, the suit for rectification was dismissed.[6] Where a *kobala* differs from the *bainama*, on which it is based regarding the area and dimensions of a piece of land no suit for rectification is competent if the alterations in the area and the dimensions had been made with the consent and knowledge of both the parties.[7] The reason is that where a document expresses accurately the intention of the parties there can be no case for its rectification.[8] But when a document fails to represent the common intention of the parties then it is open to either party to have the contract rectified.[9]

31. **Name of plaintiff not appearing in sale-deed.**—Where a sale-deed omitted to mention the name of the plaintiff as a co-vendee with the defendants by reason of the fraud played by the defendants it was held that the plaintiff could straightaway establish this in a suit for possession of his share, even though his direct suit for rectification was barred by that date.[10]

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1. Steele *v.* Haddock, 34 L. J. Ex. 73 : (1885) 56 Ex. 597.
2. Amanat Bibi *v.* Lachman Pershad, I. L. R. 14 Cal. 393 (P. C.) : 14 I. A. 18; Durga *v.* Bhajan, I. L. R. 31 Cal. 614 (P. C.).
3. Section 92, proviso (1), Evidence Act.
4. *See* Santi Ranjan *v.* Dassu Ram Mirzamal, A.I.R. 1957 Assam 49 at p. 57.
5. *See* Asitulla *v.* Sadatulla, A. I. R. 1918 Cal. 809 at p. 810 : 28 C. L. J. 197 and Mohendra Nath Mukerjee *v.* Jogendra Nath Roy Chaudhury, 2 C.W.N. 260.
6. Amanat Bibi *v.* Lachman Pershad, *supra*.
7. Mohd. Yusuf *v.* Umed Ali Mian, A.I.R. 1934 Cal. 750 at p. 750.
8. Marret *v.* Shirazi and Sons, A.I.R. 1930 P. C. 86 at p. 90.
9. Durga *v.* Bhajan, I. L. R. 31 Cal. 614 (P. C.).
10. Asitulla *v.* Sadatulla, 28 C. L. J. 197 : 41 I. C. 747.

32. Specific performance and rectification—Distinction.—Specific performance comes under a head of equitable jurisdiction, quite distinct from rectification. The former is based upon inadequacy of the remedy appointed in certain cases by the common law ; the latter gives relief from the inflexibility of the common law and from the nature of the case involves a contravention of its rules.[1]

33. Setting aside and rectification—Distinction.—"There is a material difference between setting aside an instrument and rectifying it on ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."[2]

34. Delay.—An aggrieved party should seek the assistance of the Court under this section without unreasonable delay.[3] Mere laches is not a bar to a suit for rectification of deed on the ground of mutual mistake if rights of third parties have not intervened. The date of notice of the mistake is the date from which time runs.[4]

Where there has been a mutual mistake in a mortgage-deed in the description of the property and the same mistake has been reproduced in the decree, but no sale has resulted in execution thereof, the Court may reform the mortgage-deed and the decree based on it can be set aside.[5]

35. Rectification of decree.—There is abundant authority for the proposition that if there is a mistake in an instrument and the same is reproduced in the decree, equity may go back to the original transaction and reform both the instrument and the decree so as to make them conform to the intention of the parties concerned.[6]

36. Where full satisfaction of costs is wrongly recorded correction may be made by the Judge passing order and not by his successor.—Thus a mutual mistake of the parties to the mortgage transaction manifested in the mortgage-deed which has extended into judicial proceedings automatically, as it were, without mistake on the part of the Judge is still capable of rectification.[7] A compromise or even a decree based on it may be rectified on the ground of

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1. Collett, Sec. 31.
2. *Per* Lord Chemsford, Lord Chancellor in Fowler *v.* Fowler, (1859) 4 D. E. G. & L. 250 : 45 E. R. 97 ; Rajaram *v.* Manik, A. I. R. 1952 Nag. 90 at p. 92 : I. L. R. (1951) Nag. 948.
3. Allcard *v.* Skinner, 36 Ch. D. 145.
4. Nooruddin Esmailji Kurwa *v.* Mohammad Umar Subarati, A. I. R. 1940 Bom. 321 at p. 328 : I. L. R. (1940) Bom. 605 : 192 I. C. 109; Rajaram *v.* Manik, *supra*.
5. *Ibid*.
6. Bepin Krishna *v.* Pruja Barata, 34 C. L. J. 256 : 26 C. W. N. 36 : 60 I. C. 345 : A. I. R. 1921 Cal. 73 ; Nandi Lal *v.* Jogendra Chandra Dutta, A. I. R. 1923 Cal. 53 at p. 57 : 36 C. L. J. 421 : 70 I. C. 959 ; Bala Prasad *v.* Kanoo, 8 N L. R. 13 ; Jogeswar *v.* Ganga Bishen, 8 C. W. N. 473; Venkatarama *v.* Elumalai, A. I. R. 1923 Mad. 442 at p. 443, Srish Chandra *v.* Triguna, I. L. R. 40 Cal. 541 : 18 I. C. 444 , Latchayya *v.* Seethamma, A. I. R. 1932 Mad. 275 at p. 278 : 136 I. C. 85 : 62 M. L. J. 360 : 35 L. W. 322 : 1931 M. W. N. 1329.
7. Bepin Krishna *v.* Pruja Barata, 34 C. L. J. 256 : 26 C. W. N. 36 : 60 I. C. 345 : A. I. R. 1921 Cal. 73, Nandi Lal *v.* Jogendra Chandra Dutta, *supra*. Kushoda *v.* Brajmohan, I. L. R. 43 Cal. 217 : 19 C. W. N. 1228 : 31 I. C. 14; Krishnaswamy *v.* Muthulakshmi, A. I. R. 1928 Mad. 1097 at p. 1099 : 1928 M.W.N. 609, Valiakal *v.* Karuppa, A. I. R. 1926 Mad. 1146 at p. 1146 : 97 I. C. 920 : 1926 M. W. N. 714 : 51 M. L. J. 46.

mutual mistake for it is well settled that a contract of the parties is nevertheless a contract because there is superadded to it the command of a Judge.[1] Where in execution of decree, as regards costs only an adjustment petition is presented, but it being wrongly worded, full satisfaction of the decree is recorded although the intention of the parties was to record satisfaction in respect of costs only, the order can be rectified in review by the Judge passing it. But such an application for review cannot be entertained by his successor. The Execution Court, which would include a Judge coming in as a successor of the Judge who passed the order in question has no jurisdiction as an executing court to enter into the questions relating to the certification of the order in question under the provisions of Sec. 47 of the Civil Procedure Code. A suit for rectification under Sec. 31 (old) of this Act is, therefore, maintainable and Sec. 47 of the Civil Procedure Code is no bar to it.[2] Where a plaintiff sues merely for the rectification of a compromise and not for the rectification of the decree into which it has merged, the technical omission in the plaint will not be allowed to stand in his way and if he can make out a case for the rectification of the compromise, he will be given a decree for the rectification of not only the compromise but for the decree based on it as well.[3]

37. Rectification of decree based on a reference.—A suit similarly lies to rectify a decree based on a reference and which has been fraudulently altered after publication and before the decree. The section permits the rectification of such award, and if it permits that, it also permits the rectification of the decree which is based on and gives formal expression to it.

But even if it is necessary for the plaintiff to take recourse to rectification, the defendant would have no answer to his claim. The principles applicable to cases of this character were reviewed in *Bepin Krishna Roy* v. *Jogeshwar Roy*.[4] The mutual mistake of the parties to the mortgage transactions manifested in the mortgage-deed which has extended into judicial proceedings automatically as it were without mistake on the part of the Judge, is still capable of rectification.[5]

But the courts in passing decrees for rectification of decrees should safeguard the equities in favour of the transferees for value in good faith.[6] A previous decree may be set aside by a separate suit also where one of the parties is a guardian acting for a minor without the consent of the Court, or where one of the parties is a minor ostensibly represented by a guardian not properly representing him.[7]

Section 31 (old), Specific Relief Act, gives the Court, if fraud or mistake is proved, discretion to rectify the instrument so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

A court purchaser is bound by estoppels which affect his judgment-debtor, all the more, must he be bound by an obligation on binding the

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1. Srish Chandra *v.* Triguna, I. L. R. 40 Cal. 541 : 18 I. C. 444.
2. Abdul Sattar Chaudhury *v.* Abdul Rusan, 39 C.W.N. 960 : 164 I.C. 651.
3. Bhai Chainrai *v.* Mst. Debibhai, 52 I. C. 916 : 13 S. L. R. 144.
4. (1921) 34 C. L. J. 256.
5. Nandiram *alias* Nandi Lal Agrani *v.* Jogendra Chandra Dutta, A. I. R 1923 Cal. 53 at p. 57 : 36 C. L. J. 421.
6. Ganesh *v.* Tularam, I. L. R. 36 Mad. 295 (P.C.).
7. Pratap Singh *v.* Badout Singh, I. L. R. 35 All. 587.

judgment-debtor to make a valid conveyance of property which the judgment-debtor has admittedly intended to convey but has not so conveyed in law by error. *Held* this Letters Patent Appeal must clearly fail and be dismissed.[1]

38. **Representative-in-interest.**—A court of equity will interfere only as between the original parties or those claiming under them, e. g. heirs, devisees, legatees, assignees, voluntary grantees or judgment-debtors or purchasers from them with notice of the facts.[2] So, a suit for the rectification of a bond given to the District Court to safeguard the interests of the beneficiary could not be filed by the beneficiary without a duly made assignment by the Court in his favour.[3]

39. **Rights acquired by third parties.**—The benefit of the proviso to Sec. 26 (new) can be claimed only if (*i*) there is a *bona fide* purchaser ; (*ii*) who purchases for value and (*iii*) without notice. Rectification, therefore, cannot be given effect to if it prejudicially affects the rights of *bona fide* third parties without notice.[4] A court, therefore, will not rectify an instrument if thereby a subsequent encumbrance is prejudiced. It is clear that the Court would not exercise its equitable jurisdiction to rectify an instrument, if thereby a subsequent incumbrancer would be prejudiced.[5]

The contract cannot be rescinded after third persons have acquired rights under it for value. This rule is a corollary from the main principle that a contract induced by fraud or misrepresentation is as such not void but only voidable. The result is that when third persons have acquired rights under the transaction in good faith and for value these rights are indefeasible. The rule is also stated to be an application of the principle of convenience, "that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud".[6]

40. **Sub-section (3)—Scope and object of.**—In order to avoid multiplicity of suits, this sub-section has been enacted to provide for the rectification and enforcement of a contract in the same suit. Even omission to ask for rectification may be treated as a mere formal defect, and the Court may decree the suit as if the document had been rectified.[7] In a converse case, that is in a suit for recovery of property without prior demand for rectification of sale-deed, the relief has been refused.[8] In a Madras case, however, it has been held that it is open to the plaintiff or the defendant in suit to adduce oral evidence in regard to the correct decription of the property in a conveyance executed between them and relief in regard thereto may be granted even though a suit

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1. S. M. R. M. Venkatachalam Chettyar *v.* P. L. A. R. M. Firm, A. I. R. 1939 Rang. 90 at pp. 91-92.
2. Story's *Equity*, Sec. 165 ; Miles *v.* Fox, 37 Ch D. 153 ; Hall Dare *v.* Hall Dare, 31 Ch. D. 251 ; Pearce *v.* Verbeke, 2 Beav. 23 ; Durga Prasad *v.* Bhajan, I.L.R. 31 Cal. 614.
3. Oppenhelmes *v.* Manecjee. A.I.R. 1933 Rang. 337 at p. 338 (I. L. R. 36 Bom. 42 ref. to).
4. Mahadeo *v.* Gopala, I.L.R. 34 Mad. 54; Nandi Lal *v* Jogendra Chandra Dutta, A.I.R. 1923 Cal. 53 at p. 54 : 70 I. C. 960 : 36 C. L. J. 421 ; Collett, Sec. 31.
5. Modan Mohan Prasad *v.* Sital Prasad, A. I. R. 1921 Pat. 226 at p. 227 : 2 Pat. L. T. 64.
6. Pollock on *Contracts*, 1946 Ed., pp. 464 *et sec.*
7. Venkataramanappa *v.* Ramsetty, 3 Mys. L. J. 146 ; *see* also United States of America *v.* Motor Trucks Ltd. (1924) A. C. 196 ; Craddock *v.* Hunt, (1923) 2 Ch. 136.
8. Sajjad *v.* Baker, (1907) 11 O. C. 93.

for rectification has not been filed and even though a suit for rectification even if brought would be barred by time [1]

It is open to the plaintiff in a suit for partition to pray for rectification of a deed relating to the properties sought to be partitioned. He need not institute a separate suit for rectification.[2]

41. Sub-section (4).—It is provided by this clause that the relief of rectification will be open to either party if it is specifically asked for in this pleading whether initially or by amendment.

42. Cancellation with option to accept rectification.—In a group of cases, however, middle course between refusing and granting rectification has been adopted. These cases are *Garrard* v. *Frankel*,[3] *Harris* v. *Pepperell*,[4] *Bloomer* v. *Spittle*[5] and *Paget* v. *Marshall*.[6] The course adopted was to decree cancellation with an option to the defendant to accept rectification instead. In *Garrard* v. *Frankel*,[7] the defendant agreed to take from the plaintiff a lease of a house at the rent of £230 and in the lease drawn up in pursuance of the agreement the rent was stated to be £130. Lord Romilly, M. R., considered that the error was the plaintiff's but that the defendant must have perceived it, and held that though the plaintiff was not entitled to have the lease reformed the lessee ought to have the option of taking the reformed lease or of rejecting it. In *Harris* v. *Pepperell*,[8] the vendor had executed a conveyance including a piece of land he had not intended to sell but which the defendant alleged he had intended to buy. Lord Romilly, following his previous decision in *Garrard* v. *Frankel*,[9] gave the defendant the option "of having the whole contract annulled or else of taking it in the form which the plaintiff intended". *Bloomer* v. *Spittle*[10] was said by Neville, J.,[11] to be unintelligible as reported. A reservation had been inserted in the conveyance by mistake. In *Paget* v. *Marshall*,[12] the plaintiff by mistake had offered and demised to the defendant four floors of three houses, whereas he had intended to reserve for his own use the first floor of one of the houses.

Middle course between refusing and granting rectification.

The principle underlying "this peculiar group of cases" is said by Sir Frederick Pollock to be this: "This Court, it seems, will not hold the plaintiff bound by the defendant's acceptance of an offer which did not express the plaintiff's real intention and which the defendant could not in the circumstances have reasonably supposed to express it; nor yet require the defendant to accept the real offer which was never effectually communicated to him and which he perhaps would not have consented to accept; but will put the parties in the same position as if the original offer were still open". In *May* v. *Platt*,[13] the written contract and the conveyance were unambiguous and evidence of intention was held to be inadmissible after completion either as a defence or to support a counter-claim which amounted to a claim for specific

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1. Sooramma *v.* Venkayya, A. I. R. 1938 Mad. 589 at p. 590: 176 I.C. 875: (1939) 1 M. L. J. 806 : 47 L. W. 661 : 1928 M. W. N. 492.
2. Kotumal Mohan Das *v.* Dur Mahomed, A. I. R. 1931 Sind 78 at p. 80; Ind. Rul. I.L.R. (1932) Sind 45 : 136 I. C. 525.
3. (1862) 30 Beav. 445.
4. (1867) L. R. 5 Eq. 1.
5. (1872) L. R. 13 Eq. 427.
6. (1884) 28 Ch. D. 255.
7. (1862) 30 Beav. 445.
8. (1867) L. R. 5 Eq. 1.
9. (1862) 30 Beav. 445.
10. (1872) L. R. 13 Eq. 427.
11. Beale *v.* Kyte, (1907) 1 Ch. 564.
12. (1884) 28 Ch. D. 255.
13. (1900) 1 Ch. 616, followed in Thomas *v.* Hickman, (1907) 1 Ch. 550.

performance of a written contract with a parol variation. *Harris* v. *Pepperell*,[1] *Garrard* v. *Frankel*[2] and *Paget* v. *Marshall*[3] were said by Farwell, J., in *May* v. *Platt*[4] to be only supportable on the ground of fraud. He said, "I have always understood the law to be that in order to obtain rectification there must be mistake common to both parties, and if the mistake is only unilateral there must be fraud or misrepresentation amounting to fraud", as this was considered to be the only ground for rescission after conveyance. The Court of Appeal, however, in *Craddock* v. *Hunt*,[5] held by a majority that since the Judicature Act the Court had jurisdiction to rectify a conveyance although the deed confirmed the written agreement and although the effect of ordering rectification was a parol variation. In that case the written agreement was held to have failed to express the real agreement between the parties and the mistake had been incorporated into the deed. *Olley* v. *Fisher*[6] was preferred to *May* v. *Platt*.[7] In the former case it was held that since the Judicature Act the Court has power, in any case where the Statute of Frauds is not a bar, in one and the same action to rectify a written agreement upon parol evidence of mistake and to order that agreement as rectified to be specifically performed. Lord Strendale, M. R., in *Craddock* v. *Hunt*[8] said, "After rectification the written agreement does not continue to exist with a parol variation ; it is to be read as if it had been originally drawn in its rectified form,[9] and it is that written document, and that alone, of which specific performance is decreed". Younger, L. J , dissented and thought that the plaintiff could not have rectification involving specific performance of a written agreement with a parol variation.

The decision in *Craddock* v. *Hunt*[10] was approved by Lord Birkenhead, L.C., giving the advice of the Privy Council in *U S.A.* v. *Motor Trucks Ltd.*,[11] in which he also dealt with the point under the Statute of Frauds. Although this decision does not bind our courts, it is one of great weight and there now seems no doubt that the Court has power to grant rectification of a written instrument with a parol variation and that the Statute of Frauds cannot be allowed to stand in the way. The Court can both rectify and decree specific performance in one and the same action.[12]

New	**Old**
CHAPTER IV	**CHAPTER IV**
RESCISSION OF CONTRACTS	OF THE RESCISSION OF CONTRACTS
27. When rescission may be adjudged or refused.—(*a*) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :	**35. When rescission may be adjudged.**—Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely—

1. (1867) L. R. 5 Eq. 1.
2. (1862) 30 Beav. 445.
3. (1884) 28 Ch. D. 255.
4. (1900) 1 Ch. 616, followed in Thomas *v.* Hickman, (1907) 1 Ch. 550.
5. (1923) 2 Ch. 136.
6. (1886) 34 Ch. D. 367.
7. (1900) 1 Ch. 616, followed in Thomas *v.* Hickman, (1907) 1 Ch. 550.
8. (1923) 2 Ch. 136.
9. Johnson *v.* Bragge, (1901) 1 Ch. 28 at p. 37.
10. (1923) 2 Ch. 136.
11. (1929) A. C. 196.
12. *See* Chitty on *Contract*, 1947, pp. 460, 462.

New

(*a*) where the contract is voidable or terminable by the plaintiff ;

(*b*) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

(2) Notwithstanding anything contained in sub-section (1), the Court may refuse to rescind the contract—

(*a*) where the plaintiff has expressly or impliedly ratified the contract ; or

(*b*) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made ; or

(*c*) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value ; or

(*d*) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

Explanation.—In this section "contract", in relation to the territories to which the Transfer of Property Act, 1882 (4 of 1882), does not extend, means a contract in writing.

Old

(*a*) where the contract is voidable or terminable by the plaintiff ;

(*b*) where the contract is unlawful for causes apparent on its face, and the defendant is more to blame than the plaintiff ;

Illustrations

To clause (a)—*A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.*

To clause (b)—*A, an attorney, induces his client B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.*

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1. Legislative changes.—This section corresponds to Sec. 35 of the repealed Act. In the marginal notes the words "or refused" have been added. The language of previous Sec. 35 (*a*) and (*b*) has been incorporated in sub-sections (1) (*a*) and (*b*) of this section. The words "in writing" in first paragraph of the previous Sec. 35 have been omitted, sub-section (*c*) along with the latter paragraph of the old Sec. 35 has been deleted. Sub-section (2) along with its explanation of the new Sec. 27 has been newly inserted. The illustrations under the previous Sec. 35 have been omitted.

2. Reasons for the change.—The Law Commission of India, in their Ninth Report on the Specific Relief Act, 1877, assign the following reasons for the amendment of (old) Sec. 35 of the Specific Relief Act, 1877. They say :

> "In England, where the defendant in an action for specific performance fails to comply with a judgment against him, the plaintiff may,

at his election, move in the action to have the contract rescinded.[1] This right extends to the vendor and the vendee. The Indian courts have taken the same view.[2]

"In all probability, the England rule was sought to be adopted, without modification,[3] in the third paragraph of old Sec. 35 (*c*) of our Specific Relief Act. But, as has been pointed out by Collett[4] as well as in the cases mentioned below,[5] the words 'in the same case' are not happily chosen and 'It is not at all clear as to what these words in the same case refer whether to the second paragraph or the first paragraph of Cl. (*c*)'.[6]

"The question arises whether the vendor or lessor should have the option of bringing a separate suit for rescission, in a case coming under Cl. (*c*) (of old Sec. 35). As the section stands, he has the option of bringing a separate suit under the first paragraph of Sec. 35 (old) of the Specific Relief Act or to apply for rescission in the same suit under the third paragraph of the section.

"But as Banerji[7] observed, there is no reason why the vendor or lessor should be allowed to harass the other party in a separate proceeding when the remedy of rescission can be made available in the same suit.

"We therefore propose a new section[8] which will enable the vendor or lessor to apply for rescission in the suit for specific performance, if the purchaser or lessee fails to comply with the terms of the decree. In view of this new provision, Cl. (*c*) of Sec. 35 (old) and the two succeeding paragraphs become unnecessary and should be omitted.

"While Sec. 35 (*c*) (old) deals with the consequences which will follow from the default of the purchaser or lessee to comply with the terms of a decree for specific performance, there is no provision in the Act as what would happen if the purchaser or lessee makes the payments due from him but the vendor or lessor does not comply with the decree by executing a conveyance or how the purchaser or lessee should obtain possession of the property. At present the latter contingency is dealt with in proceedings for the execution of the decree. But if in the former case, the vendor or lessor may obtain relief by way of rescission in the same suit, there is no reason why the other party may not have his reliefs against the vendor or lessor in the suit itself inasmuch as the principle of avoidance of multiplicity of proceedings is equally applicable to both cases.

"We have already provided[9] that consequential reliefs like possession or partition can be claimed in the suit for specific performance

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1. Fry, 6th Ed., pp. 546-47.
2. Akshayalingam *v.* Avayambala, A.I.R. 1933 Mad. 386.
3. Ramji *v.* China, 82 I. C. 73 ; Kurpal *v.* Shamrao, A. I. R. 1923 Bom. 211 : I. L. R. 47 Bom. 589.
4. *Specific Relief Act*, 3rd Ed., p. 277.
5. Ramji *v.* China. *supra,* Kurpal *v.* Shamrao, A.I.R. 1923 Bom. 211 *per* Macleod, C. J., in Kurpal *v.* Shamrao, I. L. R. 47 Bom. 589 at p. 592.
6. *Per* Macleod, C. J., in Kurpal *v.* Shamrao, *supra.*
7. *Law of Specific Relief*, 2nd Ed., pp. 468-70.
8. Section 26, App. I, Report on the Specific Relief Act, 1877.
9. Section 19 of App. I. Report on the Specific Relief Act, 1877.

itself and included in the decree. We are now speaking of the enforcement of such reliefs included in the decree which are at present available only by executing the decree, in separate executing proceedings.

"We recommended[1] that complete relief in terms of the decree in a suit for specific performance shall be available by application in the suit itself, without having to resort to separate execution proceedings and that appropriate provisions should be made in the Code of Civil Procedure enabling such applications to be made and orders thereon and also for appeals.

"There are certain well-known limitations to the equitable right to rescind which are not incorporated into the existing Sec. 35 (old), but which have been applied by our courts, on general considerations. For the sake of clarity and comprehensiveness, we may codify and include these principles in Sec. 35 (old) taking care not to make the propositions rigid so as to restrict the powers of the courts to do justice. The Court may refuse to rescind a contract in any of the following cases :

(*a*) Where the plaintiff has elected, whether expressly or impliedly to abide by the contract.[2]

(*b*) Where owing to the change of circumstances which has taken place since the making of the contract (not due to any act of the defendant himself) the parties cannot be substantially restored to the position in which they stood when the contract was made.[3]

(*c*) Where the contract is of a such a nature that it is not severable[4] and a part thereof is sought to be rescinded.

(*d*) Where third parties have, during the subsistence of the contract, *bona fide* acquired rights under it, without notice of the facts which make the contract liable to be prescribed.[5]

"It is proposed that the above propositions be included in a new sub-section to Sec. 35 (old).

"The requirement of 'writing' at the beginning of Sec. 35 (old) has long been omitted by the Transfer of Property Act, 1882, as regards the territories where that Act is in force. We have made this clear by inserting an explanation at the end of the section."[6]

In the Notes on Clauses, Cl. (27) which deals with Sec. 27 (old Sec. 35) of the Specific Relief Act it is stated :

This is Sec. 35 of the existing Act with the following modifications :

(*i*) Section 35 (*c*) (old) of the existing Act and the two paragraphs succeeding it have been omitted in view of Cl. (27) of this Bill otherwise sub-clause (1) is a reproduction of (old) Sec. 35.

1. *Cf.* Sec. 26(3) of App. I, Report on the Specific Relief Act, 1877.
2. Fry, 6th Ed., p. 348, Clough *v.* L.N.W. Ry. Co., (1871) L. R. 7 Ex. 26 at p. 34; Rangaswami Gounder *v.* Nathiappa Gounder I.L.R. (1918) 42 Mad. 533 at p. 538 (P.C.); Ramgowda *v.* Bhausaheb, I.L.R. (1927) 52 Bom. 1 (P.C.).
3. Fry, pp. 346-52; Hardei *v.* Bhagwan Singh, 24 C.W.N. 105.
4. Ohid *v.* Darshu, A. I. R. 1926 Cal. 959; Inder *v.* Campbell, I.L.R. 7 Cal. 474.
5. Fry, 6th Ed., p. 348, Clough *v.* L.N.W. Ry. Co., (1871) L. R. 7 Ex. 26 at p. 35.
6. Law Commission of India, Ninth Report (Specific Relief Act, 1877), pp. 41-43.

(*ii*) Sub-clause (2) codifies the principles followed by courts in refusing to rescind a contract.

(*iii*) The requirement of "writing" at the beginning of (old) Sec. 35 has been omitted by the Transfer of Property Act, 1882, in relation to territories where that Act is in force ; hence the explanation.[1]

3. Rescission of a contract.—A court generally adjudicates upon the antecedent rights of the parties. When a court adjudges rescission of a contract or a decree it is only concerned with the question whether the person rescinding it was justified in doing so. The Court does not create any right which parties did not possess when it makes a declaration that contract has been validly rescinded. Merely because it is necessary for the Court to pass an order of rescission when a controversy arises, it does not follow that it is the Court that rescinds the contract. The Court is only passing upon the validity of the rescission already made by the party.[2]

In *Abram Steamship Company Ltd.* v. *Westville Shipping Company Ltd.*,[3] their Lordships of the House of Lords said :

" . . . where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *status quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitution *in integrum*. If so, he must discharge that duty before the rescission is in effect accomplished. But if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself by his election and he later gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of the election to rescind was justified, was effective, and put an end to the contract . . . ".

4. Scope of the section.—This section details the circumstances when a contract, solemnly entered into by the parties may be rescinded by the Court. The right to have the contract rescinded rests with the person interested in the contract. He may be a party to it, or he may be a beneficiary under it. The mode and manner of the rescission has been prescribed in this section, i.e. by means of a suit in a court of law, and the rescission has to be adjudged by the Court. The circumstances under which the rescission of a contract may be obtained have been detailed in the section ; namely, (1) when the contract is voidable or terminable by or at the option of the plaintiff, (2) when the contract is unlawful which is not apparent on the face of it, but for which the defendant is more to blame than the plaintiff.

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1. Notes no Clauses, p. 13.
2. Hungerford Investment Trust Limited *v.* Haridas Mundhra, (1972) 1 S. C. W. R. 846 at pp. 863-64.
3. Law Reports Appeals Cases, 1923, pp 773, 781.

Sub-section (2) of this section says that in spite of the facts that adequate circumstances for the rescission of the contract may be present in a case, yet the Court may in its discretion, refuse to rescind it : (1) if the plaintiff has expressly or by necessary implication ratified or accepted the contract, or (2) due to the change in the circumstances since the parties entered into it for which the defendant is not responsible, the parties cannot be substantially relegated to their original position, in which they were, when the contract was made, (3) or where the third parties have for valuable consideration and in good faith and without notice acquired interest in it, or (4) where only a part of the contract is to be rescinded, and the part to be rescinded, is not severable from the rest of the contract, so that either the whole contract has to be adjudged as rescinded or no part of it. The explanation to this section says that within the meaning of this section "contract" means "contract in writing".

Rescission of contract is one of the species of the reverse of specific performance. It is that form of specific reliefs which the party claims not for the purpose of specific enforcement of the contract, but for the purpose of the avoidance of the contract which is either voidable at his option, or terminable at his choice. This relief has been made available to the party so that he may not be made victim of the consequences of voidable contracts or other party's mistakes, defaults or laches. The object of this form of relief is that the parties may be restored or put back to their original positions in which they stood at the time they entered into the contract, but for the voidable or terminable nature of the contract, which in the ends of justice should be rescinded and cancelled when the circumstances so justify it.

All that a decree for specific performance can properly contain is an adjudication to the effect that the plaintiff was entitled to the enforcement of the contract which the defendant had entered into with him for the sale of a certain property for a certain specified sum. The power of the Court to fix a period for the deposit of the sale consideration was not provided for specifically either in the Civil Procedure Code or in the Specific Relief Act. Indeed Sec. 35 (old) of the Specific Relief Act indicates a contrary intention, for, Sec. 35 (old) indicates that in the event of a party to the decree being in default another party could either file a suit for the rescission of the contract on which specific performance had been granted or he could even apply to that Court which could rescind the decree. It is no doubt true that in this country usually when courts pass a decree for specific performance, they fix a time during which the plaintiff is enjoined to pay the consideration and thereby get a proper sale in respect of a property. But this is more for purposes of convenience rather than in compliance with any provision of law.[1]

Contract cannot be specifically performed when the character of the property itself has changed substantially after its purchase.[2]

5. Grounds of rescission.—The law prescribes two conditions for the rescission of the contract : (1) voidable nature of the contract and the party at whose option the contract could be avoided seeks to do it by means of a suit, (2) contract liable to be terminated at the choice of a party, and the party chooses to exercise its choice and terminates it, and (3) unlawful contract for which both the parties are to blame but for which the defendant is more to blame than the plaintiff.

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1. Vaijnath *v.* Shivappa, (1967) 1 Mys. C J. 658 at p. 662.
2. Jhandoo *v.* Ramesh Chandra, 1970 A. L. J. 969 at p. 970.

The circumstances under which a contract which can be avoided have been detailed in the Contract Act, namely : (1) when the contract is defective in its origin and voidable from the very beginning as having been induced by coercion, undue influence, or fraud or misrepresentation, (2) when the contract ceases to be enforceable by one party owing to some subsequent circumstances, as a contract of sale which is subject to any condition being fulfilled by the seller, becomes, on the breach of it, voidable at the option of the buyer, who may, at his choice either waive the breach and treat the contract as still valid and subsisting or choose to avoid it by express repudiation or impliedly. Section 19 of the Indian Contract Aet, 1872, prescribes that an agreement obtained by coercion, fraud or misrepresentation, is voidable at the option of the party victim of coercion, fraud or misrepresentation. The remedy of such a party at law is either to avoid the contract on one or more of the grounds mentioned in Sec. 19, or insist for the specific performance of the contract and the putting him back to the position he was entitled to but for the coercion, fraud or misrepresentations. Section 19-A of the Contract Act provides about the avoidance of the contract on the ground of undue influence, while Secs. 19-B and 19-C deal with champertous agreements.

A contract can be avoided on the ground of misrepresentations, i. e. a representation, contrary to facts or law or both, and the misrepresentations must be such as to induce the party, who but for the misrepresentations would not have entered into the contract. In order that misrepresentations may afford adequate ground for avoiding the contract, a party has to show : (1) that there was a misrepresentation from party to the contract, (2) that the misrepresentation was such which induced him to enter into the contract, (3) that had there been no misrepresentation or had correct facts been brought to his notice, he would not have entered into the contract. Pollock on *Contracts* at page 455, 13th Ed., says : "A representation relied on as ground for rescinding a contract must be contrary to fact, not a mere expression of opinion, it must proceed from a party to the contract and be part of the same transaction. Further when all these conditions are satisfied it has to be considered what are the rights of the party misled."

A representation relates to some existing fact or some past event. It implies a factum and not *fasciendum*.[1] It contains no element of futurity and as such it is distinguishable from a mere statement of intention. An affirmation of a statement of facts is different from a promise to do something in future and there are different legal consequences in a representation of fact and a promise to do something. Mellish, L. J., in *Beattie* v. *Ebury* (*Lord*)[2] draws out a distinction between the two in the following words : "There is clear difference between a representation of fact and a representation that something will be done in the future. A representation that something will be done in the future cannot either be true or false at the moment made ; and although you may call it representation, if it is anything this is a contract or promise." This distinction is of practical importance. If a person alters his position on the faith of a false representation, the mere fact of its falsehood entitles him to certain remedies. If, on the other hand, he sues upon what is in truth a promise, he must show that this promise formed part of a valid contract and he may be very well met by any of the defences which are available in a case of breach of contract such as absence of consideration,

1. Spencer Bower, *Actionable Misrepresentation*, p. 38.

2. (1872) 7 Ch. App. 777 at p. 804.

breach, or non-observance of some necessary formality or the contravention of some positive rule of statute, or rule of law. The distinction is well illustrated in *Maddison* v. *Alderson*.[1] In this case a man induced a woman to serve him as house-keeper without wages for many years by an oral promise to leave her in his will a life estate in his land. He later signed a will to this effect, but it was not properly witnessed, and he died intestate. The woman sought specific performance of the oral agreement. Her action was dismissed by the House of Lords. The contention on her behalf to the effect that the promise to make a will in her favour should be treated as a representation which would operate by way of estoppel was repelled by the House of Lords who said, "The doctrine of estoppel by representation is applicable only to representation as to some state of facts alleged to be at the time actually in existence and not to promises *de futuro*, which, if binding at all must be binding as contracts."

The expression of an opinion as to belief is incapable of actual proof and as such is not a representation of fact.[2] But a statement of opinion as to certain circumstances may amount to a representation of facts. In *Smith* v. *Land and House Property Corporation*,[3] Bowen, L. J., at page 15 states, "It is often fallaciously assumed that a statement of opinion cannot involve a statement of facts in a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion . . . But if the facts are not equally well-known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of material facts, for he impliedly states that he knows facts which justify his opinion. Thus if it can be proved that the speaker did not hold the opinion or that a reasonable man possessing his knowledge could not honestly have held it, or that he alone was in a position to know the facts upon which the opinion must have been based, all these are a misrepresentation of facts for which there is a remedy.[4] Where the false statement has been embodied in a contract common law prevails to the exclusion of equity and the remedy varies according to the nature of representation, as the representation is either a condition or a warranty.[5] If it is a warranty the remedy is the recovery of damages. The contract itself cannot be repudiated, if it is a condition, the representee has, however, an election, for he may either treat the contract as still open or as discharged. If he prefers the former election, the condition becomes the warranty *ex post facto*, and he is limited to damages only but if he treats the contract as discharged he can refuse to perform any of the obligations restored upon himself and sue the other party for a total failure to perform the contract.[6] If the misrepresentation is not embodied in the contract it is called a mere representation and it creates no contractual obligation and hence it is not actionable at common law. The contract is not voidable and damages cannot be claimed on mere representations in the absence of fraud. The present position is that an innocent misrepresentation of fact, which does not form part of a contract but which form part of the inducement to enter into contract entitles the representee to rescission, but it does not entitle him to recover damages."[7]

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1. (1883) App. Cas. 467.
2. Bisset *v.* Wilkinson, (1927) A. C. 177.
3. (1884) 28 Ch. D 7.
4. Brown *v.* Rapheal, (1958) Ch. 336 : (1958) 2 All E. R. 79.
5. Pennsylvania Shipping Co. *v.* Compagnie de Navigation, (1936) 2 All E. R. 1167 at p. 1171.
6. Wallis Son and Wells *v.* Pratt, (1910) 2 K. B. 1003 at p. 1012, *per* Fletcher Moulton, L.J.; Behn *v.* Burness, (1863) B. & S. 75; *see* also Harling *v.* Eddy, (1951) 2 All E. R. 212 at p. 215, *per* Sir Raymond Evershed, M. R.
7. Harrison *v.* Knowles and Foster, (1918) 1 K. B. 608 at p. 610, *per* Scrutton, L. J.; Red Grave *v.* Hard, (1881) 20 Ch. 81; Gilchestor, etc. I td. *v.* Gomm, (1948) 1 All E. R. 493.

6. **"Courses open to representee."**—Where a contract is induced by false representations, the representee can sue for the equitable remedy of rescission. If it is his belief that the contract will enure to his benefit he can, of course, insist upon its performance, if it is still executory he can remain inactive and plead the false statement as a defence to a suit for specific performance, but if it is or may be detrimental to him in any manner, he may either notify the representor that he refuses to be bound by the contract or he may initiate proceeding for rescission. If, in the former case, his notification is ignored and he is driven to an action, the termination of the contract, if decreed by the Court, dates from the notification, not from the judgment at the action.[1]

The object of rescission is the cancellation of the contract and to petition for suit directions as may be necessary in the circumstances for restoration of both the parties to the position that they occupied prior to the contract. In the words of Bowen, L. J., in *Newbigging* v. *Adam*,[2] "there ought to be a giving back and taking back on both sides". The defendant must restore the advantages that he has obtained by the contract. These advantages are of two kinds, (1) benefits actually received, (2) burdens assumed by the plaintiffs. In other words, the defendant must restore all the benefits to the plaintiff and the plaintiff must make a similar restitution of anything received by him.

The right to rescind a contract whether fraudulent or innocent is lost if the representee has affirmed the contract, if *restitutio in integrum* is no longer possible, or if rescission would deprive a third party of a right in the subject-matter of the contract that he has acquired in good faith and for value. Further the right to rescind a contract for innocent as opposed to fraudulent misrepresentation is said to be lost if the contract has been followed by a completed conveyance or lease or the formal assignment of a chattel. These are the four limits to the right of rescission. As regards the first limit, re-affirmation, it must be remembered that the affirmation may be either explicit or implicit, explicit by declaration of the intention to proceed with the contract or reasonable inference from acts as conducts declaring such intention. Lapse of time without any step towards repudiation does not itself constitute affirmation, but it is evidence of affirmation. In *Clough* v. *London and North West Railway Co.*,[3] it was stated that when the lapse of time is great, it probably would in practice be treated as conclusive evidence of an election to recognize the contract. The second condition is that rescission must be total and not partial. As a consequence of rescission, the representee is entitled to recover all he may have paid or delivered under the contract. A necessary corollary is that he should himself make a restoration of anything he may have obtained under the contract. When a buyer, while he avoids the contract on the ground of misrepresentation, it retains the benefits under the contract, it would be inequitable and would be inconsistent with the object of rescission. In *Spense* v. *Crowford*,[4] Lord Wright says it pages 288-89, "Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched as he would be, if he both got back what he had parted and kept what he had received on return. The purpose of the relief is not punishment but compensation." The rule, therefore, is that the rescission cannot be enforced if events which have occurred since the contract

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1. Abraham S. S. Co. *v.* Westville Shipping Co., (1923) A. C. 773 at p. 785.
2. (1886) 34 Ch. D. 582 at p. 595.
3. (1871) L. R. 7 Exch. 26 at p. 35.
4. (1939) 3 All E. R. 271.

and in which the representee has participated make it impossible to restore the parties substantially to their original position for if a contract cannot be rescinded *in toto*, it ca not be rescinded at all.[1]

The third limit is that if the third party has acquired interest for value and in good faith in the subject-matter of the contract, the right of rescission is defeated.[2] A third party does not acquire an indefeasible title under a voidable contract unless he acts *bona fide* and also gives consideration.[3]

The fourth limit is that the right to rescind a contract for innocent as opposed to fraudulent misrepresentatton is said to be lost if the contract has been followed by a completed conveyance, or lease or the formal assignment of the chattel. This rule is laid down in *Seddon* v. *North Eastern Salt Co. Ltd.*[4] It was restated by McCardie, J., in *Armstrong* v. *Jackson*,[5] in the following words : "Now it is undoubted law that where a vendor has procured the sale of his property by misrepresentation, the purchaser can set aside the contract prior to completion, even though the misrepresentation be innocent. But if the contract has been executed by the completion of a conveyance lease or the formal assignment of a chattel, their rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor. When the contract is so completed fraud must be proved before rescission can be granted. This view is again supported in *Angel* v. *Fay*."[6] In this case the facts were these : "During the negotiation for a lease the lessor innocently represented that the drains were in good order, when in fact they were defective. The lessee took possession after execution of the lease, and occupied the premises for some months. It was held that since the transaction had been completed by the execution of the lease the right of rescission had been lost. This rule has been accepted as binding by Denning, J., in *Edler* v. *Aneback*.[7] The rule laid down in *Seddon* v. *North Eastern Salt Co. Ltd.*[8] has been the subject of different reactions in subsequent decisions. In *Lever Brothers Ltd.* v. *Bell*,[9] Scrutton, K. J., concluded his judgment with these words : "I reserve liberty to consider the decision in *Seddon* v. *North Eastern Salt Co. Ltd.*,[10] so far as it decides that executed contracts cannot be rescinded for innocent and material misrepresentation."

In *Solle* v. *Butcher*,[11] Denning, L. J., expressed the opinion that *Angel* v. *Fay*[12] was wrongly decided, but Jenkins, L. J., was not prepared to overrule it and regarded it as fatal to a claim for rescission on the ground of misrepresentation in the case. In *Leaf* v. *International Galleries*,[13] Evershed, M.R., though threw doubts over the correctness of the rule laid down in *Seddon* v. *North Eastern Salt Co. Ltd.*,[14] in view of *Solle* v. *Butcher*,[15] remarked that the rule had stood the test of time over 45 years, without being expressly overruled or altered by statute. Jenkins, L. J., approved the rule, though

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1. Sheffield & Co. *v.* Unwin, (1877) 2 Q. B. D. 214.
2. Clough *v.* London and North Western Ry. Co., (1871) L.R. 7 Exch. 26 at p. 35.
3. Scholerfield *v.* Templer, (1859) 4 De G. & J. 429.
4. (1905) 1 Ch. 326 ; *see* 55 L.Q.R. at pp. 90, 105.
5. (1917) 2 K. B. 822 at p. 825.
6. (1911) 1 K. B. 666.
7. (1950) 1 K. B. 359 at p 373: (1949) 2 All E. R. 692.
8. (1905) 1 Ch. 326 , *see* 55 L.Q.R. at pp. 99-105
9. (1931) 1 K. B. 557.
10. (19 5) 1 Ch. 326; *see* 55 L. Q. R. at pp. 99-105.
11. (1950) 1 K. B. 671 at pp. 695-96.
12. (1911) 1 K B. 666.
13. (1950) 2 K. B. 86 at p. 95 : (1950) 1 All E. R. 631 at p. 634.
14. (1905) 1 Ch. 326 ; *see* 55 L.Q.R. at pp. 90-105.
15. (1950) 1 K. B. 671.

stating that the rule had perhaps been too widely stated. Denning, L. J:, emphatically repeated his view expressed in his decision given in *Solle* v. *Butcher*[1] and *Curtis* v. *Chemical Cleaning and Dyeing Co.*[2] In *Long* v. *Loyd*,[3] the Court of Appeal adopted attitude on the question. From the review of the authorities referred to above it will be seen that the rule laid down in *Seddon* v. *North Eastern Salt Co. Ltd.*,[4] though doubted in some case, has stood the test of time for over 55 years and has neither been over-ruled, nor seriously challenged and is still the good law.

Misrepresentation as ground of rescission.

7. **English law as to the right of rescission.**—A representation, (*a*) contrary to facts (as distinguished on the one hand from matter of law, and on the other hand from a matter of mere opinion or intention) may be a ground for rescinding a contract; (*b*) it must be such as to induce the contract, ***dans locum contractui***;[5] (*c*) it must proceed from a party to the contract; (*d*) be part of the same transaction and (*e*) it is the party who is misled who has the right of rescission.[6]

8. **Misrepresentation as to a matter of fact.**—"A representa tion reli on as a ground for rescinding a contract must be contrary to fact, not a mere expression of opinion; it must proceed from a party to the contract, and be part of same transaction. Further, when all these conditions are satisfied it has to be considered what are the rights of the party misled.[7]

9. **Representation must be material.**—The representation in order to be effective for rescission must be material. It is difficult to give the exact meaning of the term "material fact." "It is anything which would affect the judgment of a reasonable man governing himself by the principles on which men in practice act in the kind of business in hand."[8]

10. **Kinds of misrepresentation**—Misrepresentation is of two kinds, being either fraudulent or innocent, that is to say, it may either amount to a wilful and conscious falsehood intended to deceive the representee or it may, on the contrary, be merely an honest mistake on the part of the representor, by which the representee is misled though not wilfully deceived. The first kind is called fraud or deceit; the second has no other recognized name than innocent misrepresentation.[9]

11. **Innocent misrepresentation is not actionable.**—"Innocent misrepresentation is not actionable, whatever its effect may be in invalidating the contract." "A man is under no general duty to be careful in making statements so as to avoid causing loss to others who choose to act upon them, and this is so even though he intended them so to act. His only legal duty is to refrain from wilfully and knowingly deceiving them. For his honest error he is not responsible, however negligent, in the absence of some special duty

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1. (1905) 1 Ch. 326; *see* 55 L. Q. R. at pp. 90-105.
2. (1951) 1 K. B. 805 at p. 810: (1951) 1 All E. R. 631, 634.
3. (1958) 1 W. L. R. 753: (1958) 2 All E. R. 402.
4. (1905) 1 Ch. 326.
5. Attwood *v.* Small, 49 R. R. 137; Smith *v.* Kay, 115 R. R. 383.
6. Pollock on *Contracts*, Ch. XI.
7. Pollock on *Contracts*, 13th (1951) Ed., p. 455.
8. 43 L. J. Q. B. 227 at p. 439.
9. Salmond and Williams on *Contracts*, 2nd Ed., p. 231.

Innocent representation as ground of rescission.

of care imposed on him by contract or otherwise in the particular case. They who choose to act in reliance on what another tells them to do so and in general at their own risk and not at his."[1]

Even an innocent misrepresentation is a ground of rescission.[2]

12. Representation as to matter of law. --There is authority at Common Law that misrepresentation made by one of the parties to an instrument as to its legal effect does not enable the other to avoid it.[3] And in equity there is no reason to suppose that the rule is otherwise, though the authorities only go to this extent, that no independent liability can arise from a misrepresentation of what is purely matter of law.[4] Note, however, that a representation as to the effect of an existing instrument may estop the party making it from setting up any other construction.[5] The rule probably does not apply to a deliberately fraudulent misstatement of law.[6] The circumstances and the position of the parties may well be such as to make it not imprudent or unreasonable for the person to whom the statement was made to rely on the knowledge of the person making it and it would certainly work injustice if it were held necessary to apply to such a case the maxim that every one is presumed to know the law * * * But there is no need to extend this to exceptional cases. At all events the rule applies only to pure propositions of law.[7]

In this connexion the remarks of Salmond and Williams[8] are worthy of perusal. In their learned commentary on the *Law of Cantracts* they have stated thus :

> "It is sometimes suggested that by the proposition in question fact is opposed to law, and that a misrepresentation of law is destitute of legal effect. This suggestion is, however, contrary to principle, and is thought to be unsupported by authority.
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> "It is certainly possible in fact for one man to deceive and defraud another by wilfully misrepresenting the law to him ; and there seems to be no reason why fraud of this kind should be subject of a special exemption from liability. It is true that every man is presumed to know the law, and that a plea of ignorance or mistake of law will not be listened to in the courts for any purpose. But to be ignorant of the law is surely a different thing from being wilfully deceived as to it."[9]

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1. Salmond and Williams on *Contracts*, 2nd Ed., p. 232, citing Derry *v.* Peek, (1889) 14 App. Cas. 337, a leading case decided by House of Lords.
2. Redgrave *v.* Hurd, (1881) 20 Ch. D. 1.
3. Pollock on *Contracts*, citing Lewis *v.* Jones, 28 R. R. 360.
4. Pollock on *Contracts*, citing Lewis *v.* Jones, 28 R. R. 360; Rashdall *v.* Ford, 35 L. J. Ch. 769 ; Beattie *v.* Lord Ebury, (1872) L. R. 7 Ch. 777 at p. 802 : 41 L. J. Ch. 804.
5. De Tachihatchef *v.* Salerni Coupling, (1932) 1 Ch. 330 : 101 L. J. Ch. 209.
6. Hirschfield *v.* London B. & S. Coast Ry. Co., (1876) 2 B. D. 1 : 46 L. J. Q. B. 1; Bowen, L. J., in West London Commercial Bank *v.* Kitson, (1884) 13 R. D. Div. at p. 363.
7. Pollock on *Contracts*, 11th Ed., pp. 463, 464.
8. Salmond and Williams on *Contracts*, 2nd Ed., p. 248, citing West London Commercial Bank *v.* Kitson, (1884) 13 Q.B D. 360; Englesfield *v.* Marquis of Londonderry, (1877) 4 Ch. D. 693 ; Derry *v.* Peek, (1889) 14 App. Cas. 337 and Beattie *v.* Lord Ebury, (1872) L.R. 7 Ch. 777.
9. Salmond and Williams on *Contracts*, 2nd Ed., pp. 248, 249.

13. A misrepresentation of motive or intention.—As stated above, a false representation of motive or intention, not amounting to or including an assertion of existing facts, is of no effect. Thus where the defendant brought a business on behalf of a partnership firm, the price was fixed at £ 4,500 on his representing that his partners were not willing to pay more. This representation was proved to be false by the fact that he debited them in account with a large price and kept the resulting difference in their shares of the purchase money for himself. Under the circumstances the vendor could not sue for deceit, as the statement amounted only to giving a false reason for not offering a higher price.[1]

14. Whether party misled or deceived was duty bound to make enquiries.—Where active misrepresentation has been made by the defendant it is not open to him in a suit either for damages or for setting aside the contract to say that the plaintiff complaining of the misrepresentation had the means of making inquiries. Therefore in an action for deceit in falsely representing the amount of the business done in a public house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he had thought proper.[2] "It needs no authority to show that a statement of what is merely a matter of opinion cannot bind the person making it as if he had warranted its correctness. And it is said that if a man makes assertions, as a matter of fact within his own knowledge, concerning that which is by its nature only matter of more or less probable repute and opinion, he is not legally answerable as for a deceit if the assertion turns out to be false."[3]

But it seems doubtful if this could be upheld at the present day. For surely the affirmation of thing as within my own knowledge implies the affirmation that I have peculiar means of knowledge, and if I have not such means then my statement is false and I shall justly be held answerable for it, unless indeed the special knowledge thus claimed is of a kind manifestly incredible.

15. Ambiguous statements are not necessarily false.—Statements which in themselves are ambiguous cannot be treated as fraudulent merely because they are false in some one of their possible senses. In such a case the party who complains of having been misled must satisfy the Court that he understood and acted on the statement in the sense in which it was false.[4]

"When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You at least, who have stated what is contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'."[5]

16. Misrepresentation must be such as to induce the contract.—If a party to a contract to whom misrepresentation has been made, has in fact not acted

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1. Vernon *v.* Keys, (1810) 11 R R. 499.
2. L. R. 2 H. L. 121, *per* Lord Chelmsford, citing Dobel *v.* Stervens, 27 R. R. 441.
3. Pollock on *Contracts*, p. 450 citing Hay Croft *v.* Creasy, 6 R. R. 380 : (1801) 2 East 92.
4. Pollock on *Contracts*, 11th Ed., p. 465, citing Smith *v.* Chadwick, 51 L. J. Ch. 597.
5. (1867) L. R. 2 H. L. 99 at p. 120 ; *see* also 51 L. J. Ch. 113.

on it, but has acted on his own judgment formed after verification, he cannot be allowed to rescind the contract on the ground of fraud or misrepresentation.[1]

"When the fact is not misrepresented but concealed (or rather not communicated)[2] and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so he may have no right to complain, because his ignorance of the fact is attributable to his own negligence."[3]

In *Higgens* v. *Smels*,[4] where the plaintiff sued for specific performance of an agreement to take lease of a lime-stone quarry the plaintiff knew that his statement was untrue, and the defendant had the means of learning the truth. The plaintiff made a distinct representation as to the quality of the lime-stone which was in fact false. He did not believe it to be false, but he had taken no pains to enquire whether it was true or not which he could easily have done. On the other hand, the defendant had not relied exclusively upon the statement of the plaintiff. He went to look at the stone himself. As he was not a lime-burner by trade, he could not be supposed to have trusted merely to what he saw being in fact not competent to judge of the quality of lime-stone. It was held that the plaintiff was not entitled for specific performance.

17. Misrepresentation must be by a party to the contract.—The misrepresentation in order to form a ground of rescission of a contract must be made by a party to the contract.

18. Representation made by an agent with the express authority of his principal or otherwise.—A false statement made by an agent with the express authority of his principal who knew it to be false, is obviously equivalent to a falsehood told by the principal himself. It makes no difference as against the principal whether the agent knows the statement to be false or not, but even in cases where the representation proceeded from the agent is false to or without the knowledge of the principal, or to the knowledge of the agent, the contract is liable to be rescinded. Thus the master is held liable for wrong representations made by the servant in the discharge of his duties.[5] The rule is applicable even if the principal is a corporation.[6] The directors, managers and other officers of the company acting in discharge of their duties as such officers, are for this purpose agents, and the companies are bound by their acts and conduct.[7]

Liability of master for servant's misrepresentation.

19. Right of affirmation or rescission.—A contract induced by fraud is not void, but voidable only at the option of the party defrauded. The party misled, therefore, can either affirm the contract or rescind it at his option.[8] It may be remembered that the "contract continues valid till the party

1. Farrar *v.* Churchill, (1890) 135 U. S. 609.
2. *See* L. R. 2 H. L. 339.
3. Pollock on *Contracts*, 11th Ed., p. 467, citing New Brunswick & Co. *v.* Conybeare. (1862) 9 H. L. C. 711 at p. 742 : 31 L. J. Ch. 297 : 131 R. R. 415.
4. 134 R. R. 304, *see* also 130 R. R. 394 and (1871) L. R. 6 Q. B. at p. 605.
5. Mackay *v.* Commercial Bank, etc., (1874) L. R. 5 P. C. 394 at p. 411 : 43 L J. P C. 31 ; *see* also 47 L.J P.C. 18.
6. L. R. 5 P. C 413-5.
7. Weir *v.* Barnet, (1877) 3 Ex. D. 32, affd. in C. A. nom. Weir *v.* Bell, 47 L. J. 704.
8. (1857) L. R. 2 H. L. 346 at pp. 375, 376 : (1941) 1 K. B. 295 : 110 C. J. K. B. 375 (C. A.).

defrauded has determined his election by avoiding it".[1] The right of rescission is finally lost, if the party entitled to rescind elects. instead of doing so, to confirm the contracts [2] Where the party misled has once waived his right of rescission subsequent discovery of further acts constituting "a new incident in the fraud" cannot revive it.[3] But it is not so where a distinct cause of rescission arises.[4]

20. **Rescission by act of the party**.—A contract may be rescinded by the act of a party on his electing to do so. He may intimate his election to the other party either by words or conduct, thereby causing automatic and immediate dissolution of the contract *ab initio*. Suit to enforce the contract is a conclusive proof of election not to rescind the contract.[5]

21. **Rescission by judicial decree**.—It is also open to the aggrieved party to apply to the Court and obtain a judicial decree in suit for rescission.

22. **Manifestation of election to rescind**.—As rescission is only an alternative remedy and is in derogation of the contract, it is said that a party who wishes to avail himself thereof must manifest his election in some way. The way in which election must be manifested may vary in different cases. The Uniform Sales Act provides that where delivery has been made, the buyer must notify the seller within a reasonable time his election to rescind for breach of warranty. Where the right to restitution exists, formal notice is certainly not always requisite, and bringing an action promptly for restitution is generally held sufficient.

It is also said that one who wishes to rescind must manifest his election to do so without undue delay, or the right will be lost. It seems probable, however, that this is true only where the party seeking rescission has received money or property which he must restore as a condition of relief, or where there is further performance due under the contract from the other party which in the absence of notice he might suppose would be accepted in spite of his prior breach. The cases, though containing broader statements generally fall in these classes. There seems no reason why a plaintiff who has paid a sum of money for the defendant's promise to give him a horse may not, after breach of his promise by the defendant wait any period short of that fixed by the Statute of Limitation before deciding whether to sue for the value of the horse or for the recovery of the price. Unsuccessful negotiations looking forward performance can hardly be considered inconsistent with a continuing right of rescission, and if a seller induces a buyer to retain defective goods for a further trial, a prompt manifestation of election after such further trial is sufficient. Where promptness of rescission is required, it would seem that the facts of each case should be considered by the jury to determine whether there has been unreasonable delay, unless perhaps where there is no dispute as to facts and the delay has been so inordinate or so short as to justify the Court holding as a matter of law whether rescission is timely.

Where a plaintiff seeks rescission and restitution, he must not only restore what he has received but his offer of restitution must be kept good.

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1. (1871) L. R. 7 Ex. 26.
2. Salmond and Williams on *Contracts*, 2nd Ed., p. 274 ; Pollock on *Contracts*.
3. Campbell *v.* Fleming, (1834) I. A. & E. 40 : 53 R. R. 194. This does not apply where a new and di tinct cause of rescission arises.
4. Gray *v.* Fowler, L. T. 8 Ex. 249 at p. 280 : 142 L. T. Ex. 161 : (1873) Ex. Ch. 29.
5. *Ibid*.

Election once made determines the plaintiff's rights. Judgment based on the assertion of one alternative, is generally a conclusive election. It has not infrequently been held, however, that a "plaintiff who brings an action under the Sales Act to recover the purchase price, based upon a theory of rescission, may be permitted to amend so as to allege and claim damages for breach of warranty".[1]

A binding election is constituted by any words or acts which unequivocally express or indicate his intention to rescind or to conform to the contract. If, for example, with full knowledge of his right to rescind, he proceeds with the performance of the contract, or demands performance from the other party, or exercises rights conferred on him by the contract, in such manner and in such circumstances as to indicate in an intention to stand upon the contract, he cannot afterwards rescind it.[2] But he cannot in this manner lose his right of rescission by acts done before he knows the facts which entitled him to rescind.[3]

In *Clough* v. *London and North Western Ry. Co.*,[4] Mellor, J., has clearly stated the law on the point thus :

> "The contract continues valid till the party defrauded has determined his election by avoiding it." He further states : "If it can be shown that the . . . . company have, at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined forever. But . . . . we think the party defrauded may keep the question open so long as he does nothing to affirm the contract . . . . .
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> "In such cases the question is, has the person on whom the fraud was practised having notice of the fraud elected not to avoid the contract, or has he . . . . to avoid it, or has he made no election ? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the . . . . interval, whilst he is deliberating, an innocent third party has acquired an interest in the property or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract and when the lapse of time is great it probably would in practice be treated as conclusive evidence to show that he has so determined."

23. Affirmation.—Affirmation must be complete and unequivocal.[5]

If the party defrauded elects to affirm the contract, he must affirm it in all its terms. Any acts or conduct which unequivocally treat the contract as subsisting, after the facts giving the right to rescind have come to the knowledge of the party, will have the same effect.[6]

24. Rescission as defence.—Rescission may be set up as a defence.[7]

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1. Williston on *Contracts*, Sec. 1469.
2. Salmond and Williams on *Contracts*, 2nd Ed., p. 274.
3. *Ibid.*
4. (1871) L. R. 7 Ex. 26 at pp. 34, 35.
5. Abram S. S. Co. *v.* Westville Shipping Co., (1923) A. C. 773.
6. Clough *v.* London and North Western Ry. Co., (1871) L. R. 7 Ex. 26 at p. 34 : 41 L. J. Ex. 17.
7. *Ibid.*

The contract cannot be rescinded where third persons have acquired rights under it for value. In other words, the rescissions of a contract cannot so operate as to destroy an intervening *jus tertii* in the subject-matter of the contract.[1] Property reclaimed on the rescission of the contract under which it passed must be reclaimed while still the property of the other party to the contract, or of an assignor not being a purchaser for value in good faith. If *X* is induced by fraud to sell his horse to *Y*, and *Y* sells it to *Z* who has no knowledge of the fraud, it is too late for *X* to rescind the contract and demand the return of the horse. His only remaining remedy is an action for damages against *Y* who defrauded him.[2]

Effect of right acquired by third person.

25. Change of position of parties.—The contract cannot be rescinded by the party misled or defrauded after the position of the parties has been changed so that the former state of things cannot be restored. "It is, I think, clear on principles of general justice that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put in *status quo*. It is a doctrine which has often been acted upon both at law and equity."[3] It has been said that "a contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all ; but the party complaining of the non-performance or the fraud, must resort to an action for damages."[4]

26. Misrepresentation must have been made as part of the same transaction.—The misrepresentation in order to be effective must have been made as part of the same transaction. A false representation made to a third person, or even to the party himself previously in the course of different transaction and for a different purpose, is no ground either for rescinding a contract or for maintaining an action of deceit.[5]

27. Delay in rescission.—The contract must be rescinded within a reasonable time, that is, before the lapse of a time, after the true state of things is known, so long that in the circumstances of the particular case the other party may fairly infer that the right of rescission is waived.

It is believed that the statement of the rule in some such form as this will reconcile the substance and language of all the leading authorities. On the one hand it is often said shat the election must be made within a reasonable time, while on the other hand it has several times been explained that lapse of time as such has no positive effect of its own. The Court is specially cautious in entertaining charges of fraud or misrepresentation brought forward after a long interval of time ; it will anxiously weigh the circumstances, and consider what evidence may have been lost in consequence of the time that has lapsed. But time alone is no bar to the right of rescinding a voidable transaction ; and the House of Lords, in one case set aside a purchase of a principal's estate by his agent in another name after the lapse of more than half a century, the facts having remained unknown to the principal and his representative for thirty-seven years. In a later case Lord Justice Turner stated expressly that "the two propositions of a bar by length

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1. Babcock *v.* Lawson, (1880) 5 Q. B. 284.
2. Salmond and Williams on *Contracts*, 2nd Ed., p. 273.
3. Erlanger *v.* New Sombrero Phosphate Co., (1878) 3 App. Cas. 1218.
4. Sheffield Nickel Co. *v.* Unwin, (1877) 2 Ch. B. D. 214 at p. 223.
5. *See* (1867) L. R. Sc. 145. where a shareholder of a bank purchased shares acting on a series of flourishing but untrue reports made by the directors previously.

of time and by acquiescence, are not distinct propositions." Length of time is evidence of acquiescence, but only if there is knowledge of the facts, for a man cannot be said to have acquiesced in what he did not know. Lord Campbell slightly qualified this by adding, that although it is for the party relying on acquiescence to prove the fact from which consent is to be inferred, it is easy to conceive cases in which, from great lapse of time, such facts might and ought to be presumed."

The rule has been laid down and acted upon by the Judicial Committee in this form: "In order that the remedy should be lost by laches or delay, it is if not universally, at all events ordinarily . . . . necessary that there should be sufficient knowledge of the facts constituting the title to relief."

To the same effect it has been said in the Supreme Court of the United States: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge." And the knowledge must be actual, not merely possible or potential: "the wrong-doer cannot make extreme vigilance and promptitude conditions of the rescission".

Acquiescence need not be manifested by any positive act; the question is whether there is sufficient evidence either from lapse of time or from other circumstances of "a fixed, deliberate and unbiased determination that the transaction should not be impeached". In estimating the weight to be given to length of time as evidence of acquiescence the nature of the property concerned is material. And other special circumstances may prevent lapse of time even after everything is known from being evidence of acquiescence; as when nothing is done for some years because the other party's affairs are in such a condition that proceedings against him would be fruitless. In questions of this kind it is not only time but the conduct of the parties which has to be considered.[1]

"Mere delay in making this election after knowledge of his rights does not itself amount to confirmation of the contract. There is no rule of law that he must rescind immediately or within a reasonable time. He is entitled to suspend his judgment and election, and to consult his own interest in the matter by reference to the event. But if he does so delay he runs certain risks and may in the result lose his right of rescission."[2] "We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay, the position even of the wrong-doer affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has determined."[3]

28. Time allowed for election of remedies for fraud.—It is generally said that a defrauded party must elect whether he will affirm the fraudulent transaction or rescind it. But a transaction though induced by fraud is not on that account void, it is only voidable. Consequently, if nothing

1. Pollock on *Contracts* (1946 Ed.), pp. 467-68.
2. Salmond and Williams on *Contracts*, 2nd Ed., p. 274.
3. (1871) L. R. 7 Ex. 26 at pp. 34, 35; *see* also L. R. 8 Ex. 205.

is done, the transaction is not avoided, and the rights of the parties will be fixed by the agreement which they made without any manifestation of election. The right to sue for deceit which is based on the assumption that the fraudulent transaction is to stand does not, therefore, require prompt action by the injured party. The Statute of Limitation alone prevents excessive delay, though it is obvious that delay in asserting a right of action for fraud will tend to show both that no fraud was perpetrated and, in connexion with other circumstances, that if there was fraud, any right of action that may have existed has been discharged. Setting a fraudulent bargain aside, however, is an alternative right given on equitable principles to the injured party, and, therefore, if this remedy is desired, it must be sought with reasonable promptness after the fraud has been discovered. But "The question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind ; the immediate consideration being whether the period has been long enough to result in prejudice to the other party." In the case of an executory contract a refusal to perform any obligation thereunder and the defence of an action sought thereon are all that the defrauded party can do by way of asserting his right to disaffirm the contract, and, unless his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary first asserts his claim by action. The failure of the vendee to disaffirm the contract might sometimes prevent the vendor from selling to another.

The fact that the defrauded party has broken the contract before discovery of the fraud will not deprive him of his right to damages for the fraud in inducing him to enter into it, although the contract has been terminated by the fraudulent party on account of the breach; nor will it prevent the exercise of his power of avoidance if the requisite restoration of the former status is possible and it is no defence to an action for deceit that part of the defrauded party's performance is not yet due. But where the right to rescission has been lost a breach of the conduct is not nullified by the fraud.

Where the delay has permitted the rights of third parties to intervene, rescission will generally be denied, but under some circumstances prompt avoidance is not ineffective merely because of the intervention of rights of other parties.[1]

29. "Rescind and rescission."—The words "rescind" and "rescission" used in the section have been used in their ordinary and general sense and have no special significance. In common parlance the word "rescind" means "to abrogate", "to annul" and "to revoke" and "to cancel" and in legal terminology the expression has been understood to mean and convey the same sense. It has been used in connexion with and applied to a variety of transactions such as transfers and contracts. The expression "rescission" therefore in relation to legal transactions, may mean "termination, abrogation, annulment, avoidance, discharge, cancellation and revocation".

(1) It is sometimes assumed that rescission of a contract necessarily involves a restoration of the previous status with restitution of anything

1. Williston on *Contracts*, Sec. 1526

received by either party, or its value. This is not necessarily the case where rescission is by mutual assent; and in many cases where a partly reformed contract is rescinded by the act of one party for the fault of the other, restoration of what has been received, or its value, is not a condition qualifying the right to rescind.

(2) It is sometimes assumed, specially in the English books, that contracts unless they fall within those classed as voidable, cannot be abrogated or rescinded by one party—that mutual assent is necessary—and in order to enable the Court to reach the desired result a material breach or repudiation is treated by fiction as it were an offer to rescind. In fact, under appropriate circumstances, a contract may be terminated not only by mutual consent, but by the act of one party, or by the Court, and the words "rescind" or "rescission" as applied in any of these cases should not give rise to misunderstanding, though other words may be more commonly used in some classes of cases.

In the Restatement of Contracts the words in question are used chiefly where the termination of the contractual relation is by mutual consent. "Avoid" or "discharge" or other equivalents are generally, though not always used where the relation is terminated in other ways.

(3) Under a usage originating in the English books subsequent to the development of the doctrine of anticipatory breach, "rescind" and "rescission" are used where the contract has not been terminated but where one party has acquired an excuse for non-performance because of a breach or repudiation by the other. This usage violates the plain meaning of the words. It should rather be said that the contract still exists, and that one party has a defence.

(4) Parties, themselves, frequently use the words inaccurately, and neither in a contract nor in parol statements by them is it to be assumed as matter of course that they are renouncing all rights on the contract merely because of the use of "rescind." "rescission," or similar words.[1]

30. "**Any person interested in a contract.**"—This expression means that the person, who is entitled to institute for the rescission of the contract under this section is not only a party to the contract but even a third person, who is interested in the performance of the contract or who may derive benefits under it. The words "any person interested" mean not only the party to a contract but also include privy, heirs, legal representatives, assignees and the like. Patkar, J., in *Shravan* v *Kashi Ram*,[2] says: "The law is clearly laid down in Halsbury's *Laws of England*, Vol. XV, p. 106, para. 209, and the cases therein cited bear out the contention that a suit can be brought by a legal representative to set aside a document which has been induced by fraud or undue influence. I may refer to the cases of *Gresley* v. *Monsley*,[3] *Holman* v. *Loynees*,[4] *Marle* v. *Laughman*[5] and *Allcard* v. *Skinner*.[6] To the same effect is the case of *Twyeross* v. *Grant*.[7] I think that Sec. 35 (old) of the Specific Relief Act also supports this contention." Section 35 (old) says:

> "any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court.

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1. Williston on *Contracts*. Sec. 1454-A.
2. A. I. R. 1927 Bom. 384 at p. 387.
3. (1859) 28 L. J. Ch. 620 : 4 De. G. & J. 78: 7 W. R. 427 : 5 Jur. (N.S.) 583.
4. (1854) 4 De. G. M. & G. 270 : 23 L. J. Ch. 529 : 2 W. R. 205 : 18 Jur. 839.
5. (1893) 1 Ch. 736 : 62 L. J. Ch. 515 : 68 L. T. 619 : 3 R. 592.
6. (1887) 36 Ch. D. 145: 56 L. J. Ch. 1952 : 36 W. R. 251 : 57 L. T. 61.
7. (1878) 4 C. P. D. 40 : 48 L.J.P.C. 1 : 39 L. T. 616: 27 W. R. 87.

"The wording of the section is not that a party to a contract may sue to have it rescinded, but any person who is interested in a contract in writing may do so. I think the heir is a person interested in a contract in writing which is sought to be set aside."

31. **Rescission—How it can be obtained.**—A rescission of a contract can be obtained only by a suit by a person interested in it. It is only the plaintiff who can obtain the rescission of the contract, but the question is whether rescission of a contract can be obtained by means of defence. From the perusal of the section it will be seen that it is the plaintiff, who sues for the rescission of the contract, who can get it adjudged so. The defendant can also set up in defence the contract, and yet get it adjudged, rescinded in the same case or he may claim rescission in a suit for specific performance of the contract.[1]

32. **Rescission may be adjudged.**—It is within the discretion of the Court to adjudge a contract as rescinded on the facts placed before it. But the discretion vested in the Court is not arbitrary, but is judicial, it has to be exercised in accordance with the principles laid down in this section. Thus where under a contract a third party has acquired interest in the subject of the contract in good faith and for valuable consideration the Court should refuse rescission of the contract, because the intervention of the third party had altered the position of the parties and has made their restoration to the original position impossible or impracticable.[2]

33. **Rescission of a contract.**—A plaintiff suing for specific performance of the contract can alternatively sue for the rescission of the contract but the converse is not provided. It is therefore not open to a plaintiff to sue for rescission of the agreement and in the alternative sue for specific performance. Section 35 (Sec. 27 new) of the Specific Relief Act, 1877, states the principles upon which the rescission of a contract may be adjudged. But there is no provision in this section or any other section of the Act that a plaintiff suing for rescission of the agreement may sue in the alternative for specific performance. The omission is deliberate and the intention of the Act is that no such alternative prayer is open to the plaintiff.[3]

Unless a time-limit is given in the decree for specific performance for payment of purchase money or performing other matters which may be ancillary in connexion with the decree for specific performance within certain time, no question could at all arise regarding the rescission of the contract and the decree. It is therefore quite clear that although such power of fixing time-limit is not expressly provided in Sec. 35 (1) of the old Act, it must be deemed to have been there by necessary implication. Where the Court did give a time-limit, it is not open to the decree-holder to come at any stage and at any time to pay the money and ask for enforcement of the decree for specific performance of the contract. It may be that even after fixing the time-limit, the Court has power to enlarge such time, but, that again would depend upon the attitude that may be taken by the party in whose favour such decree for specific performance is passed.[4]

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1. Baroda *v.* Gegendra, 9 C. L. J. 383; Hem Chandra *v.* Lalit Mohan, 16 C.W.N. 715; Abdul Qadir *v.* Ali Mia, 15 C. L. J. 640; Eastern Mortgagee and Agency Co. *v.* Rabal, 3 C. L. J. 260.
2. Talib *v.* Ameer, 22 W. R. 529; Fry, *Specific Performance*, Secs. 736-46.
3. Danegi Gurumurty *v.* Raghu Padhan, A. I. R. 1967 Orissa 68.
4. Pankoj Kumar Bhattacharjee *v.* Manmatha Nath Vidyabhushan Bhattacharjee, A.I.R. 1973 Cal. 439 at p. 440.

In the above-noted case, even after the application was made by the vendor showing that under the terms of the decree for specific performance there was rescission of the decree for non-payment of the purchase money within the time-limit fixed by the Court, the decree-holder did not make any application at any stage either at the Trial Court or even at the first Appellate Court for enlargement of time to enable him to deposit the balance of purchase money. It was held that the order rescinding the contract and the decree for specific performance based thereon was rightly made.

34. Rescission and cancellation—Distinction between.—There is a distinction between "rescission" and "cancellation", their meanings and their implications. The relief of cancellation is available alike in void and voidable documents, while rescission can be claimed in only voidable contract. It is a matter of no importance that the nullity is apparent or inherent, latent or patent. Bacon, V. C., in *Dunnes* v. *Woods*,[1] refers to certain cases in which grounds have been mentioned to obtain rescission of the contract. It was stated therein that it was not obligatory to the vendor to give notice to the purchaser that he will rescind the contract, unless the requisition and objections are withdrawn. He may rescind at once.

35. Rescission of contract—Form of application.—There is no statutory or standardized form of application for rescission of the contract or decree.[2]

36. "Terminable."—A terminable contract is one which contains a stipulation that in a certain event it may be put an end to. It is a contract which may be put an end to by one or both of the parties upon certain terms without a change in the circumstances or upon the happening of certain event or on the default by one of the parties in the performance of the contract. In the words of Fry a contract is terminable "where it reserves to one or both of the contracting parties a power in certain specified circumstances to rescind it".[3] The excepted risk of a charter party is an illustration in point.[4] A vendor of immoveable property may agree that if he fails to show a good title within a specified period, the bargain will come to an end.[5] It is not rare that a vendee takes immoveable property subject to the approval of his solicitors. In such a case the vendee is at perfect liberty to rescind the contract in the case of disapproval by the solicitors.[6] The vendor can enforce the agreement only if he proves either—(*i*) that solicitors had approved of the title, or (*ii*) there was such a title tendered as made it unreasonable for an ordinary person not to approve of it.[7] The right of rescission, in case of a gift on the part of the donor is circumscribed by the same set of circumstances as would operate to invalidate a contract for sale, mortgage, etc.[8] As to what is not terminable contract, *see* the undermentioned case.[9]

37. Decree under this section.—The Code of Civil Procedure does not prescribe any particular form for the drawing up of a decree for specific

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1. (1884) 27 Ch. D. 172 at p. 178.
2. Pankoj Kumar Bhattacharjee *v.* Manmatha Nath Vidyabhushan Bhattacharjee, A.I.R. 1973 Cal. 439 at p. 440.
3. Fry, Sec. 1045; Collett. Sec. 35.
4. Goipel *v.* Smith. (1872) 7 Q. B. 404; Nugent *v.* Smith, (1876) 1 C. P. D. 423.
5. Whitbreed & Co. *v.* Whatt, (1901) 1 Ch. 911: (1902) 1 Ch. 835.
6. Sree Gopal *v.* Ram, I.L.R. 8 Cal. 856: 12 Ch.R. 125; Treacher & Co. *v.* Mohd. Ally Adamji. I. L. R. 35 Bom. 1010.
7. Treacher & Co. *v.* Mohd. Ally Adamji, *supra.*
8. Beharilal *v.* Sindubala, I. L. R. 48 Cal. 434 : 41 I. C. 878 : 27 C. L. J. 497 : 2 C. W. N. 210.
9. Lakshmi Das *v.* Kissenlal. 11 C. W. N. 147 at p. 153 : 4 C. L. J. 537, Collett, 276, 277.

performance as it does in the case of some other decrees, nor does the Code of Civil Procedure indicate the contents of such a decree as it does in case of a decree in a prescription suit as provided for by Order XX, rule 11, C. P. C. Section 27 (new) of the Specific Relief Act provides that in the event of a party to the decree being in default, another party could either file a suit for the rescission of a contract in which specific performance had been granted or he could even apply to that Court which could then rescind the decree. It is no doubt usual that the courts sometimes pass a decree for specific performance fixing a time during which the plaintiff is enjoined to pay consideration and thereby get a proper sale in respect of a property. But this is more for purposes of convenience than in compliance with any provision of law. In *Someshwar Dayal* v. *Widow of Lalman Shah*,[1] B. Mukerji, J., while referring to the following decisions in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*,[2] *Rama Bhatlu* v. *Annayya Bhatlu*,[3] *Abdul Rahim* v. *Tamij Uddin*,[4] and *Gokul Prasad* v. *Fattelal*[5] observed: "a decree which is made in a suit for specific performance is not a final decree of the character that completely debars the Court from extending the period fixed by it, for, in our opinion, the decree in such a suit partakes of the nature of a contract and unless it is rescinded or performed it subsists and therefore the right of the Court to make the extension of time for payment also subsists." Reliance was placed on a ruling given in *Dori Lal* v. *Mst. Jamaga*,[6] for the proposition that a court had no power to extend the time fixed by it for the deposit of money in a suit for specific performance. The Bench declined to follow the rule of the Court laid down in that case on the ground that in *Dori Lal* v. *Mst. Jamaga*,[7] Sec. 35 of the Specific Relief Act, 1877, was overlooked and its effect ignored.

38. Effect of decree.—The true effect of the decree passed under Sec. 27 (new) of the Specific Relief Act is that the Court which passed the decree for specific performance of contract is given power to rescind the contract and consequently set aside the decree which it had passed earlier if the successful plaintiff fails to comply with the terms of the decree. The net result is that a suit, which is once decreed can be dismissed again if the Court finds that the condition in the decree has not been complied with.[8]

Where a vendor transfers his property without disclosing the material defects to the vendee and the vendor is aware of such defects, while the vendee is not and such defects cannot be discovered on the part of the vendee with ordinary care and inquiry, then such an omission or failure on the part of the vendor must be held to be fraudulent and when the vendee is deprived of the possession of the property purchased by him as a consequence of such material defects, then it is open to him to bring a suit against the seller for the return of the purchase money which the vendee has paid to the seller ; he may also claim interest by way of damages on such purchase money. He may pursue an independent remedy by way

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1. A. I. R. 1958 All. 488 at p. 491.
2. A. I. R. 1923 Mad. 284 : I. L. R. 46 Mad. 148.
3. A. I. R. 1926 Mad. 144 : 90 I. C. 605.
4. A. I. R. 1933 Cal. 580 : 145 I. C. 381.
5. A. I. R. 1946 Nag. 29: I. L. R. (1945) Nag. 924.
6. A. I. R. 1923 Oudh 16 : 72 Ind. App. 879.
7. *Ibid.*
8. *See* Narayan Gangadhar Deshpande *v.* Rango Krishna Dixit, A. I. R. 1960 Mys. 175 at p. 176.

of a suit for rescission of the sale-deed as well as damages. These are the various remedies available to the vendee in a case like this.[1]

But it would be going too far to lay down an absolute rule of law that a suit for return of the purchase money on breach of warranty of title would be incapable of being maintained in law without suing for the cancellation of the sale-deed.[2]

39. Right to rescind decree.—Section 35 of the Specific Relief Act, 1877 (corresponding to Sec. 27 of the new Act) provided that where a decree for specific performance of a contract of sale or of a contract to take a lease has been made and the purchaser or lessee makes default in payment of the purchase money, which the Court has ordered him to pay, the decree may be rescinded as regards the party in default either by a suit or by an application. The right to rescind the decree under the section can arise only if the purchaser makes default in paying the purchase money ordered to be paid under the decree. Before the lapse of a reasonable time from the date of the decree, the appellant can have no right to have the decree rescinded on the ground of default of the purchaser. To put it in other words, the right of the appellant to have the decree rescinded is dependent upon the default of the purchaser in paying the purchase money.[3]

The mere right to take advantage of the provisions of an Act is not an accrued right.[4]

New	Old
28. Rescission in certain circumstances of contracts for the sale or lease of immoveable property, the specific performance of which has been decreed.—(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immoveable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money or other sum which the Court has ordered	**35.** (*c*) Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums, which the Court has ordered him to pay. In the same case the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

1. Champalal *v.* Roopa, A. I. R. 1963 Raj. 38 at p. 41.
2. *Ibid.*; *see* also Mst. Nanhi *v.* Mst. Ketki, A. I. R. 1932 All. 224: 1932 A. L. J. 69; Nand Ram *v.* Purshottam Das, A.I.R. 1933 All. 203 : 1933 A. L. J. 201 ; Ouseph Varkhey *v.* Ouseph Chacko, A. I. R. 1953 T. C. 236; Udho Das *v.* Mehr Buksh, A. I. R. 1933 Lah. 262 ; 34 Punj. L. R. 714; Mohd. Siddiq *v.* Li Kan Shoo, A. I. R. 1925 Rang. 372; Allahdino *v.* Udhoomal, A. I. R. 1942 Sind 81.
3. Hungerford Investment Trust Ltd. *v.* Haridas Mundhra, A. I. R. 1972 S. C. 1826 at p. 1832 : 1972 S.C.D. 378.
4. *See* Abbott *v.* The Minister for Lands, 1895 A. C. 425.

New	Old
him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.	
(2) Where a contract is rescinded under sub-section (1), the Court—	When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.
(*a*) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and	
(*b*) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connexion with the contract.	
(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within	

the period referred to in sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely :

(*a*) the execution of a proper conveyance or lease by the vendor or lessor ;

(*b*) the delivery of possession, or partition, and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The cost of any proceedings under this section shall be in the discretion of the Court.

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1. Legislative changes.—This is a new section. The sub-section (*c*) of Sec. 35 of the repealed Act has been enacted in the modified form in the shape of the present Sec. 28 (1) of the new Act. In fact the present Sec. 28 has been enacted in such a manner that it appears that this new section assumed an entirely different shape and garb and this change is not merely in word but in substance also so as to make the section look entirely a new one.

Sub-sections (2), (3), (4) and (5) of this Sec. 28 have been newly inserted.

2. Reasons for the change.—Suggesting the reasons for the change in the old Sec. 35 (*c*) and the latter part of Sec. 35 of the repealed Act, the Law

Commission of India, in their Ninth Report on the Specific Relief Act, 1877, at pages 41, 42 and 43 says :

> "In England, where the defendant in an action for specific performance fails to comply with a judgment against him, the plaintiff may at his election, move in the action to have the contract rescinded.[1] This right extends to the vendor and the vendee. The Indian courts have taken the same view.[2] In all probability, the English rule was sought to be adopted, without modification,[3] in the third paragraph of old Sec. 35 (*c*) of our Specific Relief Act. But, as has been pointed out by Collett,[4] as well as in the cases mentioned below,[5] the words, 'in the same case' are not happily chosen and 'it is not at all clear to what these words in the same case refer whether to the second paragraph or the first paragraph of old Cl. (*c*)'.[6] The question arises, whether the vendor or lessor should have the option of bringing a separate suit for rescission, in a case coming under old Cl. (*c*). As the section stands, he has the option of bringing a separate suit under the first paragraph of old Sec. 35 or to apply for rescission in the same suit under the third paragraph of the section. But, as Banerji[7] observes, there is no reason why the vendor or lessor should be allowed to harass the other party in a separate proceeding when the remedy of rescission can be made available in the same suit. We, therefore, propose a new section[8] which will enable the vendor or lessor to apply for rescission in the suit for specific performance, if the purchaser or lessee fails to comply with the terms of the decree. In view of this new provision, Cl. (*c*) of old Sec. 35 and the two succeeding paragraphs become unnecessary and should be omitted. While Sec. 35 (*c*) deals with the consequences which will follow from the default of the purchaser or lessee to comply with the terms of a decree for specific performance, there is no provision in the Act as to what would happen if the purchaser or lessee makes the payments due from him but the vendor or lessor does not comply with the decree by executing a conveyance or how the purchaser or lessee should obtain possession of the property. At present, the latter contingency is dealt with in proceedings for the execution of the decree. But if in the former case, the vendor or lessor may obtain relief by way of rescission in the same suit, there is no reason why the other party may not have his reliefs against the vendor or lessor in the suit itself, inasmuch as the principle of avoidance of multiplicity of proceedings is equally applicable to both cases. We have already provided[9] that consequential reliefs like possession or partition claimed in the suit for specific performance itself are included in the decree. We are now speaking of the enforcement of such reliefs included in the decree which are at present available only by executing the decree, in separate execution proceedings. We recommend[10] that complete relief in terms of the decree in a suit for specific performance shall be available by application in the suit itself, without having to resort to separate execution proceedings and that appropriate provisions

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1. Fry 6th Ed., pp. 546-7.
2. Akshayalingam *v* Avayambala Ammal, A. I. R. 1933 Mad. 386.
3. Ramji *v.* Chinai, 82 I. C. 73 ; Kurpal *v.* Shamrao, A. I R. 1923 Bom. 211.
4. *Specific Relief Act*, 3rd Ed., p. 277.
5. Ramji *v.* Chinai, *supra*, *per* Macleod C. J., in Kurpal *v.* Shamrao, 1. L. R. 47 Bom. 589 at p. 592.
6. *Per* Macleod, C.J., in Kurpal *v* Shamrao, *supra*
7. *Law of Specific Relief*, 2nd Ed., pp. 468-70.
8. Section 26, App. I.
9. Section 19, App. I.
10. *Cf*. Sec. 26 (3), App. I.

should be made in the Code of Civil Procedure enabling such applications to be made and orders thereon and also for appeals.

"There are certain well-known limitations to the equitable right to rescind which are not incorporated into the existing Sec. 35, but which have been applied by our courts, on general considerations. For the sake of clarity and comprehensiveness, we may codify and include these principles in Sec. 35, taking care not to make the proposition rigid so as to restrict the powers of the courts to do justice. The Court may refuse to rescind a contract in any of the following cases :

(*a*) Where the plaintiff has elected, whether expressly of impliedly, to abide by the contract ;[1]

(*b*) where owing to the change of circumstances which has taken place since the making of the contract (not due to any act of the defendant himself) the parties cannot be substantially restored to the position in which they stood when the contract was made ;[2]

(*c*) where the contract is of such a nature that it is not severable[3] and a part thereof is sought to be rescinded ;

(*d*) where third parties have, during the subsistence of the contract, *bona fide* acquired rights under it without notice of the facts which make the contract liable to be prescribed.[4]

"It is proposed that the above propositions be included in a new sub-section to Sec. 35.

"The requirement of 'writing' at the beginning of Sec. 35 has long been omitted by the Transfer of Property Act, 1882, as regards the territories where that Act is in force. We have made this clear by inserting an explanation at the end of the section."

Speaking on the insertion of this new section for the old Sec. 35 (*c*) of the repealed Specific Relief Act, it was stated in the General Notes on Cl. 27 which deals with the present Sec. 28 of this Act :

"*Clause* 27. This is new. Under Sec. 35 (*c*) (old) of the existing Act, the vendor or lessor has the option of bringing a separate suit for the rescission of a contract or to apply for rescission in the same suit under the third paragraph of the section, but there is no reason why the vendor or lessor should be allowed to harass the other party in a separate proceeding when the relief of rescission can be made available in the same suit. At the same time suitable reliefs should also be made available to the purchaser or lessee when he makes the payments due, but the vendor or lessor does not comply with the terms of the decree. The new clause therefore seeks to provide complete relief to both the parties in terms of the decree for specific performance in the same suit with ut having to resort to separate proceedings."

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1. Fry, 6th Ed., p. 348; Clough *v.* L.N.W. Ry. Co., (1871) L. R. 7 Ex. 26 at p. 34; Rangaswami Gounden *v.* Nathiappa Gounden, I.L.R. (1918) 42 Mad. 523 at p. 538 (P. C.), Ramgowda *v.* Bhausaheb, I.L.R. 52 Bom. 1 (P. C.).
2. Fry, pp. 346-52 ; Hardei *v.* Bhagwan Singh, 24 C W. N. 105.
3. Ohid *v.* Dorshu, A. I. R. 1926 Cal. 959, Inder *v.* Campbell, I.L.R. 7 Cal. 474.
4. Fry, 6th Ed., p. 348, Clough *v.* L. N. W. Ry. Co., (1871) L. R. 7 Ex. 26 at p. 35.

On a construction of sub-section (1) of Sec. 28 of the Specific Relief Act, 1963, it is clear that it is confined only to sale or lease of immoveable property and does not cover agreements for sale of moveables.[1]

3. **Scope.**—This section is new. It has been enacted with a view to provide a remedy in cases the plaintiff in whose favour the decree for specific performance of contract for sale or lease of immoveable property has been passed, but who does not pay within the time specified in the decree or within such further time the Court may allow the purchase money or any other sum which the Court ordered him to pay as a condition for the enforcement of the decree. It says that in such cases the vendor or the lessor will have a right to approach the Court which passed the decree and apply in the same suit, in which the decree was passed to rescind the contract so far as it related to the party in default or the whole of it, as the justice of the case requires. Under Sec. 28 of the Specific Relief Act, 1963, at the time of passing a decree for specific performance of a contract for the sale of immoveable property, the Court has undoubtedly the power to direct payment by the purchaser of the price or other sum by a fixed date. The said section, however, proceeds to lay down that, in such a case, if the purchaser fails to pay the amount within the time fixed by the decree for specific performance, the vendor could apply in the same suit to have the contract rescinded and, on such application, the Court may order rescission of that contract and proceed to give consequential directions for the restoration of any benefits received thereunder.

Self-operative final decree.

A decree is not a decree under Sec. 28(1) of the Specific Relief Act, 1963, if it is a self-operative final decree which provides in express terms that if the payment is not made within the time fixed the suit is to stand dismissed.

In the case of such a decree, it is impossible to apply the provisions of Sec. 28 of the Specific Relief Act, 1963, which, for instance, provide for a subsequent application for the rescission of the contract itself, and for certain consequential orders.[2]

A Division Bench of the Bombay High Court consisting of S. T. Desai and Datar, JJ., by their judgment dated 19th August, 1959, held in the said case[3] that the failure on the part of the plaintiffs to carry out the terms of the decree had automatically resulted in the disposal of the suit and the Court had become *functus officio* and had no power to grant an extension of the time fixed by the decree. It is true that in a subsequent case the Supreme Court has in the case of *Mahanth Ram* v. *Ganga Das*,[4] taken the view that Sec. 148 of the Code of Civil Procedure empowers the Court to deal with events that might arise subsequent to an order, for the purpose of enlarging time for payment even though it had been peremptorily fixed, but in that connexion the Supreme Court observed as follows :

> "Such procedural orders, though peremptory (conditional decrees apart) are, in essence, *in terrorem*, so that dilatory litigants might

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1. Hungerford Investment Trust Ltd. *v.* Haridas Mundhra, A. I. R. 1971 Cal. 182 at p. 193 : 75 C.W.N. 517.
2. Bhujangrao Ganpati *v.* Sheshrao Rajaram, A. I. R. 1974 Bom. 104 at p. 105 : 75 Bom. L. R. 772.
3. Civil Application No. 3964 o 1958.
4. A.I.R. 1961 S. C. 882.

> put themselves in order and avoid delay. They do not, however, completely estop a court from taking note of events and circumstances which happen within the time fixed."

It is, therefore, quite clear that whilst laying down, in effect, that Sec. 148 must be liberally coustrued, the Supreme Court has excluded from its ambit decree which provides in express terms that if the payment is not made within the time fixed the suit is to stand dismissed. The decision of S. T. Desai and Datar, JJ., referred to above is perfectly in consonance with the view taken by the Supreme Court in *Mahanth Ram* v. *Ganga Das*,[1] just cited and is, therefore, still good law.[2]

Section 28 of the Specific Relief Act, 1963, provides only for an application for rescission of a decree for specific performance for the sale or lease of immoveable property, no application to rescind a decree for specific performance of an agreement to sell moveables would lie under that section.[3]

For application of Sec. 28 of the Act it is immaterial whether a decree for specific performance of the agreement is passed in a suit for specific performance or in a suit for mere recovery of money or any other suit. The Court in considering an application is not entitled to go behind the decree. It has to look into the decree and if it finds that it is a decree for specific performance in a suit, then if the other conditions of the section are satisfied, it may order rescission of the contract either as regards the party in default or altogether as the justice of the case may require. The contention that the petitioner has to file a separate suit to work out his rights under the terms of the decree, is untenable having regard to the provisions of Sec. 28 (1) of the Act. The decree being one for specific performance, before granting the relief prayed for under Sec. 28 (1) of the Act, all that the Court has to see is whether the purchaser has committed any default.[4]

Sub-section (2) of the section provides that where the contract has been rescinded either wholly or in part, in accordance with the provisions of sub-section (1) of this section, the following consequences will ensue : (1) The Court shall, while rescinding the contract further order the purchaser or the lessee if he has obtained the possession under the contract to restore the possession of the same to the vendor or the lessor. (2) The Court may also direct the purchaser or lessee to pay to the vendor or lessor, all the rents and profits which have accrued in respect of the property purchased or leased from the date of the possession to the date of the restoration of possession to the vendor or the lessor. It may also direct the vendor or the lessor to refund any sum he may have received from the purchaser or lessee as earnest money or any other sum as deposit in connexion with the contract.

Sub-section (3) of the section enacts that where the purchaser or the lessee complies with the terms and conditions of the decree for specific performance of the contract within the time and the manner laid down in sub-section (1) of this section, the Court may on an application in the same suit by the purchaser or lessee give him any or all the reliefs detailed below:

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1. A. I. R. 1961 S. C. 882.
2. Bhujangrao Ganpati *v.* Shesharao Rajaram, A.I.R. 1974 Bom. 104 at pp. 107-6 : 75 Bom. L. R. 772.
3. Hungerford Investment Trust Ltd. *v.* Haridas Mundhra, A. I. R. 1972 S. C. 1826 at p. 1832 : 1972 S. C. D. 378.
4. Sathamraju Suryanarayana *v.* Thummeti Sydaiah, (1972) 1 Andh. W. R. 367 at p. 369.

(1) The Court may order the vendor or lessor to execute proper instrument or conveyance in favour of the purchaser or the lessee. (2) The Court may order the delivery of possession or partition or separate possession of the property mentioned in the contract by the vendor or lessor, on the proper execution of the deed of conveyance. Sub-section (4) of the section specifically bars the institution of a separate suit in respect of the relief or reliefs claimable under this section by the vendor or the purchaser or the vendee or the lessee.

The costs of the proceedings under this section has been left at the discretion of the Court.

4. Applicability of the section.—On a construction of sub-section (1) of this section, it is clear that it is confined only to sale or lease of immoveable property and does not cover agreements for sale of moveables. The use of the article "the" before the word "sale" is significant and that makes it all the more clear that sub-section (1) of Sec 28 is confined only to a contract for the sale of immoveable property.[1] In *Mrs. R. S. Puglar* v. *Sachindra Nath Barik*,[2] the appeal arose out of an order made in an application for setting aside a decree for specific performance and also for a declaration that the decree-holder was no longer entitled to specific performance of the contract for sale of a premises. It was held that before the Court could make an order under Cl. (*c*) of Sec. 35 of the old Act, it must be satisfied that the purchaser had made default in payment of the purchase money or any other sum which the Court had ordered him to pay and that there could be no default unless a time-limit had been fixed or an order had been made directing something to be done within that time. It was also held that the expression "in the same case", in the 1st paragraph of Sec. 35 of the old Act could only refer to the case specified in Cl. (*c*), i.e., where a purchaser or lessee made default in payment of the purchase money or other sums which the Court had ordered him to pay. In order to appreciate this contention it is necessary to set out the last paragraph of Sec. 35 of the old Act which is as follows: "In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require".

The decision mentioned above is an authority for the proposition that there could be no default unless a time had been fixed or an order made directing something to be done within that time and also for the proposition that unless there was such a default an application for rescission in the suit could not be maintained. Default in payment of the purchase money or other sums ordered by the Court to be paid by the purchaser is a condition precedent to an application for rescission of a contract under Sec. 35 (*c*) of the old Act. There can be no default unless a time has been fixed by the Court for payment. Default in payment of the purchase money contemplated by sub-section (*c*) implies failure or omission to pay within a specified time and there can be no default unless time has been fixed for payment of the money. The law regarding rescission of contract so far as this country is concerned was codified in Sec. 35 of the old Act and the conditions prescribed in that section must be fulfilled in order to successfully maintain an application for rescission of the contract under Sec. 35 of the old Act. In

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1. Hungerford Investment Trust Ltd. v. Haridas Mundhra, 75 C. W. N. 517 at p. 535.
2. Appeal No 46 of 1965.

order to maintain such an application there must be default in payment of the purchase money or other sums directed to be paid by the Court, and such default can occur only if a time has been fixed by the Court for payment ; and if no time has been fixed by the Court there could be no such default to enable a party to obtain an order for rescission. The default contemplated by the last paragraph of Sec. 35 is referable to and confined to the default in payment of purchase money or other sums as contemplated by sub-section (*c*) of that section and not a default by a party in other respect. The word "default" used in the last paragraph of Sec. 35, must be given the same meaning which it has in sub-section (*c*), and not a different meaning unless such is required by the mandate of the statute or by the necessary implication or intendment.[1]

In the above-noted case no order was made fixing a time for payment of the purchase money. It was held that there was no default and indeed there could be no default under sub-section (1) of Sec. 35 of the old Act.

The default contemplated by the last paragraph of Sec. 35 of the old Act is a default in payment of the purchase money or sums directed by the Court to be paid and not any other default. This section applies to rescission of the contract to sell and lease under certain circumstances and is for the benefit of both lessor and lessee and vendor and purchaser. It confers adequate power and discretion to the Court to grant adequate relief in case the plaintiff does not carry out the terms of the decree or pass appropriate orders. A decree in a suit for specific performance of a contract of sale or lease of immoveable property enures for the benefit of the plaintiff and the defendant, the decree-holder and the judgment-debtor and any of the party to the decree is entitled to enforce the decree. Prior to the enactment of this section there was a controversy between various High Courts in India regarding the rights of the parties, powers of the Court, nature of the relief and other allied matters, if the decree for specific performance of the contract is not carried out by the parties or if there is a breach of terms of the decree. The preponderance of the authority is for the proposition that where a default has been made in a case under Cl. (*c*) the Court can make an order to rescind the contract in the same suit in which the decree has already been made instead of putting the opponent to file another suir for rescission.[2] Contrary view has been adopted by Mr. Justice Kemp in *Chaturbhuj Bhavanidas* v. *Kalyanji Bhimji*.[3] It has been held in that case that where a vendor has obtained a decree for specific performance of the contract of sale it is not open to the defendant-purchaser to apply by way of motion to the Court to vacate the decree and rescind the contract in the event of default by the plaintiff-vendor. The defendant's rights in such a case can be enforced only by a fresh suit. The minority view has the support of Collett and Dr. Banerji. The majority view proceeds on the ground that the words "in the same case" in the last paragraph of the section refer to Cl. (*c*) in the section.[4]

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1. Hungerford Investment Trust Ltd. *v.* Haridas Mundhra, 75 C. W. N. 517 at pp. 532-35.
2. Kurpal *v.* Shamrao, A. I. R. 1923 Bom. 211 at p. 212 ; Abdul Shakur *v.* Abdul Rahiman, A. I. R. 1923 Mad. 286 at p. 287 : I.L.R. 46 Mad. 148 : 72 I. C. 868: 44 M. L. J. 107 : 1933 C. W. N. 1 : 17 L. W. 216 ; Ramji *v.* Chinai, A. I. R. 1925 Sind 40 at pp. 41-42 : 82 I. C. 73 ; Mohd. Ali *v.* Abdul Khader, 128 I. C. 875 ; Akshayalingam *v.* Avayambala, A.I.R. 1933 Mad. 386 at pp. 387-90 : I. L. R. 56 Mad. 796 : 144 I. C. 621 : 64 M. L. J. 536 : 37 M. L. W. 417: 1933 M. W. N. 265.
3. A. I. R. 1927 Bom. 231 at p. 240 : 104 I. C. 322 : 29 Bom. L. R. 309.
4. Kurpal *v.* Shamrao, *supra*; Akshayalingam *v.* Avayambala, *supra*.

But all this controversy has been set at rest by the enactment of the present Sec. 28 and the enactment of sub-clauses (2) to (5) in the new section.

Now the Court can under this section, extend the time for the performance of the decree, rescind the contract, if there is a default on the part of any party to the decree or put the party to suitable terms.

In *Gomathinayagan Pillai* v. *Palaniswami Nadar*,[1] it has been pointed out that where a person claims a decree for specific performance, it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract and that if he failed to do so, his claim for specific performance must fail. Their Lordships referred to the observations of the Privy Council in *Ardeshir H. Mama* v. *Flora Sassoon*,[2] where the Privy Council pointed out as follows :

> "In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

Then the Supreme Court went on to say :

> "The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform this part of the contract continuously between the date of the contract and the date of hearing of the suit."

Clearly, in this case, after the date of the decree, the plaintiff has not been able to show that he was continuously ready and willing to perform his part of the contract. Indeed it is doubtful, if he had the necessary money with him, considering the fact that from 27th June, 1966, the date of the decree, to April, 1967, when he seems to have ultimately paid the amount after ten long months. It may be that he has taken advantage of the unfortunate failure of the Court below to specify the period within which he had to deposit the amount.

A Bench of the Madras High Court has held in *Abdul Shaker* v. *Abdul Rahiman*,[3] that a decree for specific performance is in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein including, in appropriate cases, the extension of the time, and that the contract is not determined by mere failure of the plaintiff to pay the amount within the specified time. On this point Schwabe, C. J., discussing the legal position observed as follows :

> "Specific performance is an equitable remedy which has been known and used by the Courts of Chancery in England for centuries and appropriate forms of judgment have been approved by learned Equity Judges

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1. (1967) 1 S. C. R. 227 : A. I. R. 1967 S. C. 868.
2. (1928) 55 M. L. J. 523 : L. R. 55 I. A. 360 : A. I. R. 1928 P. C. 208.
3. (1923) 44 M. L. J. 107 : A. I. R. 1923 Mad. 284.

in England and have now become almost stereotyped ; and those at present in use will be found set out in Seton on *Judgments* under the title 'Specific Performance'. On a perusal of them the first thing to be observed is that not one of those forms contained in the first instance a limit of time for payment of the purchase money and not one attempt to make payment of the purchase money by a certain date a condition of the continuance of the rights under the judgment. After the original judgment for specific performance it is the definite practice in England that all consequential relief by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. Such applications are made by motion in the action showing that in England, after the original judgment, the action is by no means ended but remains under the control of the same Court. If the default is made by the purchaser in paying the purchase money there are several remedies open to the vendor—(1) He may on motion in the action obtain an order fixing a definite time and place for payment and delivery over of the conveyance and title-deed and can, after the expiration of that time, levy execution for the amount, if not paid. (2) He may apply by motion in the action for an order rescinding, not the judgment but the contract, and in order to succeed *in such a motion he has to satisfy the Court that there has been a positive refusal, to complete, which it may be observed in the present case, the respondent has certainly not proved.* A similar right is given by Sec. 35 of the Specific Relief Act of 1877. (3) He can enforce his unpaid vendor's lien for the purchase money and costs. (4) He can by motion in the action obtain an order for sale by the Court of the property when he will be at liberty to bid. The proceeds of the sale are paid into Court and the vendor gets his contract price, interest and costs and the purchaser the balance if any. Where the vendor is in default, the remedies are even more varied. It would seem to be absurd to hold that the mere fact that a date of completion is fixed in the original decree put an end to the action and that the control of the original Court expires on the expiration of the date and thus substitute in effect for all the known remedies stated above the simple expedient of treating the action and the decree as dead for all purposes and leaving the vendor in undisturbed possession of property. . . ."

The other learned Judge pointed out as follows :

"But that it is in the nature of a preliminary and not a final decree is, I think, placed beyond doubt by Sec. 35 of the Specific Relief Act (Sec. 28 of the present Act). As I read that section, it lays down that when a decree for specific performance of a contract of sale has been passed and the purchaser makes default in payment of the sum which the Court has ordered him to pay, the vendor may either file a fresh suit for rescission of the contract or may, in specific performance suit itself, apply to the Court to rescind the contract. It is perfectly clear that the contract is not determinable or determined by the mere failure to comply with the terms of the decree. It is not determined until the Court orders that it is determined. By the decree for specific performance the Court sets out what it finds the real contract between the parties was, and declares that such a contract exists and gives what it considers a reasonable time within which the contract shall be carried out. Regarding the decree from this point of view, as a contract, *it is clear in this case, as in most others of the same kind, that time is not*

of the essence of the contract and that, until the contract is rescinded by formal order or decree such time for performances not being an essential part of the contract, may be varied by the Court which has declared what the essential terms of the contract are. It is clear, as the learned Chief Justice has shown, that it must be within the power of the Court to vary the time within which the contract shall be performed, as difficulties might arise through no fault whatever of the parties preventing performance within the time specified in the decree, e. g. when a third party as within that period set up a *bona fide* claim of title to the property, it may even be necessary to direct specific performance to stand over for a reasonable but indefinite period, until that claim has been adjudicated.

"I take it then that where specific performance of sale has not been effected within the period laid down by the decree, it is open (*a*) to the purchaser to apply to the Court for an extension of time for payment of the purchase money, and (*b*) to the vendor to apply either for a final and peremptory order for specific performance or of an order rescinding the contract either immediately or to follow automatically on the expiry of the period peremptorily granted. The original action is thus open until a final decree or order of such a nature and scope is passed and the original Court has until then ample power to extend the time for specific performance."

Thus, it is obvious that after the decree has been passed even where the decree does not specify the time within which the plaintiff should deposit the amount, it is open to the Court to fix a fresh period or extend the period already fixed. As pointed out by the Supreme Court in *Gamathinayagam Pillai* v. *Palaniswami Nadar*,[1] if the contract relates to a sale of immoveable property, it would normally be presumed that time was not the essence of the contract. Section 28 of the Act seems to really embody this principle. Under Sec. 28 of the Act, the power to extend the period even where it has already fixed a period within which the plaintiff should deposit the amount, it has the power to extend that period, it should be deemed to have the power to either fix a period or grant a fresh period for the plaintiff to deposit the purchase money where by the decree it has not already fixed a period.[2]

It is common ground that this is a suit for specific performance of the agreement to reconvey the suit property which originally belonged to the respondent here. There is also the compromise decree in and by which certain time was fixed for depositing the sum of Rs. 800. Unfortunately as noted by the courts below, there is no default clause. In such a case the Court should take into consideration that the suit should be deemed to be pending but not finally disposed of. In *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*,[3] the facts are similar. In that case a decree for specific performance of a contract for sale provided (*a*) that, upon payment by the plaintiffs of a sum named which in two months from the date of the decree, the first defendant do execute and register a proper deed of conveyance of the properties in the schedule and (*b*) that upon payment the first defendant do put the plaintiffs in possession of

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1. (1967) 1 S. C. R. 227 : A. I. R. 1967 S. C. 868.
2. Vaiyapuri Reddy *v.* Sivalinga Reddiar, (1970) 1 M. L. J. 92 at pp. 93-95.
3. 44 M. L. J. 107 : A. I. R. 1923 Mad. 284.

the said properties together with all title deeds. In such a case, Sir Walter Schwabe, C. J., for the Bench observed at page 113 :

> "Lastly it was contended and this is a more difficult point that as two years had elapsed from the date of the original offer of the money the plaintiffs were too late in bringing this suit. It is a well-established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff, is such that the Court ought not to exercise its powers. In this case on the facts I think that the delay should be excused, for on the evidence, the plaintiffs were put off for sometime by the first defendant himself. The case has, however, been brought very late but in my judgment, not late enough to compel us to refuse relief at not being shown that the defendant had been prejudiced."

There is also a decision which will be useful to refer, namely, *Bhagwatsaran Singh* v. *Mithila Saran Singh*,[1] there a party by an order of the Court was required to deposit certain amount in Court under a compromise and a time-limit was prescribed for it. But there was no provision as to the effect of the non-payment of the said amount. In such a case the learned Judges held :

> "But if the time has expired and on account of absence of a provision in the petition of compromise, or in the order as to the effect of non-payment, the order has not operated automatically, then the Court has seisin of the matter and can still deal with it".

Time should be extended to enable the respondent to deposit the money as per the terms of the compromise decree.[2]

Since Sec. 28 of the Specific Relief Act, 1963, provides only for an application for rescission of a decree for specific performance for the sale or lease of immoveable property, no application to rescind a decree for specific performance of an agreement to sell moveables, would lie under that section.[3]

5. Power under the section is discretionary.—The power under Sec. 28 of the Act of 1963 or under Sec. 35 of the old Act, 1877, is a discretionary one. The Court on flimsy grounds could not exercise its power and annul the decree, once passed by it. A clear case of default has to be found out in order to give relief of rescission of contract so as to nullify the decree of specific performance.[4]

6. Rescission of the contract and refund of consideration.—An order for specific performance of a contract being in the nature of a preliminary decree, the Court retains the power to make any stipulation it thinks fit with reference to the performance including the power to extend time. "In considering whether the time should be granted it has to be remembered that the delay need not be explained so minutely in a case of this sort, as in a case for instance under the Limitation

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1. A. I. R. 1953 Pat. 158.
2. Manicka Gounder *v.* Samikannu Gounder, A I.R. 1967 Mad. 397 at p. 398.
3. Hungerford Investment Trust Ltd. *v.* Harida: Mandhra. (1972) 1 S.C.W.R. 846 at pp. 857-58.
4. Bisun Prasad Mishra *v.* Kamla Kant Jha, A.I.R. 1972 Pat. 322 at p. 325.

Act, where it is sought to excuse a bar of limitation. In the latter the applicant is seeking to revise a right which he has not lost and it is necessary for him to show that he has not lost it by negligence. Here it is a question of destroying a right which plaintiff had to enforce a contract and it does not necessarily follow that because he has been guilty of some delay in enforcing the contract, that that fact alone should deprive him of a right which undoubtedly is his. Consequently, I think that delay in such a case should be looked more leniently than in a case of limitation."[1] Where a decree passed is conditional on payment of a certain sum of money in Court within a specified time, the Court has power to extend time for payment of such sum on adequate grounds.[2]

The Court may require the party rescinding a contract to do equity. Therefore on adjudging rescission of a contract the Court generally require the party to whom such relief is granted to make compensation to the other which justice of the case may require.[3] Section 64 of the Indian Contract Act provides that the party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Similarly, when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received.[4]

7. **Rescission of completed conveyance.**—The conveyance to plaintiff admittedly was not a nullity which plaintiff could ignore. Defendant had title to at least part of the property. Also it is admitted that plaintiff obtained possession of at least part of the property. On his allegation the only case which plaintiff could advance was that the sale-deed was voidable because of material defect in his vendor's title not disclosed by the vendor, such non-disclosure amounting to fraud under Sec. 55, Transfer of Property Act. Plaintiff's remedy in these circumstances was a suit for rescission of the sale-deed, and for return of the price paid under Sec. 38 (old), Specific Relief Act. It was not open to him to ask for return of the price before the conveyance was rescinded.[5]

8. **Nature of a decree passed in a suit for specific performance.**—The provisions in Sec. 28 go to show that the Trial Court would have jurisdiction to extend the time for payment of purchase price even if it had fixed a date for the same in the first instance in the decree originally passed. It further goes to show that the provision in any decree whether passed by a Trial Court or an Appellate Court in a suit for specific performance when it mentions a date for payment of purchase price, the date is merely an incidental direction in favour of the plaintiff. The date is not such as cannot be extended at a subsequent stage by the Trial Court. In this connexion, reference may be

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1. Metta Rama Bhatlu *v.* Metta Annayya Bhatlu. A.I.R. 1926 Mad. 144 at p. 145: 90 I. C. 605 : 49 M. L. J. 152: 22 L. W. 366, *per* Phillips, J., Gokul Prasad *v.* Fatte Lal, 1945 N. L. J. 500 and Shri Murti Parasnathji *v.* Gulab Chand, A. I. R. 1943 Nag. 111 at p. 112.
2. Abdur Rahim *v.* Tarnij-ud-Din, A.I.R. 1933 Cal. 580 at p. 580: 145 I. C. 381 : 37 C. W. N. 397.
3. Specific Relief Act, Sec. 38 (old).
4. Contract Act, Sec. 65.
5. Allahdino Bacha *v.* Udhoomal Amardinomal, A. I. R. 1942 Sind 81 at p. 82.

made to the decision of the High Court of Madras in the case of *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*.[1] Now, this case has been a leading authority and has been followed in several subsequent decisions by different High Courts. In this case, the Court came to consider the true nature of a decree passed in a suit for specific performance. In that connection, the learned Chief Justice referred to the forms of judgments in such suits and in that connexion referred to the treatise of Seton on *Judgments* and in the result held that the decree for specific performance was in its nature a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases the extension of time. In arriving at the above finding Mr. Justice Wallace particularly referred to the scheme of Sec. 35 (old) of the Specific Relief Act.

This section came to be discussed in the case of *Kurpal* v. *Shamrao*.[2] It is not necessary to refer to the observations made by the Bombay High Court in the judgment in that report.

In the case of *Gokul Prasad* v. *Fattelal*,[3] the High Court of Nagpur referred to the above decision of the High Court of Madras and the scheme of Sec. 35 (old) and made a definite observation that :

> "It is open to the Lower Court to extend time for payment fixed in a decree for specific performance. The decree is in the nature of a preliminary decree which rests on the contract between the parties until it is rescinded by a formal order. The delay in payment of specific performance of a contract in which time is not the essence of the contract cannot entail the penalty of rescission unless there has been such persistent delay as to justify the rescission. . . ."[4]

9. Extension of time.—Section 28 of the Act of 1963, permits the deposit to be made within such further period as the Court may allow the time even after its expiry. Even if an order of the Trial Court extending time for payment of money is without jurisdiction, the extension of time remains a valid extension unless that order has been recalled. The order cannot be challenged in execution proceedings under Sec. 28.[5]

When the time for payment of money is extended, it does not mean a modification of the decree.[6]

Hence the time be extended by the Trial Court after its decree has merged in the decree of the High Court in second appeal.

The Trial Court has power to extend the time, and the expression "such further period as the Court may allow," would mean the Court which had passed the decree, or, where the application under Sec. 28 of the Act of 1963, is filed. The Court has power under Sec. 148 of the Code of Civil Procedure to extend the time even after its expiry *vide* the case of *Mahanth Ram Das* v. *Ganga Das*.[7]

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1. A. I. R. 1923 Mad. 284.
2. 25 Bom. L. R. 234 : A. I. R. 1923 Bom. 211.
3. I. L. R. 1945 Nag. 924 : A. I. R. 1946 Nag. 29.
4. Maruti Vishnu Kshirasagar *v.* Bapu Keshav Jadhav, A. I. R. 1970 Bom. 398 at pp. 401-2 : 72 Bom. L. R. 615.
5. Bishun Prasad Misbra *v.* Kamla Kant Jha, A. I. R. 1972 Pat. 322 at p. 324.
6. *Ibid.*
7. A.I.R. 1961 S. C. 882 , *see* also Bishun Prasad Mishra *v.* Kamla Kant Jha, *supra.*

10. True nature of the decree for specific performance.—The question of the true nature of the decree for specific performance arose before several courts and in some of the decisions in that connexion reference was made to the provisions in Sec. 35 of the Specific Relief Act, 1877, Cl. (*c*) whereof provided for a right in the defendant in a suit for specific performance to apply for rescission of the contract after the decree was passed in the following words :

> "Where a decree for specific performance of a contract of sale or of a contract to take a lease, had been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay."

In the last paragraph of that section it was provided :

> "In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract. . . ."

Having regard to the above provisions and what has been often noticed by the courts granting decrees for specific performance, particularly on the original side, it is quite clear that the declaration in a decree that the plaintiff is entitled to specific performance of the agreement for sale or lease mentioned in the plaint must in the nature of things be not sufficient to completely dispose of the suit for specific performance in all respects. After such a declaration is made in favour of the plaintiff by a decree, questions like the failure of the defendant to deliver to the plaintiff's solicitors documents of title for investigation of title, the failure of the defendant's solicitors to answer requisitions on title submitted to him, the failure of the solicitors of the parties in agreeing as to correctness of including certain provisions and/or covenants in the deeds of conveyance and leases prepared by them for ultimate execution on behalf of the vendors and/or lessors, the necessity of determining outgoings to be borne by the plaintiff and the credit to which the plaintiff would be entitled in connexion with the rents to be appropriated by the seller and/or lessor and such several matters of details will always arise for further consideration. In connexion with these matters, from time to time, different kinds of applications will have to be entertained and decided by the Trial Court. Now, it is true that these serious questions do not crop up in mofussil courts. That, however, does not make any difference to the matter of the true construction and the true nature of decrees for specific performance which are passed on the original side of the Bombay High Court and/or in mofussil courts. One of the items which arises for consideration in these suits for specific performance is the item of the liability of the plaintiff to pay the price in exchange of his getting the sale-deed and/or lease in his favour completely executed on behalf of the defendant. Apparently, the stage for exchange of price against the duly executed sale-deed is the very last stage with which the Trial Court would have to deal in suits for specific performance of agreements of sale. The date fixed for payment of price by depositing the same in Court would, therefore, be always an incidental direction towards getting to the plaintiff relief of specific performance for which he instituted the suit. Ordinarily, the date for deposit of price should be fixed in accordance with the request and convenience of the plaintiff in such a suit. Mere failure to carry out the direction for depositing the amount of price as ascertained on the date fixed would not result into the defendant getting the right of having the plaintiff's suit dismissed. The scheme of Sec. 35 (old) of the Specific Relief Act goes to show that even after the plaintiff makes a default in carrying out directions for depositing the price in the Trial Court, the contract for sale

continues to be binding between the parties and the defendant in the suit would have to enforce his rights under Sec. 35 and apply for rescission of the contract if he wants to escape from the liabilities under the contract. This scheme of Sec. 35 (old) has been better clarified in Sec. 28 of the Specific Relief Act, 1963.

Now, the scheme in the Sec. 28 of the Specific Relief Act, 1963, is in accordance with the practice which has prevailed in the English Courts in connexion with the reliefs to be granted in a suit for specific performance from time to time on different applications made to the Trial Court. The provisions in this Sec. 28 go to show that the Trial Court would have jurisdiction to extend the time for payment of purchase price even if it had fixed a date for the same in the first instance in the decree originally passed. It further goes to show that the provisions in any decree whether passed by a Trial Court or an Appellate Court in a suit for specific .performance for payment of purchase price on the date fixed is merely an incidental direction in favour of the plaintiff. The date is not such as cannot be extended at a subsequent stage by the Trial Court. Such extension could be granted until the Court was in a position to make a finding that because of the default made by the plaintiff in making deposit, his suit was liable to be dismissed on the ground that the plaintiff was guilty of breach of contract.[1]

New	Old
29. Alternative prayer for rescission in suit for specific performance.—A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.	**37. Alternative prayer for rescission in suit for specific performance.**—A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that if the contract cannot be specifically enforced it may be rescinde l and delivered up to be cancelled and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

SYNOPSIS

1. Legislative changes ... 783 2. Scope ... 783

1. Legislative changes.—This section is a verbatim reproduction of previous Sec. 37. There is no change.

2 Scope.—The section is limited to contracts in writing and does not cover oral contracts. "The plaintiff bringing an action for the specific performance of a contract may claim in the alternative that if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled, provided that the alternative relief is based on the same state of facts, though with

1. Maruti Vishnu Kshirsagar *v.* Bapu Keshav Jadhav, 72 Bom. L. R. 615 at pp. 617-19.

different conclusions as to law."[1] But this rule is not applicable to a converse case. Thus it has been held that an action to set aside a transaction for fraud or in the alternative for specific performance of a compromise is not maintainable.[2] When a purchaser of immoveable property has entered into a contract of sale and paid a deposit, and when the time for completion comes, the vendor fails to complete, the purchaser has two alternatives open to him, the second being again subject to two alternatives. He can—(1) treat the contract as rescinded and sue either in equity to be placed in the position he would have been, had it never been made, or at law for any money that he has parted with as money received by the other side for a consideration that has wholly failed; and (2) he can treat the contract as on foot, (*a*) either ask for damages for its breach, or (*b*) seek the remedy of specific performance.[3]

New

30. Court may require parties rescinding to do equity.—On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

Old

38. Court may require party rescinding to do equity.—On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

SYNOPSIS

1. Legislative changes ... 784
2. Reasons for the change ... 785
3. Principle ... 785
4. Scope ... 785
5. Obligation to restore any benefit obtained under the instrument n question ... 785
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10. Cost to the plaintiff or benefit to the defendant ... 787
11. Benefit to the defendant is the proper measure of restitution ... 788
12. Specific performance in the absence of any covenant ... 789
13. Limitation ... 790

1. Legislative changes.—The present Sec. 30 corresponds to the old Sec. 38 of the repealed Act. The following are the changes introduced in the body of the old Sec. 38 so as to make it assume the present shape and form of the new Sec. 30. In the present Sec. 30 the words "to restore so far as may be, any benefit which he may have received from the other party and", have been substituted after the words "such relief is granted", for the words "to make any compensation", and the words "to him" have been replaced for the words "to the other party".

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1. Fry, Sec. 1058.
2. Panama Telegraph Co. *v.* Indian Rubber Co., (1875) 10 Ch. 515; Cowlay *v.* Poole, 1 H. & M. 2.
3. Pratap Chand *v.* Raghunath Rao, A.I.R. 1937 Nag. 243 at p. 244 : I.L.R. (1933) Nag. 283 : 169 I. C. 887.

2. Reasons for the change.—The Law Commission of India says :

"The second part of Sec. 64 of the Contract Act deals with another corollary which follows from the same principle as underlies old Sec. 38 of the Specific Relief Act, namely 'he who seeks equity must do equity'. While Sec. 38 (old) of the Specific Relief Act enjoins the Court, while decreeing rescission, to direct the plaintiff to make any compensation to the defendant which justice may require, the second part of Sec. 64 of the Contract Act enjoins the party who rescinds to restore any benefit which he may have received from the defendant under the contract. It is desirable the same equitable principle should also be included in Sec. 38 (old), so that while decreeing rescission the Court may direct not only payment of compensation to the defendant (for instance, for improvements made by him on the property) but also restoration of any benefit received by the plaintiff under the contract.[1]

"We suggest that Sec. 38 (old) be amended accordingly."[2]

In the notes on Cl. (29), which deals with Sec. 38 (old) of the Specific Relief Act, 1877, it has been said : "This is Sec. 38 (old) of the existing Act amplified to provide that while decreeing rescission the Court might direct not only payment of compensation to the defendant but also restoration of any benefit received by the plaintiff under the contract."[3]

3. Principle.—The basic principle of the section is the well-known maxim "he who seeks equity must do equity". If a plaintiff to an action for rescission of contract were not to return the benefits, he would be awarding himself damages under cover of suit for rescission, though legally he may not be entitled to any damages.

4. Scope.—The section does not relate to the case of a plaintiff who seeks rescission of a contract and also claims damages. It is confined in its application to the case of a defendant against whom a decree for rescission is made and who in consequence of such rescission is entitled to compensation. It is clear, therefore, that no question of compensation to the defendant under this section can arise where the suit against him has been dismissed. The section leaves the question of quantum of compensation to the discretion of the Court to be exercised according to the circumstances of each particular case. The section applies where a contract or transaction is impeached on the ground of undue influence.[4]

The specific performance of contract is essentially a matter of equitable relief and either in granting or refusing any relief or rescinding either the contract or the decree for specific performance, it is open to the Court to grant such relief to either party as justice may require.[5]

5. Obligation to restore any benefit obtained under the instrument in question.—While Sec. 38 (old) of the Specific Relief Act enjoined the Court,

1. Lodge *v.* National Union Investment Co., (1907) 1 Ch. 300 [*cf.* Nagappa *v.* Brahadambal, 39 C.W.N. 709 (P.C.)].
2. Law Commission of India, Ninth Report (Specific Relief Act, 1877), pp. 43-44.
3. Notes on Clauses on Cl. (29), p. 14.
4. Narain *v.* Akubai, 33 I. C. 576 : 18 Bom. L. R. 27.
5. Pankoj Kumar Bhattacharjee *v.* Manmatha Nath Vidyabhushan Bhattacharjee, A. I. R. 1973 Cal. 439 at pp. 440-41.

while decreeing rescission, to direct the plaintiff to make any compensation to the defendant which justice may require, the second part of Sec. 64 of the Contract Act enjoined the party who rescinds to restore any benefit which he may have received from the defendant under the contract. The same equitable principle has also been included in Sec. 30 of the present Act so that while decreeing rescission the Court may direct not only payment of compensation to the defendant (for instance, for improvements made by him on the property) but also restoration of any benefit received by the plaintiff under the contract.[1]

6. Compensation under decree not paid—Effect.—Section 35 of the Act provides that any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in certain cases, one of which is where the contract is voidable as terminable by the plaintiff.

A voidable contract is not voided by repayment of a benefit obtained under the contract, but by the exercise of the option of the aggrieved party to rescind the contract. He has to make repayment because the contract is voided; the contract is not voided on condition of his making such repayment.[2]

7. Refund of consideration.—In the words of Lord Dunedin, "it was the putting of an equitable doctrine under a legal form, a contrivance introduced to meet an equitable idea". The familiar case was of the paying of money by *A* to *B* under the mistaken impression that in fact the debt was due, when in truth there was no debt due. It was to fit cases of this sort that the common law evolved the action for money had and received. Though there is no guarantee in a court sale, there is some duty which is imposed by law upon the decree-holder in this connexion. Under O. XXI, R. 13, C. P. C., when an application for attachment is made by the decree-holder the application must contain a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant and so far he has been able to ascertain the same, and under rule 14 when lands are registered in the Collectorate, a certified extract from the register may be called for. If the decree-holder states something which is false, and makes that statement knowing it to be false, with a view to mislead the bidders, there would be obviously a case of fraud. But even when the misrepresentation was innocent or there was mistake or ignorance of facts under which the parties were labouring, which led to the invalidity of the whole proceeding, a fiction of a promise to pay, can be justly imputed to the decree-holder, and it would be against natural justice to allow him to retain the money which he got possession of under such ignorance or mistake. It would be open of course to the defendant to take all equitable defences, e. g. laches, delay, or acquiescence on the part of the plaintiff or his knowledge of all material facts in connexion with the affair. There is no reason why the plaintiff should not be able to invoke the principle in his favour, and claim refund of the money paid under an honest mistake of facts.[3]

8. Court sale.—Though there is no guarantee in a court sale, there is some duty which is imposed by law upon the decree-holder in this connexion.

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1. L dge *v.* National Union Investment Co., (1907) 1 Ch. 300.
2. Reverend Brother Patrick *v.* Maung E., A. I. R. 1938 Rang. 408 at pp. 409, 410, 411, 412 : I.L.R. 11 Rang. 309.
3. Chaitanya Das Banerjee *v.* Ranjit Pal Chowdhury, A. I. R. 1938 Cal. 263 at p. 270 : I. L. R. (1938) 11 Cal. 512.

Under O. XXI,R. 13, C.P.C., when an application for attachment is made by the decree-holder, the application must contain a specification of the judgement-debtor's share of interest in such property to the best of the belief of the applicant and so far as he has been able to ascertain the same. If the decree-holder states something which is false, and makes that statement knowing it to be false, with a view to mislead the bidders, there would be obviously a case of fraud. But even when the misrepresentation was innocent or there was mistake or ignorance of facts, under which the parties were labouring, which led to the invalidity of the whole proceeding, a fiction of a promise to pay, can be justly imputed to the decree-holder and it would be against natural justice to allow him to retain the money which he got possession of under such ignorance or mistake. The auction-purchaser can even then invoke the principle in his favour and claim refund of the money paid under an honest mistake of facts.[1]

9. Measure of compensation.—What is equitable measure of compensation depends upon the circumstances of a particular case. The general principle is that the parties should be restored to substantially the same position as if the contract had never been made. If the parties are innocent the Court will try to arrive at a fair measure of compensation but if the defendant is to blame, the Court cannot be very precise to help the wrongdoer.[2]

Where the plaintiff has not an alternative right on an enforceable contract the basis of his recovery is the unjust enrichment of the defendant. But a benefit officiously thrust upon one is not considered an unjust enrichment and restitution is denied in such cases. In the present connexion, however, the right may be considered of one who has failed to fulfil his contract, either (1) because of his own wrong, or (2) because of an unjustified breach or repudiation by the other party, to recover for incomplete performance of an indivisible obligation where the plaintiff's incomplete performance is excusable because of the defendant's breach, restitution of the value of the partial performance, based on what it could have been purchased for from one in the plaintiff's position when the performance was rendered, is given without regard to the benefit received by the defendant.[3]

10. Cost to the plaintiff or benefit to the defendant.—Where the plaintiff is in default under a contract and is allowed a quasi-contractual recovery in order to prevent an unjust enrichment of the defendant and the infliction of a penalty upon the plaintiff out of proportion to the wrong he has committed, it seems clear that the law can impose no greater liability upon the defendant than to give up any benefit which he may have derived from the plaintiff's performance. To go further than this would be to penalize a defendant who has been guilty of no legal or moral wrong, and even though the immediate cause of the non-performance of a contract is the defendant's refusal to perform, the same result seems necessary if the defendant has been given by the plaintiff's fault a defence for refusal.

The use of common counts in *quantum meruit* and *quantum valebat* for the enforcement of both obligations has tended to confuse with the quasi-contractual obligations here under discussion certain obligations based on actual

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1. Chaitanya Das Banerjee *v.* Ranjit Pal Chowdhury, A. I. R. 1938 Cal. 263 at p. 270 : I.L.R. (1938) 11 Cal. 512.
2. Collett, *Specific Relief Act*, Sec. 38 ; *see* also Newbigging *v.* Adam, 34 Ch. D. 582.
3. *See* Williston on *Contracts*, Sec. 1479.

contracts, namely, those where there is a real promise whether express or implied in fact to pay the reasonable value of goods or services. In such cases and on a fair interpretation of the parties' contract if there is a market value for what the plaintiff is requested to furnish that value is the measure of the promised price ; if there is no market price, the measure is at least the cost or worth from the plaintiff's standpoint, not limited by the fact that the value of the benefit which accrues to the defendant, is a less sum. Again, even though the defendant's liability is imposed by law irrespective of the agreement of the parties, and may, therefore, be called quasi-contractual, where the defendant is a wrong-doer the plaintiff may well be preferred, and if a complete restoration of the *status quo* or its equivalent is impossible the plaintiff should at least be replaced in as good a position as he originally was in although the defendant is thereby compelled to pay more than the amount which the plaintiff's performance has benefited him. So where a vendor wrongfully refuses a conveyance to a purchaser in possession, the latter may recover what he has paid the vendor and also what he has expended in improvements on the land and not merely the increased value of the land by virtue of the improvement. That is, the law should impose on the wrong-doing defendant a duty to restore the plaintiff's former status, not merely to surrender any enrichment or benefit that he may unjustly hold or have received ; though if the market value, or, in the absence of a market value, the benefit to the defendant of what has been furnished exceeds the cost or value, to the plaintiff, there is no reason why recovery of this excess should not be allowed.

These different possible situations, as has been said, have often been confused with one another, because the form of an action in each of them was identical at common law—general assumption a *quantum meruit* or *quantum valebat* count ; and this tended to induce courts and others to inquire what is the rule of damages under such counts—a question not susceptible of a single answer. Frequently, also, it is not perceived that there is an important distinction between cost or detriment to the plaintiff and benefit to the defendant, because often, perhaps generally, the value of the performance which plaintiff has rendered is identical from whichever standpoint it is regarded. Again the assumption that benefit to the defendant if the contract were fully completed is necessarily the contract price, is frequently made, probably for these reasons a majority of decisions speaking of the damages which a plaintiff in default in the performance of his contract who is nevertheless allowed to recover for his part-performance should recover, say that he is entitled to the contract price less such damages as the defendant has suffered from the breach, or less the cost of completion ; or where the work is inferior, but not unfinished so as to be not readily capable of completion, that "there should be deducted from the contract price the amount by which the value of the performance rendered by the plaintiff falls short of what that value would have been if the contract had been exactly performed ; or the value of the labour and materials less any deductions necessary to complete the work but not to exceed the contract price".[1]

11. Benefit to the defendant is the proper measure of restitution.—The tests which are most commonly applied, and which have been criticized in the preceding section, in reality allow the plaintiff to recover on the contract. For a court to assert that a plaintiff cannot recover on the contract but must sue

1. Williston on *Contracts*, Sec. 1480

on a *quantum meruit* ; and then to apply in an action based on a *quantum meruit* the identical rule of damages applicable to an action on the contract is an anomaly. The reasoning of a leading Massachusetts decision is unanswerable where a plaintiff in default seeks to recover : "Because, being in default in the performance of the contract, or what is the same thing, because, being unable to prove that he failed to perform the contract, he has no rights under it, he has not the same right to recover for the value of the work done and materials furnished by him, that a person has who has done work and furnished materials as he has been requested to do. In the latter case it is immaterial whether the result of his work is of any value to the defendant or not. But one who has done work under a special contract, and resorts to a recovery under the principle of *Hayward* v. *Leonard* recovers on the ground, and only on the ground, that the result of his work is of some benefit to the defendant ; he comes into Court admitting that he has not done what he agreed to do and that he cannot hold the defendant on his promise to pay him the contract price ; more than that, he admits that the part, which he has failed to perform, is one, that so far goes to the essence of the contract, that it is a condition precedent to a recovery by him on the contract ; for, if the part which he agreed to perform, and did not perform, was of slight importance, it is not a condition precedent ; he can recover the contract price without performing it, and the only advantage which the defendant can take of it is by way of recoupment, or by a cross-action, in which the burden is on him, the defendant, to prove the damage he has suffered from its non-performance. The only ground, on which a plaintiff, who resorts to a recovery under the principle of *Hayward* v. *Leonard*, is entitled to recover anything is that, though so far as his contract rights are concerned, he is entirely out of Court, yet it is not fair that the defendant should go out of transaction as a whole with a profit at his, the plaintiff's expense, and therefore if the structure, which, for the purposes of a recovery on this ground, he necessarily admits does not come up to the contract requirements in essential particulars, is nevertheless, a thing of some value, the defendant ought to make him compensation therefor." "His sole claim to be paid anything is that if he is not paid, the defendant will profit at his expense. Until he has proved that the defendant will in that case profit at his expense, he has not made out a *prima facie* case to be paid anything, and until he has proved how much that profit will be, his *prima facie* case is not complete. When the fact appears in evidence that the work for which money is sought was done under a special contract, and that the plaintiff cannot recover under the special contract, but still seeks a recovery, there is no question of the value of his work and materials, proved in the usual way, and he does not make out a *prima facie* case by proving their value according to regular rules ; to make out a case for recovery for such work and materials so furnished, he must prove how much the result of his work had benefited the defendant, he must prove what the fair market value of the thing produced by his misdirected work is, and, until he has done that he has not made out even a *prima facie* case on which he is entitled to recover anything."[1]

12. Specific performance in the absence of any covenant.—In *Daneyl Gurumurty* v. *Raghu Podhan*,[2] in the absence of any covenant, express or implied, binding defendant personally to make reimbursement to the plaintiff, defendant is not liable to refund. The equity should not be invoked against defendant when the plaintiff knowing full well that she had no power of

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1. Williston on *Contracts*, 1482.

2. A. I. R. 1967 Orissa 68 at p. 70.

transfer of the minor's property purchased the same without taking a personal covenant from her.

13. **Limitation.**—Limitation for a suit for rescission is three years under Art. 59, Indian Limitation Act, 1963 and the starting point is the time "when the fact entitling the plaintiff to have the contract rescinded first becomes known to him", i. e. the date of the knowledge.[1]

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